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

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## DEPARTMENT OF AGRICULTURE

### Grain Inspection, Packers and Stockyards Administration

### 7 CFR Part 800

**RIN 0580–AA87**

## Export Inspection and Weighing Waiver for High Quality Specialty Grains Transported in Containers

**AGENCY:** Grain Inspection, Packers and Stockyards Administration, USDA.

**ACTION:** Interim final rule with request for comments.

**SUMMARY:** The Grain Inspection, Packers and Stockyards Administration (GIPSA) is amending regulations under the United States Grain Standards Act (USGSA) to waive the mandatory inspection and weighing requirements of the Act for high quality specialty grains exported in containers. GIPSA is establishing this waiver to facilitate the marketing of high quality specialty grains exported in containers. This action is consistent with the objectives of the USGSA. This action will facilitate the continuing development of the high quality specialty export market. This waiver will be in effect for a maximum of 5 years, and if after this time period GIPSA determines that this waiver continues to advance the objectives of the USGSA, GIPSA will consider making this waiver permanent.

**DATES:** Effective April 29, 2005; comments received by June 27, 2005 will be considered prior to issuance of a final rule. Pursuant to the Paperwork Reduction Act, comments on the information collection and recordkeeping requirements burden must be received by June 27, 2005.

**ADDRESSES:** We invite you to submit comments on this interim final rule. You may submit comments by any of the following methods:

- *E-Mail:* Send comments via electronic mail to *comments.gipsa@usda.gov.*
- *Mail:* Send hardcopy written comments to Tess Butler, GIPSA, USDA, 1400 Independence Avenue, SW., Room 1647–S, Washington, DC 20250–3604.
- *Fax:* Send comments by facsimile transmission to (202) 690–2755.
- *Hand Deliver or Courier:* Deliver comments to: Tess Butler, GIPSA, USDA, 1400 Independence Avenue, SW., Room 1647–S, Washington, DC 20250–3604.
- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov.* Follow the online instructions for submitting comments.
- Please send comments regarding the information collection and recordkeeping requirements via electronic mail to: *OIRA.Submission@OMB.EOP.GOV* and to GIPSA at: *comments.gipsa@usda.gov.*

*Instructions:* All comments should make reference to the date and page number of this issue of the **Federal Register**.

*Read Comments:* All comments will be available for public inspection in the above office during regular business hours (7 CFR 1.27(b)).

**FOR FURTHER INFORMATION CONTACT:** John Sharpe, Director, Compliance Division, at his e-mail address: *John.R.Sharpe@usda.gov* or telephone him at (202) 720–8262.

**SUPPLEMENTARY INFORMATION:**

### Background

The USGSA authorizes the Department to waive the mandatory inspection and weighing requirements of the USGSA in circumstances when the objectives of the USGSA would not be impaired. Current waivers from the official inspection and Class X weighing requirements for export grain appear in section 7 CFR part 800.18 of the regulations. These waivers are provided for grain exported for seeding purposes, grain shipped in bond, grain exported by rail or truck to Canada or Mexico, grain not sold by grade, for exporters and individual elevator operators shipping less than 15,000 metric tons during the current and preceding calendar year, and when services is not available or in emergency situations.

This interim final rule provides a waiver for high quality specialty grains exported in containers.

Transactions involving high quality specialty grains are typically made between dedicated buyers and sellers who have ongoing business relationships and fully understand each other's specific needs and capabilities. Containerization allows the producer or processor to extend control of the product from the field to customer, rather than fields to local terminal elevators or export port elevators where commingling can occur.

The high quality specialty grain market has evolved for the past years as U.S. shippers have catered to the specific needs of buyers around the world. Frequently, sales are for small volumes of grain meeting strict commercial contract specifications for quality, production, handling, and packaging. Seller and buyers in this specialty market typically refer to these grains as ''food quality'' grain. The contractual specifications may require a single or limited number of seed varieties; may require production in accordance with specific agronomic practices; may specify certain harvesting and handling practices; may require cleaning and sorting of the grain to remove most foreign material and immature or damaged seeds; and frequently call for some degree of identity preservation from point of origin to final buyer. The quality management processes employed by participants of the high quality specialty grain market far exceed those practiced by the typical commodity grain market where commingling and blending of different quality grains is an inherent part of the marketing process. In return, the market value of these high quality specialty grains is substantially higher than commodity grain.

Traditionally, shippers of high quality specialty grain in containers handled less than 15,000 metric tons of grain annually and thereby, were exempt from mandatory inspection and weighing in accordance with Section 800.18(b) of the regulations under the USGSA. However, as the high quality specialty grain market has grown volumes have begun to exceed the 15,000 metric ton waiver threshold requiring shippers to have their high quality specialty grains inspected and weighed in accordance with the Act. The cost of official inspection and weighing for these specialty operations is approximately $1.80 per metric ton compared to an

average $0.34 per metric ton for bulk commodity exports. Furthermore, the contract quality specifications for the high quality specialty grains far exceed the Official United States Standards for Grain applied during the mandatory inspection and weighing process. GIPSA is therefore waiving high quality specialty grain exported in containers from the mandatory export inspection and weighing requirements. Accordingly, this action will promote the marketing of grain of high quality and will not impair the objectives of the USGSA.

High quality specialty grain for the purposes of this waiver is grain sold under contract terms that (1) specify quality better than the grade limits for U.S. No. 1 grain, or (2) specify ''organic'' as defined by the regulations 7 CFR part 205 under the Organic Foods Production Act of 1990, as amended. The following are examples of what GIPSA would consider to be high quality specialty grains: Corn with broken corn limits of 0.5 percent or less; post-harvest, pesticide-free corn; and organically grown soybeans. The following would not meet GIPSA's definition of high quality specialty grain: U.S. No. 2 or better Yellow soybeans grown in a particular geographic area; U.S. No. 2 or better Soft White wheat with maximum 10.5 percent protein and minimum Falling Number of 300 seconds; and non-genetically modified corn.

This waiver will not prevent the buyer or seller from requesting and receiving official inspection and weighing service should they desire such services. Moreover, this waiver will be in affect for a maximum of 5 years and if after this time period GIPSA determines that this waiver continues to advance the objectives of the USGSA, GIPSA will consider making this waiver permanent. GIPSA will monitor this waiver of official inspection and weighing requirements; however, if at any time, GIPSA determines that this waiver is not consistent with the objectives of the Act, GIPSA will remove this waiver.

Pursuant to 5 U.S.C 553, it is found and determined upon good cause that it is impracticable, unnecessary, and contrary to public interest to give preliminary notice prior to putting this rule in effect and that good cause exists for not postponing the effective date of this rule until 30 days after publication in the **Federal Register** because: (1) The relieving of regulatory burden on affected entities is necessary to facilitate the continuing development of the high quality specialty export market and; therefore, this action should be implemented as soon as possible and (2) this rule provides a 60-day opportunity for comment; and all written comments timely received will be considered prior to finalization of the rule.

**Executive Order 12866 and Effect on Small Entities**

This interim final rule has been determined not to be significant for the purpose of Executive Order 12866 and, therefore, has not been reviewed by the Office of Management and Budget (OMB). This rule would provide regulatory relief to both large and small businesses. Small agricultural service firms have been defined by the Small Business Administration (SBA) (13 CFR 121.201) as those that employ fewer than 500 employees. This action would effectively eliminate the cost impact on small businesses that would otherwise have to pay for onsite inspection and weighing.

In addition, pursuant to requirements set forth in the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*), GIPSA has considered the economic impact of this interim final rule on small entities and has determined that its provisions would not have a significant economic impact on a substantial number of small entities because it is an elimination of burden. Interested parties are invited to submit information on the regulatory and informational impacts of this action on small businesses.

The growing market for high quality specialty grain exported in containers has caused shippers of high quality specialty grains to exceed the 15,000 metric ton waiver threshold for export inspection and weighing. GIPSA posed this situation to its Advisory Committee on November 16, 2004. GIPSA's Advisory Committee is composed of members representing producers, handlers, processors, and exporters. The Advisory Committee resolved that GIPSA should continue to enforce the mandatory export inspection and weighing requirements for commodity grains and establish a waiver for high quality specialty grains exported in containers. GIPSA believes that waiving high quality specialty grains exported in containers is consistent with the intent of the USGSA and will allow this market to continue to grow.

Various methods were considered to address the challenges facing U.S. high quality specialty grain producers, marketers, processors, and handlers exporting via containers from global competition. GIPSA looked at requiring relaxed inspection and weighing requirements for these grains and decided that they would still place an undue burden on these types of shipments.

This rule will allow exporters of high quality specialty grains shipped in containers to ship such grain without the burden of mandatory inspection and weighing, while allowing them to request the service when desired. Relieving this burden will allow the industry to grow and equitably compete with global competitors.

This rule poses minimal additional cost to exporters as explained below in the Paperwork Reduction Act section of this rule. However, this rule eliminates the cost of the mandatory export inspection and weighing requirements for high quality specialty grain exported in containers. GIPSA estimates this cost to be at $1.80 per metric ton of grain exported and GIPSA believes that the benefits of this rule outweighs the cost.

**Paperwork Reduction Act**

In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35), this rule announces that GIPSA has requested emergency approval for a new information collection request that waives high quality specialty grain exported in containers from the mandatory inspection and weighing requirements outlined in the United States Grain Standards Act. The emergency clearance is necessary because insufficient time is available to follow normal clearance procedures. OMB has approved this emergency information collection request under OMB Control No. 0580–0022.

GIPSA is committed to compliance with the GPEA, which requires Government agencies, in general, to provide the public the option of submitting information or transacting business electronically to the maximum extent possible.

*Title:* Export Inspection and Weighing Waiver for High Quality Specialty Grains Transported in Containers.

*OMB Number:* 0580–0022.

*Type of Request:* New.

*Abstract:* GIPSA is amending regulations under the United States Grain Standards Act (USGSA) to waive the mandatory inspection and weighing requirements for high quality specialty grains exported in containers. GIPSA is establishing this waiver to facilitate the marketing of high quality specialty grains exported in containers. This action is consistent with the objectives of the USGSA and will facilitate the continuing development of the high quality specialty export market.

Traditionally, shippers of high quality specialty grain in containers handled less than 15,000 metric tons of grain

annually and thereby, were exempt from mandatory inspection and weighing in accordance with Section 800.18(b) of the regulations under the USGSA. However, as the high quality specialty grain market has grown volumes have begun to exceed the 15,000 metric ton threshold requiring shippers to have their high quality specialty grains inspected and weighed in accordance with the USGSA.

To ensure that exporters of high quality specialty grains comply with this waiver, GIPSA is asking these exporters to maintain records generated during their normal course of business that pertain to these shipments and make these documents available to the GIPSA upon request, for review or copying purposes. GIPSA is not requiring exporters of high quality specialty grains to complete or submit new Federal government record(s), form(s), or report(s). GIPSA is requesting exporters to maintain and make available documentation that fully and correctly disclose transactions concerning high quality specialty grain exported in containers. These records shall be maintained for a period of 3 years. This information collection requirement in this request is essential to ensure that exporters who ship high quality specialty grain in containers comply with the waiver.

The Paperwork Reduction Act requires the Agency to measure recordkeeping burden. Under this interim final rule, exporters must maintain records generated during the normal course of business. Experience has shown that the U.S. grain industry maintains grain contracts which specify quality parameters agreed to by buyers and sellers of grain. GIPSA believes that grain contracts would provide sufficient information to determine if exporters of high quality specialty grain are complying with the waiver. GIPSA made estimates regarding the number of entities who would likely export high quality specialty grain. Because GIPSA has no basis to determine the number of prospective exporters of high quality specialty grain, GIPSA drew upon its oversight experience of the U.S. grain industry and believes that the overall estimates presented in this interim final rule are accurate. GIPSA estimates that approximately 80 organizations will export high quality specialty grain in containers. GIPSA estimates that the time required for each exporter to maintain and make available contractual information in a manner consistent with this rule is an average of 5-hours per year at $5.50 per hour for a total annual burden of $27.50 per exporter. Assuming that the estimated 80 exporters of high quality specialty grain in containers provide GIPSA's this contractual information, the total annual burden is estimated to be $2,200.

*(1) Grain Contracts*

*Estimate of Burden:* Public burden for maintaining contract information is estimated to average 5.0 hours per exporter.

*Respondents:* Exporters of high quality specialty grain in containers.

*Estimated Number of Respondents:* 80.

*Estimated Number of Respondents per Request:* 1.

*Estimated Total Burden on Respondents:* 400 hours.

*Estimated Total Cost:* $2,200.

Comments are invited on: (1) Whether maintaining and providing contractual information is necessary to ensure compliance with the waiver; (2) The accuracy of the Agency's burden estimates for respondents to maintain and provide contractual information including the validity of the methodology and assumptions used; and (3) Ways to minimize burden of maintaining and providing contractual information on those respondents, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology. Please send comments regarding the information collection and recordkeeping requirements via electronic mail to: *OIRA.Submission@OMB.EOP.GOV*. In addition, please send GIPSA comments regarding the information collection and recordkeeping requirements to: *comments.gipsa@usda.gov.*

**Executive Order 12988**

Executive Order 12988, Civil Justice Reform, instructs each executive agency to adhere to certain requirements in the development of new and revised regulations in order to avoid unduly burdening the court system. This interim final rule has been reviewed under this Executive Order. This interim final rule is not intended to have a retroactive effect. The United States Grain Standards Act provides in Section 87g that no State or subdivision may require or impose any requirements or restrictions concerning the inspection, weighing, or description of grain under the Act. Otherwise, this interim final rule will not preempt any State or local laws, regulations, or policies unless they present irreconcilable conflict with this rule. There are no administrative procedures which must be exhausted prior to any judicial challenge to the provisions of this interim final rule.

**Action**

To provide waivers from official inspection and Class X weighing for exporters of high quality specialty grains shipped in containers, GIPSA, under the United States Grain Standards Act, is:

1. Revising section 800.0 to include a definition of high quality specialty grains.

2. Revising section 800.18 to include a new paragraph (b)(8) to exempt high quality specialty grain shipped in containers from mandatory export inspection and weighing requirements.

**List of Subjects in 7 CFR Part 800**

Administrative practice and procedure, Export, Grain

■ For reasons set out in the preamble, 7 CFR Part 800 is amended as follows:

## PART 800—GENERAL PROVISIONS

■ 1. The authority citation for Part 800 continues to read as follows:

**Authority:** Pub. L. 94–582, 90 Stat. 2867, as amended (7 U.S.C. 71 *et seq.*).

■ 2. Section 800.0 is amended as follows:

■ a. Paragraphs (b)(44) through (106) are redesignated as (b)(45) through (107), respectively.

■ b. New paragraph (b)(44) is added to read as follows:

**§ 800.0 Meaning of terms.**

* * * * *

(b) * * *

(44) High Quality Specialty Grain. Grain sold under contract terms that specify quality better than the grade limits for U.S. No. 1 grain, or specify ''organic'' as defined by 7 CFR Part 205. This definition expires July 31, 2010.

* * * * *

■ 3. Section 800.18 is amended by adding a new paragraph (b)(8) to read as follows:

**§ 800.18 Waivers of the official inspection and Class X weighing requirements.**

* * * * *

(b) * * *

(8) High quality specialty grain shipped in containers. Official inspection and weighing requirements do not apply to high quality specialty grain exported in containers. Records generated during the normal course of business that pertain to these shipments shall be made available to the Service upon request, for review or copying. These records shall be maintained for a

period of 3 years. This waiver expires July 31, 2010.

**David R. Shipman,**

*Acting Administrator, Grain Inspection, Packers and Stockyards Administration.*

[FR Doc. 05–8519 Filed 4–27–05; 8:45 am]

BILLING CODE 3410–EN–P

## DEPARTMENT OF TRANSPORTATION

## Federal Aviation Administration

## 14 CFR Part 39

**[Docket No. FAA–2004–19891; Directorate Identifier 2004–NM–136–AD; Amendment 39–14006; AD 2005–05–17]**

**RIN 2120–AA64**

## Airworthiness Directives; Boeing Model 737–300, –400, and –500 Series Airplanes Modified in Accordance With Supplemental Type Certificate (STC) ST00127BO

**AGENCY:** Federal Aviation Administration (FAA), Department of Transportation (DOT).

**ACTION:** Final rule; correction.

**SUMMARY:** The FAA is correcting a typographical error in an existing airworthiness directive (AD) that was published in the **Federal Register** on March 14, 2005 (70 FR 12401). The error resulted in specifying a non-existing part number. This AD applies to Boeing Model 737–300, –400, and –500 series airplanes modified in accordance with STC ST00127BO. This AD requires installation of bonding straps to the safe side harnesses of the digital transient suppression device of the fuel quantity indicating system.

**DATES:** Effective April 18, 2005.

**ADDRESSES:** The AD docket contains the proposed AD, comments, and any final disposition. 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 U.S. Department of Transportation, 400 Seventh Street SW., room PL–401, Washington, DC. This docket number is FAA–2004–19891; the directorate identifier for this docket is 2004–NM–136–AD.

**FOR FURTHER INFORMATION CONTACT:** Richard Spencer, Aerospace Engineer, Boston Aircraft Certification Office, ANE–150, FAA, Engine and Propeller Directorate, 12 New England Executive Park, Burlington, Massachusetts 01803; telephone (781) 238–7184; fax (781) 238–7170.

**SUPPLEMENTARY INFORMATION:** On March 2, 2005, the FAA issued AD 2005–05–17, amendment 39–14006 (70 FR 12401, March 14, 2005), for Boeing Model 737–300, –400, and –500 series airplanes modified in accordance with Supplemental Type Certificate (STC) ST00127BO. The AD requires installation of bonding straps to the safe side harnesses of the digital transient suppression device of the fuel quantity indicating system.

As published, paragraph (g) of the AD specifies that, ''As of the effective date of this AD, no person may install a safe side harness, Part Number 50357–01XX, on any airplane, unless that safe side harness has been modified in accordance with Goodrich Service Bulletin 737–300766–28–2, Revision 2, dated July 28, 2004.'' We have determined that 50357–01XX is not an existing part number, and that the correct part number is 50367–01XX.

No other part of the regulatory information has been changed; therefore, the final rule is not republished in the **Federal Register**.

The effective date of this AD remains April 18, 2005.

### § 39.13 [Corrected]

In the **Federal Register** of March 14, 2005, on page 12402, in the first column, paragraph (g) of AD 2005–05–17 is corrected to read as follows:

* * * * *

(g) As of the effective date of this AD, no person may install a safe side harness, Part Number 50367–01XX, on any airplane, unless that safe side harness has been modified in accordance with Goodrich Service Bulletin 737–300766–28–2, Revision 2, dated July 28, 2004.

* * * * *

Issued in Renton, Washington, on April 19, 2005.

**Ali Bahrami,**

*Manager, Transport Airplane Directorate, Aircraft Certification Service.*

[FR Doc. 05–8402 Filed 4–27–05; 8:45 am]

BILLING CODE 4910–13–P

## DEPARTMENT OF TRANSPORTATION

## Federal Aviation Administration

## 14 CFR Part 39

**[Docket No. 2001–NM–293–AD; Amendment 39–14072; AD 2005–09–04]**

**RIN 2120–AA64**

## Airworthiness Directives; McDonnell Douglas Model DC–9–81 (MD–81), DC–9–82 (MD–82), DC–9–83 (MD–83), DC–9–87 (MD–87), and MD–88 Airplanes

**AGENCY:** Federal Aviation Administration (FAA), Department of Transportation (DOT).

**ACTION:** Final rule.

**SUMMARY:** This amendment supersedes an existing airworthiness directive (AD), applicable to certain McDonnell Douglas Model DC–9–81 (MD–81), DC–9–82 (MD–82), DC–9–83 (MD–83), DC–9–87 (MD–87), MD–88, and MD–90–30 airplanes. The existing AD currently requires repetitive inspections to detect cracking of the main landing gear (MLG) shock strut pistons, and replacement of a cracked piston with a new or serviceable part. This amendment removes certain airplanes but requires that the existing inspections, and corrective actions if necessary, be accomplished on additional MLG shock strut pistons. This amendment also requires replacing the MLG shock strut pistons with new improved parts, which would terminate the repetitive inspections. The actions specified by this AD are intended to prevent fatigue cracking of the MLG pistons, which could result in failure of the pistons and consequent damage to the airplane structure or injury to airplane occupants. This action is intended to address the identified unsafe condition.

**DATES:** Effective June 2, 2005.

The incorporation by reference of Boeing Alert Service Bulletin MD80–32A308, Revision 04, dated June 12, 2001, as listed in the regulations, is approved by the Director of the Federal Register as of June 2, 2005.

The incorporation by reference of Boeing Service Bulletin MD80–32–309, Revision 01, dated April 25, 2001, as listed in the regulations, was approved previously by the Director of the Federal Register as of June 20, 2002 (67 FR 34823, May 16, 2002).

The incorporation by reference of McDonnell Douglas Alert Service Bulletin MD80–32A308, dated March 5, 1998; and McDonnell Douglas Alert Service Bulletin MD80–32A308, Revision 01, dated May 12, 1998; as listed in the regulations; was approved

previously by the Director of the Federal Register as of as of July 28, 1999 (64 FR 33392, June 23, 1999).

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

**FOR FURTHER INFORMATION CONTACT:** Mike Lee, Aerospace Engineer, Airframe Branch, ANM–120L, FAA, Los Angeles Aircraft Certification Office, 3960 Paramount Boulevard, Lakewood, California 90712–4137; telephone (562) 627–5325; fax (562) 627–5210.

**SUPPLEMENTARY INFORMATION:** A proposal to amend part 39 of the Federal Aviation Regulations (14 CFR part 39) by superseding AD 99–13–07, amendment 39–11201 (64 FR 33392, June 23, 1999), which is applicable to certain McDonnell Douglas Model DC–9–81 (MD–81), DC–9–82 (MD–82), DC–9–83 (MD–83), DC–9–87 (MD–87), MD–88, and MD–90–30 airplanes, was published in the **Federal Register** on May 7, 2004 (69 FR 25507). The action proposed to continue to require repetitive inspections to detect cracking of the main landing gear (MLG) shock strut pistons, and replacement of a cracked piston with a new or serviceable part. The action proposed to remove certain airplanes but require that the existing inspections, and corrective actions if necessary, be accomplished on additional MLG shock strut pistons. The action also proposed to require replacing the MLG shock strut pistons with new improved parts, which would terminate the repetitive inspections.

## Comments

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

## Request for Approval of Alternative Method of Compliance (AMOC)

One commenter requests that we revise the ''Alternative Methods of Compliance'' paragraph of the proposed AD to specify that an AMOC previously approved for AD 2002–10–03, amendment 39–12749 (67 FR 34823, May 16, 2002), is also approved as an AMOC for the proposed AD. The commenter notes that this AMOC addresses assigning flight cycle counts to MLG shock strut pistons and states that this AMOC would also be applicable to the proposed AD.

We concur with the commenter's request and have revised paragraph (l)(2) of this AD to give credit for AMOCs approved for AD 2002–10–03.

## Request To Clarify Acceptable Replacement Parts

The same commenter requests that we revise paragraph (b) of the proposed AD to specify that only an MLG shock strut piston having part number (P/N) 5935347–517 is an acceptable replacement. The commenter states that paragraphs (b) and (j) of the proposed AD contradict one another in this regard. The commenter observes that paragraph (b) allows installation of a piston having P/N 5935347–511 as an approved replacement part (in accordance with Boeing Alert Service Bulletin MD80–32A308, Revision 04, dated June 12, 2001). However, paragraph (j) of the proposed AD states that an MLG shock strut piston having P/N 5935347–1 through –509 inclusive, 5935347–511, 5935347–513, or SR09320081–3 through –13 inclusive, cannot be installed after the effective date of the AD.

We partially agree with the commenter's request. We note that paragraph (b) of this AD is part of a restatement of the requirements of AD 99–13–07. When AD 99–13–07 was issued, a new or serviceable MLG shock strut piston of any approved P/N was an acceptable replacement part. Paragraph (j) is a new requirement of this AD, and the requirements of that paragraph reflect the main purpose of this new AD, which is to require replacing the MLG shock strut pistons with new, improved parts. Thus, we do not agree that paragraph (b) and (j) contradict each other. Rather, paragraph (j) of this AD restricts the P/Ns that may be installed when paragraph (b) is done after the effective date of this AD. However, we agree that it is acceptable to clarify paragraph (b) to state that only an MLG shock strut piston having P/N 5935347–517 may be installed after the effective date of this AD. We have revised paragraph (b) of this AD accordingly.

## Conclusion

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

## Cost Impact

There are approximately 1,364 airplanes of the affected design in the worldwide fleet. The FAA estimates that 849 airplanes of U.S. registry will be affected by this AD.

The inspections that are currently required by AD 99–13–07 take approximately 4 work hours per airplane to accomplish, at an average labor rate of $65 per work hour. Based on these figures, the new inspections that are required by this AD take approximately 4 work hours per airplane to accomplish, at an average labor rate of $65 per work hour. The cost impact of these new inspections on U.S. operators is estimated to be $220,740, or $260 per airplane, per inspection cycle.

The other costs associated with this AD are carried over from the existing AD which is being superseded and are not new or additional costs. The impact of these existing costs were covered in the rulemaking for that AD.

The cost impact figures discussed above are based on assumptions that no operator has yet accomplished any of the requirements of this AD action, and that no operator would accomplish those actions in the future if this AD were not adopted. The cost impact figures discussed in AD rulemaking actions represent only the time necessary to perform the specific actions actually required by the AD. These figures typically do not include incidental costs, such as the time required to gain access and close up, planning time, or time necessitated by other administrative actions. The manufacturer may cover the cost of replacement parts associated with this AD, subject to warranty conditions. Manufacturer warranty remedies may also be available for labor costs associated with this AD. As a result, the costs attributable to this AD may be less than stated above.

## Authority for This Rulemaking

Title 49 of the United States Code specifies the FAA's authority to issue rules on aviation safety. Subtitle I, Section 106, describes the authority of the FAA Administrator. Subtitle VII, Aviation Programs, describes in more detail the scope of the Agency's authority.

We are issuing this rulemaking under the authority described in Subtitle VII, Part A, Subpart III, Section 44701,

''General requirements.'' Under that section, Congress charges the FAA with promoting safe flight of civil aircraft in air commerce by prescribing regulations for practices, methods, and procedures the Administrator finds necessary for safety in air commerce. This regulation is within the scope of that authority because it addresses an unsafe condition that is likely to exist or develop on products identified in this rulemaking action.

## Regulatory Impact

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

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

## List of Subjects in 14 CFR Part 39

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

## Adoption of the Amendment

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

## PART 39—AIRWORTHINESS DIRECTIVES

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

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

### § 39.13 [Amended]

■ 2. Section 39.13 is amended by removing amendment 39–11201 (64 FR 33392, June 23, 1999), and by adding a new airworthiness directive (AD), amendment 39–14072, to read as follows:

**2005–09–04 McDonnell Douglas:** Amendment 39–14072. Docket 2001–NM–293–AD. Supersedes AD 99–13–07, Amendment 39–11201.

*Applicability:* Model DC–9–81 (MD–81), DC–9–82 (MD–82), DC–9–83 (MD–83), DC–9–87 (MD–87), and MD–88 airplanes; certificated in any category; as identified in Boeing Alert Service Bulletin MD80–32A308, Revision 04, dated June 12, 2001.

*Compliance:* Required as indicated, unless accomplished previously.

To prevent fatigue cracking of the main landing gear (MLG) pistons, which could result in failure of the pistons and consequent damage to the airplane structure or injury to airplane occupants, accomplish the following:

**Requirements of AD 99–13–07**

*Initial Inspection*

(a) For airplanes equipped with an MLG shock strut piston having part number (P/N) 5935347–1 through –509 inclusive, 5935347–511, or 5935347–513: Perform fluorescent dye penetrant and fluorescent magnetic particle inspections to detect cracking of an MLG shock strut piston, in accordance with McDonnell Douglas Alert Service Bulletin MD80–32A308, dated March 5, 1998, or Revision 01, dated May 12, 1998; or Boeing Alert Service Bulletin MD80–32A308, Revision 04, dated June 12, 2001 (for Model DC–9–81 (MD–81), DC–9–82 (MD–82), DC–9–83 (MD–83), DC–9–87 (MD–87), and MD–88 airplanes). Perform the inspections at the later of the times specified in paragraphs (a)(1) and (a)(2) of this AD.

(1) Prior to the accumulation of 10,000 total landings on an MLG shock strut piston, or within 6 months after July 28, 1999 (the effective date of AD 99–13–07, amendment 39–11201), whichever occurs later.

(2) Within 2,500 landings after a major overhaul and initial inspection of the MLG shock strut piston accomplished prior to July 28, 1999, in accordance with McDonnell Douglas All Operator Letter 9–2153 (for Model DC–9–81 (MD–81), DC–9–82 (MD–82), DC–9–83 (MD–83), DC–9–87 (MD–87), and MD–88 airplanes).

*Corrective Actions*

(b) For airplanes equipped with an MLG shock strut piston having P/N 5935347–1 through –509 inclusive, 5935347–511, or 5935347–513: Condition 1. If any cracking is detected, prior to further flight, replace any cracked MLG shock strut piston with a new or serviceable piston, in accordance with McDonnell Douglas Alert Service Bulletin MD80–32A308, dated March 5, 1998, or Revision 01, dated May 12, 1998; or Boeing Alert Service Bulletin MD80–32A308, Revision 04, dated June 12, 2001 (for Model DC–9–81 (MD–81), DC–9–82 (MD–82), DC–9–83 (MD–83), DC–9–87 (MD–87), and MD–88 airplanes). Thereafter, repeat the inspections required by paragraph (a) of this AD prior to the accumulation of 10,000 total landings on the MLG shock strut piston. After the effective date of this AD, only an MLG shock strut piston having P/N 5935347–517 may be installed in accordance with this paragraph.

*Repetitive Inspections*

(c) For airplanes equipped with an MLG shock strut piston having P/N 5935347–1 through –509 inclusive, 5935347–511, or 5935347–513: Condition 2. If no cracking is detected, repeat the fluorescent dye penetrant and fluorescent magnetic particle inspections thereafter at intervals not to exceed 2,500 landings, in accordance with McDonnell Douglas Alert Service Bulletin MD80–32A308, dated March 5, 1998, or Revision 01, dated May 12, 1998; or Boeing Alert Service Bulletin MD80–32A308, Revision 04, dated June 12, 2001 (for Model DC–9–81 (MD–81), DC–9–82 (MD–82), DC–9–83 (MD–83), DC–9–87 (MD–87), and MD–88 airplanes); as applicable; until the replacement required by paragraph (h) of this AD has been accomplished.

**New Requirements of This AD**

*Clarification of Inspection Sequence*

(d) For inspections accomplished after the effective date of this AD: Where this AD requires fluorescent penetrant and magnetic particle inspections, accomplishment of the fluorescent penetrant inspection must precede accomplishment of the magnetic particle inspection.

*Inspection of MLG Piston P/Ns SR09320081–3 through –13*

(e) For any MLG piston having P/N SR09320081–3 through –13 inclusive: Perform fluorescent penetrant and magnetic particle inspections to detect fatigue cracking of the MLG pistons, in accordance with the Accomplishment Instructions of Boeing Alert Service Bulletin MD80–32A308, Revision 04, dated June 12, 2001. Do the initial inspections at the later of the times specified in paragraphs (e)(1) and (e)(2) of this AD. Repeat the inspections thereafter at intervals not to exceed 2,500 landings, until the requirements of paragraph (f) or (h) of this AD have been accomplished.

(1) Prior to the accumulation of 10,000 total landings on the MLG piston.

(2) Within 6 months after the effective date of this AD.

*Corrective Actions*

(f) For airplanes equipped with an MLG shock strut piston having P/N SR09320081–3 through –13 inclusive: If any cracking is detected during the inspections required by paragraph (e) of this AD, prior to further flight, replace any cracked MLG shock strut piston with a new or serviceable improved assembly, in accordance with the Accomplishment Instructions of Boeing Alert Service Bulletin MD80–32A308, Revision 04, dated June 12, 2001. Such replacement terminates the repetitive inspections required by paragraph (e) of this AD for the replaced shock strut piston only.

(g) Where Boeing Alert Service Bulletin MD80–32A308, Revision 04, dated June 12, 2001, specifies to contact Boeing-Long Beach for disposition of certain repair conditions: Before further flight, repair per a method approved by the Manager, Los Angeles Aircraft Certification Office (ACO), FAA. For a repair method to be approved by the Manager, Los Angeles ACO, as required by

this paragraph, the Manager's approval letter must specifically refer to this AD.

*Replacement of MLG Shock Strut Piston Assemblies*

(h) Replace the MLG shock strut piston assemblies, left- and right-hand sides, with new or serviceable improved assemblies, in accordance with the Accomplishment Instructions of Boeing Service Bulletin MD80–32–309, Revision 01, dated April 25, 2001. Do this replacement at the applicable compliance time specified in paragraph (h)(1) or (h)(2) of this AD. Such replacement terminates the repetitive inspections required by this AD. If the MLG shock strut piston is not serialized, or the number of landings on the piston cannot be conclusively determined, consider the total number of landings on the piston assembly to be equal to the total number of landings accumulated by the airplane with the highest total number of landings in the operator's fleet.

(1) For airplanes listed in Boeing Service Bulletin MD80–32–309, Revision 01, dated April 25, 2001: Do the replacement before the accumulation of 30,000 total landings on the MLG shock strut piston assemblies, or within 5,000 landings after June 20, 2002 (the effective date of AD 2002–10–03, amendment 39–12749), whichever occurs later.

(2) For airplanes other than those identified in paragraph (h)(1) of this AD: Do the replacement before the accumulation of 30,000 total landings on the MLG shock strut piston assemblies, or within 5,000 landings after the effective date of this AD, whichever occurs later.

**Note 1:** Paragraph (a) of AD 2002–10–03, amendment 39–12749, requires the same actions as paragraph (h) of this AD.

*Actions Accomplished Previously in Accordance With Other Service Information*

(i) Accomplishment of the replacement specified in Boeing Service Bulletin MD80–32–309, dated January 31, 2000, before June 20, 2002, is considered acceptable for compliance with the requirement of paragraph (h) of this AD.

*Parts Installation*

(j) As of the effective date of this AD, no person may install an MLG shock strut piston having P/N 5935347–1 through –509 inclusive, 5935347–511, 5935347–513, or SR09320081–3 through –13 inclusive, on any airplane.

*No Requirement To Submit Information*

(k) Although Boeing Alert Service Bulletin MD80–32A308, Revision 04, dated June 12, 2001, specifies to submit certain inspection results to the manufacturer, this AD does not include such a requirement.

*Alternative Methods of Compliance*

(l)(1) In accordance with 14 CFR 39.19, the Manager, Los Angeles ACO, is authorized to approve alternative methods of compliance for this AD.

(2) Alternative methods of compliance, approved previously per AD 99–13–07, amendment 39–11201, and AD 2002–10–03, amendment 39–12749, are approved as alternative methods of compliance for the corresponding requirements of this AD.

*Incorporation by Reference*

(m) Unless otherwise specified in this AD, the actions shall be done in accordance with the service bulletins listed in Table 1 of this AD.

TABLE 1.—SERVICE BULLETINS INCORPORATED BY REFERENCE

| Service bulletin | Revision level | Date |
|---|---|---|
| Boeing Alert Service Bulletin MD80–32A308 | Revision 04 | June 12, 2001. |
| Boeing Service Bulletin MD80–32–309 | Revision 01 | April 25, 2001. |
| McDonnell Douglas Alert Service Bulletin MD80–32A308 | Original | March 5, 1998. |
| McDonnell Douglas Alert Service Bulletin MD80–32A308 | Revision 01 | May 12, 1998. |

(1) The incorporation by reference of Boeing Alert Service Bulletin MD80–32A308, Revision 04, dated June 12, 2001, is approved by the Director of the Federal Register, in accordance with 5 U.S.C. 552(a) and 1 CFR part 51.

(2) The incorporation by reference of Boeing Service Bulletin MD80–32–309, Revision 01, dated April 25, 2001, was approved previously by the Director of the Federal Register as of June 20, 2002 (67 FR 34823, May 16, 2002).

(3) The incorporation by reference of McDonnell Douglas Alert Service Bulletin MD80–32A308, dated March 5, 1998; and McDonnell Douglas Alert Service Bulletin MD80–32A308, Revision 01, dated May 12, 1998; was approved previously by the Director of the Federal Register as of July 28, 1999 (64 FR 33392, June 23, 1999).

(4) To get copies of this service information, go to Boeing Commercial Aircraft Group, Long Beach Division, 3855 Lakewood Boulevard, Long Beach, California 90846, Attention: Data and Service Management, Dept. C1–L5A (D800–0024). To inspect copies of this service information, go to the FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington; to the FAA, Los Angeles Aircraft Certification Office, 3960 Paramount Boulevard, Lakewood, California; or to the National Archives and Records Administration (NARA). For information on the availability of this material at the NARA, call (202) 741–6030, or go to *http://www.archives.gov/federal_register/code_of_federal_regulations/ibr_locations.html.*

*Effective Date*

(n) This amendment becomes effective on June 2, 2005.

Issued in Renton, Washington, on April 20, 2005.

**Ali Bahrami,**

*Manager, Transport Airplane Directorate, Aircraft Certification Service.*

[FR Doc. 05–8404 Filed 4–27–05; 8:45 am]

BILLING CODE 4910–13–P

## DEPARTMENT OF COMMERCE

## National Oceanic and Atmospheric Administration

## 15 CFR Part 902

## 50 CFR Part 648

**[Docket No. 041229366–5088–02; I.D. 122304D]**

**RIN 0648–AQ25**

## Magnuson-Stevens Fishery Conservation and Management Act Provisions; Fisheries of the Northeastern United States; Monkfish Fishery; Amendment 2

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

**ACTION:** Final rule.

**SUMMARY:** NMFS is implementing approved measures contained in Amendment 2 to the Monkfish Fishery Management Plan (FMP). Amendment 2 was developed to address essential fish habitat (EFH) and bycatch issues, and to revise the FMP to address several issues raised during the public scoping process. This rule implements the

following measures: a new limited access permit for qualified vessels fishing south of 38°20′ N. lat.; an offshore monkfish fishery in the Southern Fishery Management Area (SFMA); a maximum roller-gear disc diameter of 6 inches (15.2 cm) for trawl gear vessels fishing in the SFMA; closure of two deep-sea canyon areas to all gears when fishing under the monkfish days-at-sea (DAS) program; establishment of a research DAS set-aside program and a DAS exemption program; a North Atlantic Fisheries Organization (NAFO) Regulated Area Exemption Program; adjustments to the monkfish incidental catch limits; a decrease in the monkfish minimum size in the SFMA; removal of the 20–day block requirement; and new additions to the list of actions that can be taken under the framework adjustment process contained in the FMP. The intent of this action is to provide efficient management of the monkfish fishery and to meet conservation objectives. Also, NMFS informs the public of the approval by the Office of Management and Budget (OMB) of the collection-of-information requirements contained in this final rule and publishes the OMB control numbers for these collections.

**DATES:** Effective May 1, 2005.

**ADDRESSES:** Copies of Amendment 2, its Regulatory Impact Review (RIR), Initial Regulatory Flexibility Analysis (IRFA), and the Final Supplemental Environmental Impact Statement (FSEIS) are available on request from Paul J. Howard, Executive Director, New England Fishery Management Council (NEFMC), 50 Water Street, Newburyport, MA 01950. The document is also available online at *http://www.nefmc.org*. NMFS prepared a Final Regulatory Flexibility Analysis (FRFA), which is contained in the classification section of this rule. Copies of the Record of Decision (ROD) and the Small Entity Compliance Guide are available from the Regional Administrator, Northeast Regional Office, NMFS, One Blackburn Drive, Gloucester, MA 01930, and on the Northeast Regional Office's website at *http://www.nero.noaa.gov*.

Written comments regarding the burden-hour estimates or other aspects of the collection-of-information requirements contained in this final rule may be submitted to Patricia A. Kurkul at the above address and by e-mail to *David_Rostker@omb.eop.gov*, or by fax to (202) 395–7285.

**FOR FURTHER INFORMATION CONTACT:** Allison R. Ferreira, Fishery Policy Analyst, (978) 281–9103; fax (978) 281–9135; e-mail *allison.ferreira@noaa.gov*.

**SUPPLEMENTARY INFORMATION:**

## Background

This final rule implements measures contained in Amendment 2 to the FMP, which was partially approved by NMFS on behalf of the Secretary of Commerce (Secretary) on March 30, 2005. A proposed rule for this action was published on January 14, 2005 (70 FR 2586), with public comments accepted through February 14, 2005. The public comment period was reopened for 10 days on February 24, 2005 (70 FR 9029), because the qualification period for the proposed modification to the monkfish limited entry program was incorrectly described in the preamble to the proposed rule. The details on the development of Amendment 2 were contained in the preamble of the proposed rule and are not repeated here. In the proposed rule, NMFS requested public comment on all proposed measures, but specifically asked for comment on the measure to provide owners of limited access monkfish vessels with a one-time opportunity to reset their vessel's monkfish permit baseline characteristics to be the characteristics of the vessel first issued a Federal limited access permit, rather than the characteristics of the vessel at the time it was issued a monkfish limited access permit under the initial FMP. After considering public comments on this measure and the other measures contained in Amendment 2, NMFS, on behalf of the Secretary, has disapproved the monkfish baseline modification measure. Furthermore, NMFS is rejecting the Councils' determination and analysis with respect to the bycatch reporting methodology contained in Amendment 2, and is sending that portion of Amendment 2 back to the Councils for further consideration, development, and analysis in light of concerns raised in a recent Federal court decision in *Oceana* v. *Evans* (Civil Action No. 04–0811 (D.D.C. March 9, 2005)), which considered and rejected a similar provision in Amendment 13 to the Northeast (NE) Multispecies FMP (Amendment 13).

A process for providing a monkfish limited access vessel owner with a one-time opportunity to reset their vessel's monkfish permit baseline characteristics to be the characteristics of the vessel first issued a Federal limited access permit was proposed in Amendment 2. This proposed management measure has been disapproved because it does not comply with National Standard 7 of the Magnuson-Stevens Fishery Conservation and Management (Magnuson-Stevens Act). National Standard 7 of the Magnuson-Stevens Act states, ''Conservation and management shall, where practicable, minimize costs and avoid unnecessary duplication.'' Further, the regulatory guidelines for implementing National Standard 7 found at 50 CFR 600.340(d) state, ''The supporting analysis for FMPs should demonstrate that the benefits of fishery regulations are real and substantial relative to the added research, administrative, and enforcement, as well as costs to the industry of compliance.'' This proposed measure would only have addressed the multiple baseline issue with respect to the monkfish fishery, creating the need to address separately similar measures in other FMPs in order to fully address the larger issue of multiple baselines across all fisheries. Handling the multiple baseline issue in such a piece-meal manner would require the Councils and NMFS to develop and implement duplicate measures under each FMP, resulting in unnecessary administrative burden on the Government and on limited access permit holders. Upon implementation of such measures in each FMP, owners of vessels with multiple limited access permits would be required to modify their vessel's baseline for that particular fishery, potentially requiring a vessel owner to change a single vessel's baseline multiple times. Further, the potential benefits associated with addressing the multiple baseline issue in each individual FMP would not be fully realized until measures are implemented in all FMPs having limited access permits. Given the uncertainty of whether any fishing vessels would actually exercise their right to reset their vessel baseline under the baseline modification program proposed in Amendment 2, NMFS has determined that, at this time, the speculative benefits of this measure are not ''real and substantial'' relative to the added administrative and enforcement costs, as well as the costs to the industry of compliance. It would be more efficient, comprehensive, and less confusing to the public for the Councils to address the vessel baseline issue across all FMPs in an omnibus amendment.

## Approved Measures

NMFS has approved 10 measures proposed in Amendment 2. A description of the new management measures resulting from the partial approval of Amendment 2 and a summary of additional regulatory changes being made in this final rule are provided below.

*1. Modification of the Limited Access Permit Qualification Criteria*

Amendment 2 provides owners of vessels that do not possess a monkfish limited access permit with the opportunity to qualify for a new monkfish limited access permit through a modified limited entry program. In order to qualify for a limited access permit under this modified limited entry program, a vessel must demonstrate that it landed the qualifying amount of monkfish in the area south of 38°00′ N. lat. (i.e., at a port located south of 38°00′ N. lat.) during the qualification period of March 15 through June 15, during the years 1995 through 1998. Two permits will be available, depending on the amount of monkfish the vessel landed during the qualification period (the same landings levels that were required for the original monkfish limited access permits). To qualify for a Category G permit, a vessel must demonstrate monkfish landings of at least 50,000 lb (22,680 kg) tail weight during the qualification period. To qualify for a Category H permit, a vessel must demonstrate monkfish landings of at least 7,500 lb (3,402 kg) tail weight during the qualification period. Vessels qualifying for a Category G or H permit will be restricted to fishing on a monkfish DAS south of 38°20′ N. lat. (the initial line was established at 38°00′ N. lat. but revised to 38°20′ N. lat. in response to sea turtle protection measures).

This modified limited entry program is being implemented to provide a renewed opportunity for vessels operating in the southern range of the monkfish fishery to qualify for a limited access monkfish permit since some vessel owners claim they were not adequately notified of the monkfish control date established on February 27, 1995, because they did not possess Federal NE permits. In addition, the southern boundary of the monkfish fishery management unit was initially proposed as the VA/NC border, rather than the NC/SC border, leading some to believe they would not be affected by the FMP.

*2. Offshore Fishery Program in the SFMA*

Amendment 2 establishes an offshore monkfish fishery program that will allow vessels to elect to fish under a monkfish possession limit of 1,600 lb (726 kg) (tail weight) per monkfish DAS when fishing in the Offshore Fishery Program Area under specific conditions, regardless of the possession limit that would otherwise be applicable to that vessel. For a vessel electing to fish in this program, monkfish DAS will be prorated based on a possession limit ratio (the standard permit category possession limit applicable to non-program vessels fishing in the SFMA, divided by 1,600 lb (726 kg) (the possession limit per DAS specified for vessels fishing in the program)), multiplied by the monkfish DAS available to the vessel when fishing in the SFMA.

Vessels electing to fish in this program will be required to fish under the program rules for the entire fishing year and will receive a separate monkfish permit category (Category F). A vessel electing to fish in this program will be allowed to fish its monkfish DAS only within the Offshore Fishery Program Area from October through April. In addition, enrolled vessels will be required to have on board a Vessel Monitoring System (VMS) that is operational during the entire October through April season, and will be subject to the gear requirements applicable to monkfish limited access permit Category A and B vessels.

The Offshore Fishery Program is being implemented to help restore the offshore monkfish fishery that was essentially eliminated by the disapproval of the ''running clock'' in the original FMP. The running clock provision proposed in the original FMP would have provided vessels with the ability to account for any possession limit overages, provided that the vessel let its monkfish DAS clock run upon returning to port to account for these overages. Without the running clock provision, vessels have been discouraged from fishing in offshore areas under the current restrictive possession limits. Any vessel not electing to fish under this program will still be allowed to fish in the Offshore Fishery Program Area under the rules and regulations applicable to non-program vessels. This program is intended to provide flexibility to the fishing industry without impacting the mortality objectives of the FMP.

*3. SFMA Roller Gear Restriction*

The roller gear on all trawl vessels fishing under a monkfish DAS in the SFMA is restricted to a maximum disc diameter of 6 inches (15.2 cm). The purpose of this new management measure is to minimize, to the extent practicable, the adverse impact of monkfish trawl gear on EFH. This measure is specific to the SFMA since it will help ensure that trawl vessels, which are known to be able to target monkfish more successfully with smaller roller gear in the SFMA than in the Northern Fishery Management Area (NFMA), do not fish in areas of more complex bottom characteristics, including the offshore canyon areas.

*4. Closure of Lydonia and Oceanographer Canyons*

Vessels fishing on a monkfish DAS are prohibited from fishing in the Oceanographer and Lydonia Canyon closure areas, as defined in Amendment 2, regardless of gear used. The purpose of these closures is to minimize, to the extent practicable, the adverse impact of monkfish fishing on EFH, especially due to the potential impacts associated with the anticipated expansion of the directed offshore monkfish fishery under the Offshore Southern Monkfish Program being implemented in this final rule.

*5. Cooperative Research Initiative Programs*

Amendment 2 establishes two programs aimed at encouraging vessels to engage in cooperative monkfish research activities, including, but not limited to: Research to minimize bycatch and interactions of the monkfish fishery with sea turtles and other protected species; research to minimize the impact of the monkfish fishery on EFH; research or experimental fisheries for the purpose of establishing a monkfish trawl exempted fishery (under the NE Multispecies FMP) in the NFMA; research on the biology or population structure and dynamics of monkfish; cooperative surveys; and gear efficiency. The purpose of these two programs is to expand incentives for fishermen to participate in a range of monkfish research and survey activities by reducing the costs associated with conducting the research, and by streamlining the exempted fishing permit (EFP) process.

Under the DAS set-aside program, a pool of 500 monkfish DAS will be set aside to be distributed to vessels for the purpose of participating in cooperative monkfish research projects. These DAS will be obtained by removing 500 DAS from the total monkfish DAS available to the monkfish fleet prior to distribution to individual vessels. This will result in less than one DAS being deducted from each individual vessel allocation annually. For fishing year (FY) 2005, this set-aside will reduce individual vessel DAS allocations by 0.7 DAS. NMFS will publish a Request for Proposals (RFP) and vessels will be required to submit competitive bids to participate in specific research or survey projects. NMFS will then convene a review panel composed of Council members from the Monkfish Oversight

Committee, the Research Steering Committee, and other technical experts to review the proposals. NMFS will consider the recommendations of each panel member and award the contracts to successful applicants, including a distribution of DAS from the set-aside pool.

The Regional Administrator (RA) will reallocate any unused research DAS as exempted DAS and provide notice of the reallocation in the **Federal Register**. Thus, any of the 500 DAS not distributed through the RFP process will be available to vessels through a DAS exemption program on a first-come-first-served basis. Under the DAS exemption program, vessels applying for an EFP will indicate the number of monkfish DAS they will require to complete their research project. NMFS will then review the EFP application and, if approved, issue the permit exempting the vessel from monkfish DAS usage requirements. The total number of monkfish DAS that could be used in the two programs (distributed under the RFP process or used in the exemption program) could not exceed the originally established 500 DAS annual set-aside pool. For any DAS exemption request that exceeds the 500 DAS set-aside analyzed in the FSEIS for Amendment 2, the applicant will be required to prepare an analysis of the impacts of the additional DAS effort that fully complies with the requirements of the National Environmental Policy Act. For FY 2005, all of the 500 DAS set aside for research will be reallocated as exempted DAS since an RFP cannot be published, projects reviewed and approved, and research DAS allocated in sufficient time for the research DAS to be utilized during FY 2005.

*6. NAFO Regulated Area Exemption Program*

This final rule implements an exemption from certain FMP regulations for vessels that are fishing for monkfish under a High Seas Permit in the NAFO Regulated Area and transiting the Exclusive Economic Zone (EEZ) with monkfish on board or landing monkfish in U.S. ports. Similar to the NAFO waters exemption in the NE Multispecies FMP, monkfish vessels enrolled in the NAFO Regulated Area Exemption Program are exempt from the monkfish regulations pertaining to permit requirements, minimum mesh size, effort control (DAS), and possession limits. Further, monkfish caught from the NAFO Regulated Area will not count against the monkfish total allowable catch, provided: The vessel has on board a letter of authorization issued by the Regional Administrator; except for transiting purposes, the vessel fishes exclusively in the NAFO Regulated Area and does not harvest fish in, or possess fish harvested from, the EEZ; when transiting the EEZ, all gear is properly stowed and not available for immediate use; and the vessel complies with all High Seas Fishing Compliance Permit and NAFO conservation and enforcement measures while fishing in the NAFO Regulated Area. This exemption program provides additional flexibility to monkfish vessels without compromising the mortality objectives of the FMP.

*7. Changes to Incidental Catch Provisions*

Three adjustments to the monkfish incidental catch limits are implemented through this final rule. The purpose of these adjustments to the incidental catch limits is to minimize regulatory discards without affecting the overall stock rebuilding program. The first adjustment increases the current 50 lb (23 kg) per trip possession limit to be 50 lb (23 kg) per day, or partial day, up to a maximum of 150 lb (68 kg) per trip, for vessels not fishing under a monkfish DAS, NE multispecies, or scallop DAS, and fishing with handgear or small mesh (see below). This possession limit also applies to NE multispecies limited access vessels that hold a Small Vessel Exemption permit when not fishing under a DAS program. Small mesh is defined as mesh smaller than the NE multispecies minimum mesh size requirements applicable to vessels fishing in the GOM and GB Regulated Mesh Areas (RMAs), and the Southern New England (SNE) RMA east of the boundary for the Mid-Atlantic (MA) Exemption Area. For vessels fishing in the SNE and MA RMAs west of the MA Exemption Area boundary, small mesh is defined as mesh smaller than the minimum mesh size applicable to limited access summer flounder vessels.

The second adjustment implements the same incidental monkfish catch limit of 50 lb (23 kg) per day, or partial day, up to a maximum of 150 lb (68 kg) per trip, for vessels fishing with surfclam or ocean quahog hydraulic dredges, and sea scallop vessels (General Category or limited access) not fishing under a scallop DAS with dredge gear. These vessels were previously prohibited from retaining monkfish. For the purposes of these new possession limits, a day is counted starting with the time the vessel leaves port (as recorded in it's Vessel Trip Report), or, if the vessel has an operational VMS, when the vessel crosses the VMS demarcation line. This incidental catch limit has been modified from the proposed rule to include both General Category scallop vessels and limited access scallop vessels not fishing under a scallop DAS since limited access scallop vessels are authorized to fish under the same rules applicable to General Category vessels when not fishing under a scallop DAS, as specified under § 648.52(a). The Amendment 2 document was not clear with respect to whether or not this incidental catch provision should include limited access scallop vessels not fishing under a scallop DAS. However, because limited access scallop vessels must abide by the same provisions as General Category scallop vessels when not fishing under a scallop DAS, NMFS has determined that it was the Councils' intent to include these vessels under this incidental catch limit.

The third monkfish incidental catch limit adjustment is applicable to vessels fishing with large mesh in the SNE or MA RMAs west of the boundary for the NE Multispecies MA Exemption Area. In this area, large mesh is defined as mesh equal to or greater than the minimum mesh size applicable to limited access summer flounder vessels. This adjustment increases the possession limit to 5 percent of the total weight of fish on board, to a maximum of 450 lb (204 kg), based on tail weight.

*8. Decrease in Minimum Fish Size*

Amendment 2 reduces the minimum fish size for monkfish in the SFMA to 11 inches (27.9 cm) tail length, 17 inches (43.2 cm) total length, from the current minimum size limit of 14 inches (35.6 cm) tail length, 21 inches (53.3 cm) total length. This change makes the minimum size for the SFMA consistent with the minimum fish size for the NFMA, simplifying the FMP rules and improving enforceability. Minimum fish size regulations have been widely used in FMPs on the basis that they discourage the targeting of small fish, and increase yield-per-recruit if successfully linked to gear with appropriate size-selectivity. Monkfish limited access trawl vessels that are fishing under a combined monkfish/multispecies DAS are authorized to use the minimum regulated mesh size authorized under the NE Multispecies FMP. As a result, these vessels already catch monkfish smaller than the current minimum fish size of 14 inches (35.6 cm) tail length. Until there is sufficient information linking trawl mesh size to the size of monkfish retained, the Councils determined that it is important to minimize the regulatory discards associated with vessels targeting monkfish using minimum regulated groundfish mesh. A reduction in the minimum fish size for the SFMA, while

keeping the minimum mesh size requirements constant, will have the effect of converting some monkfish discards to landings and reducing monkfish bycatch (regulatory discards), without changing the yield-per-recruit or promoting the targeting of small fish. In addition, a uniform minimum size limit for both management areas reduces FMP complexity, making this management measure more enforceable and less confusing to the fishing industry. Further, allowing vessels to land monkfish that would otherwise have been discarded, due to a larger minimum size limit, will improve the catch data used in the stock assessment and management process.

*9. Removal of 20–day Block Requirement*

Amendment 2 eliminates the 20–day block requirement for monkfish limited access Category A and B vessels. NMFS is removing the 20–day block requirement since it imposes an enforcement burden and increases the regulatory burden on monkfish limited access vessels with no apparent biological or economic benefit. This change does not affect the requirement for monkfish limited access vessels that also hold a NE multispecies limited access permit (Category C and D vessels) since these vessels must abide by the NE multispecies 20–day block requirement when fishing under a combined monkfish/multispecies DAS.

*10. Modification of Framework Adjustment Procedures*

Amendment 2 includes three additions to the list of actions that can be taken under the existing framework adjustment procedure, which are as follows: Transferable monkfish DAS programs; measures to minimize the impact of the fishery on endangered or protected species; and measures to implement bycatch reduction devices. Including these additional measures to the list of frameworkable items could reduce the time required to implement such regulations, which otherwise would have to be done through an FMP amendment process.

*11. Regulatory Changes*

This final rule implements several editorial revisions to the existing text in 50 CFR 648, subpart F, that are not proposed in Amendment 2. These revisions remove obsolete language (references to regulations in effect during previous fishing years) and improve the organization and clarity of the regulations.

In addition to the editorial revisions referenced above, this final rule corrects an error in the incidental catch limit regulations for scallop vessels fishing under a scallop DAS found at 50 CFR 648.94(c)(2). The original FMP and the preamble to the final rule implementing the FMP (64 FR 54732, October 7, 1999) stated that all vessels issued an incidental monkfish permit that are fishing under a scallop DAS, including both dredge vessels and vessels fishing under the trawl net exemption, are subject to an incidental catch limit of 300 lb (136 kg) tail weight per DAS (see Section 4.6.3.2 of the FMP). However, the regulatory text in the final rule implementing the FMP inadvertently referenced only scallop dredge vessels fishing under a scallop DAS. The final rule will correct the regulations at § 648.94(c)(2) to apply to all vessels fishing under a scallop DAS, consistent with the intent of the original FMP.

This final rule corrects the monkfish minimum trawl mesh size for the SNE Monkfish and Skate Trawl Exemption Area, specified at § 648.80(b)(5)(i)(B), to be consistent with the minimum trawl mesh size for vessels fishing under only a monkfish DAS, specified at § 648.91(c)(1)(i). The necessary minimum mesh size change to this exemption program under the NE Multispecies FMP was inadvertently omitted in drafting the regulatory text for the final rule implementing the original FMP.

The final rule also corrects an error in the possession limit regulations for limited access Category C and D vessels fishing on a multispecies DAS in the SFMA with gear other than trawl gear, specified at § 648.94(b)(3)(ii), to reference the fact that the 50–lb (23 kg) tail weight possession limit is per multispecies DAS. This error occurred in the regulatory text of the final rule implementing the FMP, but was correctly described in the preamble to that rule.

**Comments and Responses**

A total of 15 individual comment letters were received on the proposed rule and on the Amendment. Eleven comments were received specific to the proposed rule, two comments addressed the Amendment, and two comments did not distinguish between the proposed rule and the Amendment. This section summarizes the principle comments contained in the individual comment letters that pertained to Amendment 2 and the proposed rule, and NMFS's response to those comments. Any comments received that were not specific to the management measures contained in the Amendment 2 proposed rule, or in the amendment document, are not responded to in this final rule.

Ten commentors expressed either general or specific support for the management measures contained in Amendment 2, although two of these commentors expressed opposition or lack of support for particular management measures. Five comments were received in apparent opposition to the Amendment. The opposing comments received on Amendment 2 and its proposed rule were specific to the following issues: The research DAS set-aside program; essential fish habitat (EFH) measures; the modification of monkfish vessel baselines; the reduction in the minimum fish size for the SFMA; bycatch minimization; and bycatch reporting methodology.

*Comment 1:* One commentor opposed the proposed set-aside of 500 DAS for monkfish research, questioning the validity of such research activities.

*Response:* The research set-aside program contained in Amendment 2 will encourage much needed research on the monkfish resource by providing an incentive for vessel owners to participate in monkfish research activities while not utilizing their valuable DAS. Information collected through these research activities will enable the Councils and NMFS to better understand the monkfish resource, enabling more effective management of the monkfish fishery.

*Comment 2:* Three commentors supported the Lydonia and Oceanographer canyon closure areas, while one commentor questioned the legal authority and scientific basis for these closures under the EFH provisions of the Magnuson-Stevens Act. Specifically, this commentor cites a July 28, 2004, letter from NOAA General Counsel to the NEFMC regarding the legal basis for protecting deep-water corals in Amendment 2. This letter advised that if deep-water corals are designated as EFH for monkfish, then protection of such corals in Amendment 2 is legal and appropriate. The fishing industry representatives claim that because Amendment 2 states that corals are not currently included in the EFH descriptions for any species in the NE region, the legal basis for the closures is tenuous at best. Instead, these individuals urged NMFS to work with the Councils to develop a comprehensive approach toward the protection of deep-water coral in the NEFMC's upcoming Omnibus Habitat Amendment. The three groups which expressed support for the canyon closures also recommended that these closures be revisited and/or expanded upon in a future management action

such as the Omnibus Habitat Amendment.

*Response:* The EFH final rule states that FMPs must minimize the adverse effects of fishing on EFH to the extent practicable. Although monkfish inhabit deep water, their EFH is not considered to be vulnerable to bottom-tending mobile gear (bottom trawls and dredges) and bottom gillnets because juvenile and adult monkfish are distributed over a wide geographic and depth range, and inhabit a variety of bottom substrates. As a result, no action is required to minimize the adverse impacts of the monkfish fishery or other fisheries on monkfish EFH. However, it has been determined that the monkfish fishery adversely affects the EFH for other federally managed species. Overall, there are 23 federally managed species with at least one life stage having EFH that has been determined to be more than minimally vulnerable to bottom trawl gear. As a result, management action is required to minimize, to the extent practicable, the adverse impacts of the monkfish fishery on the EFH of other species (see 50 CFR 600.815(a)(2)(ii)).

The Councils proposed the closure of Lydonia and Oceanographer canyons as a precautionary measure to prevent any potential direct or indirect impacts to the EFH of other species that may result as the offshore monkfish fishery expands under the Offshore Fishery Program in the SFMA that is being implemented in this final rule. Thus, these closure areas are not being implemented solely to protect deep-water corals. In developing these alternatives, the Councils recognized that EFH for some federally managed species extends beyond the continental shelf, and includes some of the offshore canyons. The direct benefits of these closure areas were assessed in the FSEIS for Amendment 2 in terms of the degree to which the closure areas contain EFH for any species in depths greater than 200 meters that is classified as vulnerable. Twenty-three federally managed species have been observed or collected in surveys within the two canyon closure areas, with 10 of these species having EFH defined as hard substrates in depths greater than 200 meters. Furthermore, the EFH designations for juvenile and/or adult life stages for 6 of these 10 species (redfish, tilefish, and 4 species of skates) overlap with the two canyon closure areas. Since some type of hard substrate is included in the EFH description for all six species, EFH for all six of these species has been determined to be moderately to highly vulnerable to the effects of bottom trawls and minimally vulnerable to bottom gillnets. Any reduction in the quantity or quality of EFH for these six species within the two canyon closure areas would constitute a direct adverse impact. Thus, the direct adverse impacts associated with the expansion of the offshore monkfish fishery in the SFMA will be minimized through the implementation of the Lydonia and Oceanographer canyon closure areas.

Although corals are not explicitly included in the EFH descriptions for any species in the NE region, deep-water corals are known to grow on hard substrates, which are included in the EFH descriptions for many of the federally managed species that occur within the proposed closure areas, and are considered to be potentially important features of EFH for such species. Deep-water corals are considered to be especially vulnerable to damage by fishing gear due to their often complex branching form of growth, and because many species are extremely slow growing. Additionally, some coral species are thought to function similar to other epibenthic fauna in that they provide relief and shelter to juvenile finfish. For example, the EFH for juvenile redfish is has been determined to be highly vulnerable to the effects of bottom trawling largely due to this species use of bottom structure (including corals) for shelter. In addition, several other species found in the canyon closure areas utilize deep-water gravel and other hard bottom habitat that support the growth of corals and other species of attached epifauna. Damage or loss of these organisms caused by monkfish trawl or gillnet gear would constitute an indirect adverse impact to the benthic habitats. Thus, the indirect adverse impacts associated with the expansion of the offshore monkfish fishery in the SFMA will be minimized through the implementation of the Lydonia and Oceanographer canyon closure areas. Accordingly, the implementation of these closures in the EFH context is not justified on the grounds that it is necessary to protect deep-water corals per se, but rather on the grounds that it is necessary to protect the type of habitat occurring in these areas, which incidentally includes deep-water corals among other organisms.

*Comment 3:* One commentor questioned the scientific and legal authority of the canyon closure areas under the EFH provisions of the Magnuson-Stevens Act and questioned the scientific basis for the protection of deep-water corals under the bycatch provisions of the Magnuson-Stevens Act. This commentor stated that Amendment 2 provides no scientific evidence that the monkfish fishery is harvesting coral as bycatch.

*Response:* National Standard 9 of the Magnuson-Stevens Act requires that management plans minimize bycatch to the extent practicable. NMFS considers bycatch to include finfish, shellfish, invertebrate species, and all other forms of marine animal and plant life. The extent to which deep-water corals are a bycatch in the monkfish fishery is unknown. In addition, the degree of spatial overlap between monkfish fishing effort and known locations of deep-water coral is minimal based upon available data. However, due to the potential expansion of the offshore monkfish fishery resulting from the implementation of the Offshore Fishery Program in the SFMA, these canyon closure areas are considered to be a necessary precautionary measure to limit the potential interaction between monkfish trawl and gillnet gear and the 18 species of coral known to inhabit these two canyons. Thus, in addition to serving as a measure to minimize the direct and indirect adverse impacts of the monkfish fishery on the EFH of other species, these closure areas will also serve to minimize the potential bycatch of deep-water corals in the monkfish fishery.

*Comment 4:* One commentor stated that Amendment 2 fails to minimize fishing impacts to gravel habitats and juvenile cod EFH.

*Response:* The monkfish fishery can be separated into two components: The fishery in the NFMA and the fishery in the SFMA. In general, unless fishing in the Gulf of Maine (GOM) and Georges Bank (GB) monkfish gillnet fishery exemption area, vessels fishing for monkfish in the NFMA can only fish for monkfish while utilizing either a NE multispecies DAS or a scallop DAS, and must comply with all requirements of these FMPs. Because of this, monkfish fishing effort and activities are effectively controlled by management measures implemented under the NE Multispecies and Atlantic Sea Scallop FMPs. Recent amendments to these FMPs (Amendment 13 to the NE Multispecies FMP and Amendment 10 to the Atlantic Sea Scallop FMP) considered and analyzed a wide range of measures to minimize, to the extent practicable, the effects of fishing on EFH. These amendments also implemented several new management measures that had either the direct or indirect effect of reducing fishing impacts on EFH. The types of management measures considered and/or implemented in these amendments include area closures, fishing effort

reductions, gear changes and limitations, and incentives for fishermen to use gear having less of an impact on EFH. Both amendments concluded that the measures considered and implemented minimized, to the extent practicable, the adverse effects of fishing activities on EFH. Amendment 2 did not address the effects of fishing activities in the NFMA because these activities were fully addressed in Amendment 13 to the NE Multispecies FMP and Amendment 10 to the Atlantic Sea Scallop FMP.

As opposed to the NFMA, vessels fishing for monkfish in the SFMA may operate outside the requirements and controls of the NE Multispecies and the Atlantic Sea Scallop FMPs. Therefore, Amendment 2 considered a range of management measures to minimize, to the extent practicable, the effects of monkfish fishing on EFH in the SFMA. Amendment 2 implements two management measures with the specific intent of minimizing the effects of monkfish fishing on EFH: The prohibition on otter trawl roller gear greater than 6 inches (15.2 cm) in diameter, and the closures of Lydonia and Oceanographer canyons. The specifics of the canyon closures are addressed in the response to the previous comment, and are not repeated here. The roller gear restriction is expressly intended to prevent monkfish trawl vessels from fishing in areas containing vulnerable complex habitat, such as gravel habitat. Therefore, although Amendment 2 does not contain measures to close identified areas of gravel habitat and juvenile cod EFH, the roller gear restriction being implemented in this amendment will have the effect of limiting trawl fishing in all areas where complex habitats occur. The NEFMC's upcoming Omnibus Habitat Amendment will continue to take a comprehensive approach toward protection of vulnerable habitat, such as gravel habitat.

*Comment 5:* Two individuals provided specific comments on the proposal to allow vessel owners a one-time opportunity to modify their monkfish vessel's baseline. One commentor supports the measure, while the other feels that the baseline issue would be better handled across all FMPs at one time, versus in each individual FMP. The individual opposing these measures commented that allowing vessel owners to change their vessel's baseline specifications on a piece-meal basis only adds confusion to those with more than one limited access permit, does not resolve the issue of multiple baselines in other fisheries, and could have tremendous ramifications on the fishing capacity of the fleet. Further, this individual recommended that the NEFMC's Capacity Committee work with the fishing industry, and staff from the Councils and NMFS, to develop recommendations on how to address the issue of multiple baselines.

*Response:* In the proposed rule for Amendment 2, NMFS highlighted the monkfish vessel baseline modification measure for public comment due to the concern that this measure would not address the larger issue of multiple vessel baselines across all limited access fisheries. As discussed in the preamble to this final rule, NMFS is disapproving this measure on the grounds that it does not comply with National Standard 7 of the Magnuson-Stevens Act.

*Comment 6:* Two commentors expressed concern with the measure to reduce the minimum fish size in the SFMA. Both individuals feel that this measure is a step backwards in management that would impact the sustainability of monkfish stocks, and stated that gear modifications such as an increase in the minimum mesh size should be used to prevent the harvest of immature fish, and prevent bycatch and discards. One of the commentors added that the smaller minimum fish size would also have an effect on the market price since the influx of smaller, cheaper fish would drive down the price of monkfish.

*Response:* Minimum fish size regulations have been widely used in FMPs on the basis that they discourage the targeting of small fish, and increase yield-per-recruit if successfully linked to gear with appropriate size-selectivity. Monkfish limited access trawl vessels that are fishing under a combined monkfish/multispecies DAS are authorized to use the minimum regulated mesh size authorized under the NE Multispecies FMP. As a result, these vessels already catch monkfish smaller than the current minimum fish size of 14 inches (35.6 cm) tail length. Until there is sufficient information linking trawl mesh size to the size of monkfish retained, the Councils determined that it is important to minimize the regulatory discards associated with vessels targeting monkfish using minimum regulated groundfish mesh. A reduction in the minimum fish size for the SFMA, while keeping the minimum mesh size requirements constant, will have the effect of converting some monkfish discards to landings and reducing monkfish bycatch (regulatory discards), without changing the yield-per-recruit or promoting the targeting of small fish since vessels likely catch the smaller fish under current measures. In addition, a uniform minimum size limit for both management areas reduces FMP complexity, making this management measure more enforceable and less confusing to the fishing industry. Further, allowing vessels to land monkfish that would otherwise have been discarded, due to a larger minimum size limit, will improve the catch data used in the stock assessment and management process.

The response to the portion of the comment concerning the effect of a smaller minimum fish size on market price is contained in the FRFA section of this rule.

*Comment 7:* One commentor stated that Amendment 2 fails to consider any alternatives to improve bycatch reporting methodology, including alternatives to increase mandatory observer coverage.

*Response:* Although there is a bycatch reporting methodology in place for the Monkfish FMP, NMFS is rejecting the Councils' determination and analysis with respect to the bycatch reporting methodology contained in Amendment 2, and is sending that portion of Amendment 2 back to the Councils for further consideration, development, and analysis in light of concerns raised in a recent Federal court decision in Oceana v. Evans. In Oceana v. Evans, the Court concluded that the bycatch reporting methodology provisions contained of Amendment 13 did not satisfy the requirements of the Magnuson-Stevens Act because they fail to fully evaluate reporting methodologies to assess bycatch, they do not mandate a standardized reporting methodology, including minimum levels of observer coverage, and they fail to respond to potentially important scientific evidence involving accuracy versus precision in determining appropriate levels of observer coverage. Because the monkfish fishery largely overlaps with the NE multispecies fishery, the Amendment 2 bycatch reporting methodology heavily relies on, and is set forth in a manner similar, to the bycatch reporting methodology in the NE Multispecies FMP. Thus, in light of the concerns raised in the Oceana decision about bycatch reporting methodology contained in Amendment 13 to the Multispecies FMP, NMFS has concluded that Amendment 2 does not adequately comply with the required provision in the Magnuson-Stevens Act to establish a bycatch reporting methodology.

Rejecting the bycatch reporting methodology contained in Amendment 2 does not vitiate the partial approval of other measures. As stated by the Court

in Oceana v. Evans in rejecting an analogous section in Amendment 13, the bycatch reporting methodology ''is severable from the balance of the Amendment,'' and, ''no purpose would be served by vacating other parts of the FMP, and such an approach would be unnecessarily disruptive.'' The partially approved measures in Amendment 2 implement improvements to the protection of EFH, minimize bycatch, and provide additional benefits to the fishing industry. To prevent their implementation, while awaiting a revised bycatch reporting methodology, would unnecessarily deny the environment and monkfish fishery the benefits of Amendment 2. Moreover, the Monkfish FMP does include a bycatch reporting methodology, that will be in place during the period when the Councils further consider the methodology in light of concerns raised in the decision in Oceana v. Evans.

*Comment 8:* The same individual that commented on bycatch reporting methodology also stated that Amendment 2 fails to provide adequate measures to minimize bycatch and the unavoidable mortality of bycatch. This includes the bycatch of undersized monkfish and non-target species, including marine mammals and sea turtles.

*Response:* National Standard 9 requires bycatch and bycatch mortality to be minimized to the extent practicable. The National Standard Guidelines place special emphasis on the minimization of bycatch, and provide specific guidance for evaluating conservation and management measures relative to National Standard 9 and other national standards, including specific guidance on assessing practicability. The National Standard Guidelines suggest that a practicability determination consider several factors including, but not limited to, population effects for bycatch species; ecological effects resulting from changes in the bycatch of that species; changes in the bycatch of other species; effects on marine mammals and birds; changes in fishing, processing, disposal, and marketing costs; changes in fishing practices and behavior; changes in research and other administrative costs; and changes in the social and cultural values of the fishing activities. However, this type of information is not available for the monkfish fishery. In fact, most of the bycatch information currently collected reported by NMFS is based on broad gear categories such as otter trawl, scallop dredge, gillnet greater than 10 inches (25.4 cm), and gillnet less than 10 inches (25.4 cm) (see Section 5.3.5 of the FSEIS). Furthermore, there is little information with which to estimate the impacts of specific management measures on bycatch outside of a few gear studies, most of which have focused on bycatch in the NE multispecies fishery. As a result, the discussion of the biological impacts associated with the bycatch specific measures contained in Amendment 2 is qualitative, but clearly describes how the specific measures (reduction in minimum fish size and increase in incidental catch limits) will have the effect of converting to landings, fish that would otherwise be discarded.

NMFS supports the bycatch measures contained in Amendment 2, and has determined that these incremental measures, in addition to conservation and bycatch measures already in place in the Monkfish FMP and the NE Multispecies FMP, which largely overlap with the monkfish fishery, as well as FMPs for other fisheries that catch monkfish, are appropriate to reduce bycatch to the extent practicable given what is known about the interaction of the monkfish fishery with both target and non-target species, including marine mammals and sea turtles. Amendment 2 contains several new measures aimed at reducing bycatch in the monkfish fishery including a combined research DAS set-aside and DAS exemption program. The purpose of this program is to encourage the collection of much needed information on the monkfish fishery, including information on bycatch. The information obtained from such research activities can then be used to develop scientifically sound bycatch reduction measures for the monkfish fishery. Amendment 2 also contains measures that will have the effect of further reducing regulatory discards, as well as the potential bycatch of deep-water corals. These measures consist of modifications to incidental catch limits, a reduction in the minimum fish size for the SFMA, and the closure of two canyon areas where deep-water corals are known to occur. The report of the 34th Stock Assessment Workshop (SAW 34) noted that the most frequent reason for discarding monkfish in the trawl and scallop fisheries was because the fish were too small, either for the market or due to regulations. As discussed in the response to Comment 6, more information is needed concerning the relationship between mesh size and the size of monkfish retained in the fishery. Thus, a reduction in the minimum fish size will serve to convert the discard of some small monkfish to landings, addressing the bycatch of small monkfish to some extent, until much needed information concerning the relationship between minimum fish size and minimum mesh size can be obtained and utilized in the management process.

With respect to the bycatch of marine mammals, which are not subject to the Magnuson-Stevens Act bycatch reduction mandates, and bycatch of sea turtles, sections 2.8 and 6.6.6.2 of the FSEIS describe the management measures currently in effect, or that are being developed to reduce the bycatch of marine mammals and sea turtles in the monkfish fishery. These management measures have been taken under the authority of the Marine Mammal Protection Act (MMPA) and/or the Endangered Species Act (ESA), and, therefore, take a more comprehensive approach to minimizing bycatch of marine mammals and sea turtles than can be accomplished under the Monkfish FMP alone. Given the limited information about bycatch of protected species, the measures in place under the ESA, the MMPA, and the Monkfish and NE Multispecies FMPs have been determined to reduce the potential bycatch of protected species to the extent practicable. For all of the reasons discussed above, NMFS has determined that the measures contained in Amendment 2 minimize bycatch and the unavoidable mortality of bycatch in the monkfish fishery to the extent practicable, in accordance with the guidelines for assessing practicability found at 50 CFR 600.350(d)(3), when viewed in combination with existing measures in the Monkfish and NE Multispecies FMPs, measures in the FMPs for other fisheries which catch monkfish, and specific ESA and MMPA regulations.

**Changes from the Proposed Rule**

NMFS has made one substantive change to the proposed rule resulting from the disapproval of one of the Councils' preferred alternatives. In addition to editorial changes, NMFS has also made some minor changes to the proposed rule that are technical or administrative in nature, and that clarify or otherwise enhance enforcement and administration of the fishery management program. The one substantive change is listed below, with the minor technical or administrative changes following in the order in which they appear in the regulations.

In § 648.4, the proposed revision to paragraph (a)(9)(i)(H) has been removed to reflect the disapproval of the vessel baseline modification measure contained in Amendment 2, as described in the preamble of this final rule.

In § 648.4(a)(9)(i)(A)(*5*), the annual declaration requirement for vessels participating in the Offshore Fishery Program in the SFMA, has been modified to provide owners of limited access monkfish vessels with the opportunity to change their vessel's monkfish permit category within 45 days of the effective date of the vessel's permit, regardless of the fishing year. The preamble and the regulatory text of the January 14, 2005, proposed rule (70 FR 2586) stated that vessel owners would be given only one opportunity to change their vessel's permit category to a Category F permit within 45 days of the effective date of Amendment 2. However, upon further consideration, and to be consistent with a similar provision for vessels holding limited access NE multispecies permits specified at § 648.4(a)(1)(i)(I)(2), NMFS has decided to modify the more restrictive permit category change requirement contained in the Amendment 2 proposed rule to provide vessel owners with the ability to change their vessel's limited access monkfish permit category within 45 days of the effective date of the vessel's permit in any fishing year, as long as the vessel has not fished under a monkfish DAS during that fishing year. This change will provide owners of limited access monkfish vessels with the same flexibility provided to owners of limited access NE multispecies vessels. The first sentence of this paragraph was also modified slightly to begin, ''To fish in the Offshore Fishery Program, as described under § 648.95, vessels must apply...''.

In § 648.4(a)(9)(i)(A)(*7*), the phrase ''vessels fishing only south of 38°20′ N. lat.'' contained in the introductory text has been modified to read ''vessels restricted to fishing south of 38°20′ N. lat.'' in order to be consistent with the introductory text of § 648.4(a)(9)(i)(A)(*6*).

In § 648.4, paragraph (a)(9)(i)(E)(*4*) has been added to address the issue of replacement vessels involved with qualifying for the new limited access Category G and H permits. This paragraph is similar to § 648.4(a)(9)(i)(E)(*3*) which addressed the same issue with respect to vessels qualifying for a limited access monkfish permit under the original FMP.

In § 648.4, paragraph (a)(9)(i)(N)(*3*) has been modified to reflect that a vessel's LOA will become invalid 5 days after receipt of the notice of denial, but no later than 10 days from the date of the denial letter, and that the RA's decision on the appeal is the final decision of the Department of Commerce.

In § 648.9(c)(1), the cross-reference to § 648.58(h) has been corrected to read § 648.60(f). The change to this cross-reference was inadvertently omitted from the final rule implementing Amendment 10 to the Atlantic Sea Scallop FMP (69 FR 35194, June 23, 2004). In addition, a reference to paragraph § 648.95(e)(4) has been added to paragraph (c)(1) in order to cross-reference the VMS requirements for limited access monkfish Category F vessels, since these vessels are only required to have an operational VMS during a specified season.

In § 648.9, the proposed changes to paragraph (c)(2)(i) have been eliminated since the exception for monkfish limited access Category F vessels (i.e., the VMS requirement is limited to a specific season) has been cross-referenced under paragraph (c)(1) of this section.

In § 648.10, the paragraph (b)(v) has been removed since it duplicates the preceding paragraph (b)(iv). This paragraph should have been deleted in the final rule implementing Amendment 10 to the Atlantic Sea Scallop FMP.

In § 648.10(c)(1), the cross-reference to (c)(6) is corrected to read (b)(2)(iii). This cross-reference was incorrectly contained in the final rule implementing Amendment 13 to the NE Multispecies FMP (69 FR 22906, April 27, 2004).

In § 648.10(c)(3), the cross-reference to (b)(2)(iv) is corrected to read (b)(2)(iii). This cross-reference should have been updated in the final rule implementing Amendment 10 to the Atlantic Sea Scallop FMP.

In § 648.92(b)(1)(iv), the first sentence has been modified for clarity to begin, ''A total of 500 DAS will be set aside and made available...''.

In § 648.92, paragraph (c)(1)(ii)(B) has been clarified to reflect the role of the RA in the approval of projects for the DAS set-aside program.

In § 648.92, the last sentence of paragraph (c)(1)(v) has been modified to reflect that the RA will publish a notice in the **Federal Register** notifying the public of the reallocation of unused research DAS as exempted DAS. A sentence was also added to this paragraph clarifying that any unused research DAS may not be carried over in to the next fishing year.

In § 648.94, paragraph (b)(4) has been modified to include Category F, G, and H, vessels.

In § 648.94, paragraph (c)(2) has been modified to remove the reference to Category G and H vessels, since these vessels have been included in the possession limit for scallop vessels fishing under a scallop DAS specified at § 648.94(b)(2).

In § 648.94, paragraphs (c)(3), (c)(4), and (c)(6) were clarified to indicate that the incidental catch limits for vessels not fishing under a DAS are applicable to vessels holding either a monkfish incidental catch permit or a limited access permit.

In § 648.94, paragraphs (c)(4)–(c)(8), concerning the maximum trip limit of 150 lb (68 kg), are clarified to reflect that this represents tail weight, and the whole weight equivalent of 498 lb (226 kg) is added.

In § 648.94, paragraph (c)(8) has been revised to clarify the Councils' intent to include limited access scallop vessels not fishing under a scallop DAS since these vessels are authorized to fish under the same rules as General Category vessels when not fishing under a scallop DAS, as specified under § 648.52(a).

In § 648.94, paragraph (e) is modified to reflect that monkfish vessels declared in to the NFMA may transit the SFMA as long as they do not harvest or possess monkfish, or any other fish, from the SFMA. This change is being made to make this paragraph consistent with the changes made to paragraph (f) of this section in contained in Framework Adjustment 2 to the FMP (68 FR 22325, April 28, 2003).

In § 648.95(b), the annual declaration requirement for vessels participating in the Offshore Fishery Program in the SFMA has been modified to provide owners of limited access monkfish vessels with the opportunity to change their vessel's monkfish permit category within 45 days of the effective date of the vessel's permit, regardless of the fishing year. This modification is being made to reflect similar changes made under § 648.4(a)(9)(i)(A)(5). In addition, the first sentence of this paragraph has been modified to read, ''To fish in the Offshore Fishery Program, a vessel must be issued a monkfish limited access Category F permit...''.

In § 648.95, paragraph (e)(4) has been modified to clarify that monkfish limited access Category F vessels are only required to have an operational VMS unit during the designated season for the Offshore Fishery Program, and that these vessels may turn off their VMS units outside of this season unless otherwise required under the VMS notification requirements specified at § 648.10(b)(1).

In § 648.95, paragraph (g)(2) has been modified to more clearly reflect how the monkfish DAS allocations for vessels issued a monkfish limited access Category F permit will be adjusted.

In § 648.97(b), the title of the closure area has been modified to correctly reference the Lydonia Canyon Closure

Area. The title of this closure area was incorrectly referenced as the Oceanographer Canyon Closure Area in the proposed rule. In addition, the reference for the fifth coordinate point for the Lydonia Canyon Closure Area is modified to be LC5. The proposed rule incorrectly listed this coordinate point reference as LC1.

Pursuant to the Paperwork Reduction Act (PRA), part 902 of title 15 CFR displays control numbers assigned to NMFS information collection requirements by OMB. This part fulfills the requirements of section 3506(c)(1)(B)(i) of the PRA, which requires that agencies display a current control number, assigned by the Director of OMB, for each agency information collection requirement. This final rule codifies OMB Control Number 0648–0202 for § 648.95.

**Classification**

The Administrator, Northeast Region, NMFS, determined that the FMP amendment implemented by this rule is necessary for the conservation and management of the monkfish fishery, and that it is consistent with the Magnuson-Stevens Act and other applicable laws.

There is good cause under 5 U.S.C. 553(d)(3) to waive the 30–day delayed effectiveness of this rule. This final rule has been delayed due to that fact that NMFS solicited additional public comment on the proposed rule due to an error contained in the preamble concerning the qualification period for the modified limited entry program. In order to alleviate confusion concerning the qualification period for the modified limited entry program, NMFS re-opened the public comment period for a period of 10 days on February 24, 2005 (70 FR 9029), with the public comment period ending on March 7, 2005.

It is essential that the Offshore Fishery Program be implemented by the start of FY 2005 on May 1, 2005, because this management measure impacts the annual monkfish DAS allocations for vessels that participate in the program. In fact, the regulations implementing this management measure require vessels to participate in the Offshore Fishery Program for the entire fishing year due to the impact on a vessel's DAS allocation. If the program were implemented after the start of the fishing year, vessels intending to participate in the program would be unable to fish under a monkfish DAS until the program became effective. In addition, vessels intending to participate in the program that fish under a monkfish DAS, under their standard limited access permit category (i.e., Category A, B, C or D), prior to the implementation of the program would be prohibited from participating in the Offshore Fishery Program during FY 2005. In both cases, the inability to fish would result in revenue loss, to some extent. Vessels that do not fish under a monkfish DAS until the Offshore Fishery Program is implemented would incur revenue losses resulting from the lost fishing time. On the other hand, vessels that are unable to participate in the Offshore Fishery Program because they fished under a monkfish DAS prior to the implementation of this program, would not be able to take advantage of the economic benefits of the program during FY 2005, forgoing potential fishing opportunities.

Because the Offshore Fishery Program must be implemented at the start of the fishing year, the Lydonia and Oceanographer Canyon closure areas must also be implemented at the start of the fishing year in order for their role as EFH protection measures to be effective. The purpose of the canyon closure areas is to minimize, to the extent practicable, the impacts to EFH resulting from the anticipated expansion of an offshore monkfish fishery under the Offshore Fishery Program. The closure areas are intended to be pre-emptive due to the long time-period it takes the vulnerable habitat contained within these areas to recover from the effects of fishing activities. Thus, the benefits of protecting vulnerable EFH, including deep-water coral habitat, located within the Lydonia and Oceanographer Canyon closure areas would be foregone if these canyon closure areas are not implemented in conjunction with the Offshore Fishery Program.

The remaining management measures contained in this rule will impose little to no additional regulatory burden, nor do they require additional time for vessels to come into compliance. The measures to reduce the monkfish minimum fish size for the SFMA, increase the incidental catch limits for vessels not fishing under a DAS program, and remove the 20–day block requirement for category A and B vessels would alleviate economic burden by increasing fishing opportunities by enabling vessels to land fish that would otherwise be discarded, or by enabling vessels to fish when they would otherwise be unable to fish. Furthermore, the three regulatory changes being made in this final rule correct errors in the monkfish regulations as described in the preamble of this final rule. These regulatory changes either increase economic opportunities to vessels by increasing the amount of monkfish a vessel can land, or have no actual effect since they simply clarify existing regulations. To delay the implementation of these measures and regulatory changes would cause undue economic harm. In addition, delaying the implementation of these measures, while implementing other measures on May 1, 2005, would cause confusion among members of the fishing industry, and impede enforcement of the new measures. Finally, the measure to restrict the size of roller gear that can be used by monkfish trawl vessels to 6–inches in diameter would impose an additional restriction on these vessels, but would result in little to no economic harm since monkfish trawl vessels that fish in the SFMA already use gear that complies with this new restriction. The purpose of this measure is to prevent monkfish trawl vessels from using larger roller gear, which would enable them to fish in areas containing complex bottom habitat that have been determined to be vulnerable to the effects of trawl fishing activities. Thus, implementing this measure on May 1, 2005, in conjunction with the other management measures contained in this amendment would provide immediate environmental benefits with little to no economic harm. Therefore, to delay the effective date of these regulations would unnecessarily forgo substantial environmental benefits, and significant economic benefits to the affected public, with little or no purpose served by the delay. Accordingly, there is good cause under 5 U.S.C. 553(d)(3) to establish an effective date that is less than 30 days after the date of publication if this final rule.

The Council prepared an FSEIS for this FMP amendment. The FSEIS was filed with the Environmental Protection Agency on January 7, 2005. A notice of availability was published in the **Federal Register** on January 14, 2005 (70 FR 2630). Through the FSEIS, NMFS has analyzed project alternatives, associated environmental impacts, the extent to which these impacts could be mitigated, and has considered the objectives of the proposed action in light of statutory mandates, including the Magnuson-Stevens Act. NMFS has also considered public and agency comments received during the EIS review periods. In balancing the analysis and public interest, NMFS has decided to partially approve the Council's preferred alternative. NMFS also concludes that all practicable means to avoid, minimize, or compensate for environmental harm from the proposed action have been adopted. In partially approving

Amendment 2 on March 30, 2005, NMFS issued a ROD identifying the selected alternative. A copy of the ROD is available from NMFS (see **ADDRESSES**).

This final rule has been determined not to be significant for purposes of Executive Order 12866.

**Final Regulatory Flexibility Analysis**

This section constitutes the FRFA, which NMFS, pursuant to section 604 of the Regulatory Flexibility Act (RFA), has prepared in support of Amendment 2 to the FMP. The FRFA describes the economic impact that this final rule will have on small entities. This FRFA incorporates the IRFA, comments on the proposed rule, NMFS's responses to those comments, and the analyses completed to support the action. There are no Federal rules that may duplicate, overlap, or conflict with this final rule. A copy of the IRFA is available from the NEFMC (see **ADDRESSES**).

A description of the reasons why action by the agency is being taken, and the objectives of, and legal basis for, this action is contained in the preambles to the proposed (January 14, 2005; 70 FR 2586) and final rules, and is not repeated here. This action is taken under the authority of the Magnuson-Stevens Act and regulations at 50 CFR part 648.

NMFS has disapproved the management measure that would have provided owners of limited access monkfish vessels with a one-time opportunity to reset their vessel's baseline characteristics to be those associated with the vessel's first Federal limited access permit. This management measure has been disapproved because NMFS determined it does not comply with the National Standard 7 of the Magnuson-Stevens Act. A complete discussion of the reasons why this measure was disapproved is provided in the preamble of this rule.

**Description and Estimate of the Number of Small Entities to Which the Final Rule Will Apply**

All of the entities (fishing vessels) affected by this action are considered small entities under the Small Business Administration's size standards for small fishing businesses (less than $3.5 million in gross sales) and, therefore, the analysis of alternatives to minimize impacts in Amendment 2 also applies to this FRFA. This final rule will affect all Federal monkfish permit holders. For FY 2001, the year used as the basis for the analysis, there were 723 vessels holding limited access monkfish permits, and 1,977 vessels holding incidental catch permits. As of January 27, 2005, there were 713 vessels holding limited access monkfish permits, and 2,057 vessels holding monkfish incidental catch permits. The difference between the number of vessels holding limited access monkfish permits during FY 2001 versus during FY 2004 is primarily the result of vessel replacements and permits being moved into Confirmation of Permit History. Furthermore, the modified limited entry program for vessels fishing in the southern range of the fishery contained in this final rule is estimated to affect five vessels.

**Description of the Projected Reporting, Recordkeeping, and Other Compliance Requirements**

*Reporting and Recordkeeping Requirements*

The measures approved under Amendment 2 include the following provisions requiring either new or revised reporting and recordkeeping requirements: (1) Annual declaration into the Offshore Fishery Program on the initial vessel permit application or vessel permit renewal application; (2) VMS purchase and installation; (3) VMS proof of installation; (4) automated VMS polling of vessel position once per hour while fishing under a monkfish DAS in the Offshore Fishery Program; (5) request to power down VMS unit for a minimum of 30 days; (6) initial application for a limited access monkfish permit (Category G or H) under the modified limited entry program for vessels fishing south of 38°20′ N. lat.; (7) renewal of limited access monkfish permit (Category G or H) under the modified limited entry program for vessels fishing south of 38°20′ N. lat.; (8) appeal of the denial of a limited access monkfish permit (Category G or H) under the modified limited entry program for vessels fishing south of 38°20′ N. lat.; (9) application for a vessel operator permit for new limited access monkfish vessels; (10) vessel replacement or upgrade application for new limited access monkfish vessels; (11) confirmation of permit history application for new limited access monkfish vessels; (12) DAS reporting requirements (call-in/call-out) for new limited access monkfish vessels; (13) application for Good Samaritan DAS credit for new limited access monkfish vessels; (14) annual gillnet declaration and tag order request for new monkfish limited access vessels; (15) requests for additional gillnet tags for new monkfish limited access vessels; (16) notification of lost tags and request for replacement tags for new limited access vessels; and (17) requests for an LOA to fish for monkfish in NAFO Regulatory Area under the proposed exemption program. Additional information regarding the projected reporting or recordkeeping costs associated with this action was made available for review in NMFS's PRA submission to OMB on March 3, 2005.

*Other Compliance Requirements*

All vessels participating in the Offshore Fishery Program will be required to purchase and install a VMS unit. The average VMS unit offered by the two vendors currently approved by NMFS costs approximately $3,100 to purchase and install. Many of the limited access monkfish vessels expected to participate in the Offshore Fishery Program also possess limited access NE multispecies permits. Since several new programs implemented under Amendment 13 to the NE Multispecies FMP also require the use of VMS, it is estimated that half of the 50 vessels expected to participate in the Offshore Fishery Program already have VMS units through participation in these NE multispecies programs. Thus, only 25 additional limited access monkfish vessels are expected to be required to purchase a VMS in order to participate in the Offshore Fishery Program being implemented in Amendment 2. This results in a combined one-time cost of $77,500 for these 25 vessels. In addition, the average monthly cost to operate a VMS unit is $150. This results in a combined annual cost of $45,000 for these new VMS users. Five vessels fishing south of 38°20′ N. lat. are expected to qualify for a limited access monkfish permit under Amendment 2. These vessels will be required to obtain a Federal vessel operator permit, if they do not already have one. These permits cost approximately $10 due to the need for a color photograph, and are valid for 3 years. As a result, the yearly cost to these five vessels is estimated at $16.67, or approximately $3.33 per vessel. Finally, limited access monkfish vessels using gillnet gear must purchase gillnet tags. Each tag costs $1.20 and may be used for at least 3 years. Monkfish vessels are allowed to use up to 160 gillnets. Therefore, if the five vessels fishing south of 38°20′ N. lat. expected to qualify for a limited access monkfish permit under Amendment 2 elect to fish with gillnet gear, yearly costs associated with purchasing gillnet tags for each vessel will be a maximum of $64 (i.e., $192 every 3 years).

**A Summary of the Significant Issues Raised by the Public in Response to the IRFA, a Summary of the Agency's Assessment of Such Issues, and a Statement of Any Changes Made in the Proposed Rule as a Result of Such Comments**

NMFS received a total of 15 public comments on Amendment 2 and its proposed rule. None of the comments received were specific to the IRFA. However, one comment indirectly dealt with the economic impacts to small entities (vessels) resulting from the management measures presented in the proposed rule to implement Amendment 2. That comment and NMFS's response follow:

Comment: One commentor stated that the reduction in the monkfish minimum size limit for the SFMA could lead to a reduction in the price of monkfish due to vessels landing increased quantities of smaller fish.

*Response:* Since monkfish is marketed by size category, it is possible that an increase in landings of smaller monkfish could lead to a reduction in the ex-vessel price for those size classes. However, it is not possible to predict changes in ex-vessel price because the monkfish market is international, with the majority of monkfish caught in U.S. waters exported to foreign countries. Therefore, ex-vessel price is primarily determined by foreign demand as well as landings in those countries. Furthermore, a decrease in ex-vessel price may not equate to a reduction in revenues since total revenues are dependant on the amount of monkfish landed and an increase in the amount of small monkfish landed (fish that otherwise would have to have been discarded) may offset any decrease in ex-vessel price.

The economic analysis of the reduction in the monkfish minimum size limit for the SFMA contained in Section 6.4.1.2 of the FSEIS states that this measure will increase economic opportunities for vessels fishing in the SFMA because vessels will be allowed to land fish that would otherwise be discarded. Without detailed information on the size distribution of the commercial catch in both management areas, it is difficult to determine the extent of any economic benefits resulting from the increased economic opportunity. Similarly, without an understanding of the commercial size distribution under current regulations, it is difficult to assess the impact of the reduction in minimum fish size on ex-vessel price.

**Description of Actions Taken to Minimize the Significant Economic Impact on Small Entities**

Nearly all of the management measures being implemented in this final rule provide increased economic opportunity and/or reduce the regulatory burden on vessels fishing for monkfish. A discussion of these measures is provided in the following paragraphs. Conversely, the measures to minimize the effects of monkfish fishing on EFH are expected to have some negative economic impact. The measure to establish a 6–inch (15.2–cm) maximum roller gear diameter for trawl vessels fishing under a monkfish DAS in the SFMA could have a short-term negative economic impact on some vessels since vessels using non-conforming gear will be required to bear the cost of making the necessary changes. According to individuals in the fishing industry, this roller gear diameter is already used by most vessels fishing in the SFMA, thus reducing the potential impact. The economic effect of closing Lyndonia and Oceanographer Canyons to vessels fishing under a monkfish DAS is expected to be zero based upon Vessel Trip Report (VTR) data for calendar years 1999 and 2001 which showed that no trips took place in either of these closure areas. The non-preferred EFH alternative to close up to 12 large, steep-walled canyons would have affected between 2 and 24 trips according to 2001 VTR data. Therefore, this non-preferred alternative would have been more burdensome than the selected closure alternative.

The measures to modify monkfish incidental catch limits that are being implemented in Amendment 2 will provide increased economic opportunities since they would enable vessels to land a higher incidental catch of monkfish than previously authorized, or in the case of General Category scallop vessels and surfclam and ocean quahog vessels, to land a small incidental catch of monkfish when it was previously prohibited. The no-action alternatives, i.e., not modifying the incidental catch limits, would have been more burdensome since the prohibition on retaining monkfish with dredge gear for General Category scallop vessels and surfclam and ocean quahog vessels would have remained in effect, and the incidental catch limits for other vessels would have remained at 50 lb (23 kg) tail weight per trip. The other non-preferred alternative to increase the maximum possession limit to 500 lb (230 kg), versus a maximum of 150 lb (68 kg) under the preferred alternative, would not have affected the total number of potential vessels that may benefit from the increased incidental catch limit, but would have enabled vessels to retain more monkfish during trips longer than 3 days in duration. Thus, this alternative could have resulted in slightly greater economic benefits (an average of $2,900 for each of the 112 affected vessels) in comparison to the preferred alternative. The Councils chose not to select this alternative due to a lack of evidence that the monkfish bycatch problem would not be fully addressed by a maximum possession limit of 150 lb (68 kg), and due to concerns that a higher maximum possession limit would encourage vessels to target monkfish.

The measure to reduce the monkfish minimum size limit for vessels fishing in the SFMA will enable vessels that fish in this area to land monkfish that were previously discarded. Thus, not only does this measure reduce the regulatory burden on vessels that fish in the SFMA, it provides increased economic opportunity. The other non-preferred alternative would have decreased the minimum size in both management areas to 10 inches (25.4 cm) tail length. This alternative would have resulted in increased economic opportunities for vessels fishing in both management areas, with a potentially greater economic benefit to vessels fishing in the SFMA. Although this alternative would have likely resulted in greater economic benefits than the preferred alternative, the Councils chose not to select this alternative due to concerns expressed by the Councils and fishing industry regarding the impact of a reduction in the minimum fish size on the monkfish resource, and the creation of incentives for vessels to target smaller monkfish. The no action alternative would have been more burdensome since it would have retained the larger minimum fish size for vessels fishing in the SFMA of 14 inches (35.6 cm) tail length, however, the elimination of the minimum fish size would have been the least burdensome. The Councils chose not to eliminate the minimum fish size due to concerns that this would encourage vessels to target small monkfish.

The proposal to remove the 20–day spawning block will result in a reduction in regulatory burden compared to current requirements for limited access monkfish Category A and B vessels. Furthermore, the removal of this requirement will provide these vessels with greater flexibility in choosing when they want to fish for monkfish. The non-preferred alternative would have doubled the current 20–day spawning block to 40 days. This

alternative would have placed a greater burden on trip scheduling and planning, and therefore is considered more burdensome than either the no-action or the preferred alternative.

The Offshore Fishery Program in the SFMA and the NAFO Regulated Area Exemption Program both provide vessels with increased opportunity to target monkfish in offshore areas. The Offshore Fishery Program will allow vessels that participate in the program to use their available fishing time more efficiently by effectively increasing the amount of monkfish that the vessel could retain per DAS. Furthermore, because vessels that participate in the Offshore Fishery Program will use fewer total DAS, operational costs will be reduced potentially resulting in higher profitability in comparison to the no action alternative. The NAFO Regulatory Area Exemption Program will relieve vessels fishing for monkfish in the NAFO Regulatory Area from Federal monkfish regulations within the EEZ. The economic benefit of this exemption program, in comparison to the no action alternative, cannot be estimated since the extent that current regulations inhibit the ability of vessels to fish for monkfish in the NAFO Regulatory Area is unknown. However, the reduction in regulatory burden resulting from the implementation of this exemption program has a potential positive economic impact, in comparison to the no action alternative, since monkfish regulations in the EEZ are more restrictive than NAFO measures.

The modification of the monkfish limited entry program to include vessels fishing south of 38°20′ N. lat. will restore economic opportunities to some vessels that fished for monkfish in Federal waters prior to the implementation of FMP, but did not qualify for a limited access permit under the original criteria established in the FMP. Preliminary estimates indicate that five vessels will qualify for a limited access permit under the modified limited entry program. Thus, in comparison to the no action alternative, the proposed action will increase economic opportunities resulting in economic benefits. The non-preferred alternatives for the modified limited entry program would have either increased (seven vessels under Option 1) or decreased (three vessels under Options 2 and 4) the number of vessels that would qualify for monkfish limited access permits, with commensurate economic benefits for the qualifying vessels. It is possible that the addition of the limited access vessels under the preferred or non-preferred alternatives could result in reduced trip limits for vessels fishing in the SFMA since the target TAC will be spread across a greater number of vessels. However, the economic impact of such a trip limit reduction cannot be reliably estimated at this time.

The economic impacts of the DAS set-aside and DAS exemption programs will be re-distributive in nature at most. The proposed programs will reduce the total number of monkfish DAS allocated to the fleet by 500 DAS, distributing the reduction equally across all limited access vessels. Limited access vessels that utilize their entire annual monkfish DAS allocation and that do not participate in these cooperative research programs will be minimally impacted by the slight reduction (less than one) in DAS. However, these programs will provide increased fishing opportunities to vessels that utilize all of their annual monkfish DAS and participate in monkfish research activities. Vessels that do not utilize their full annual allotment of monkfish DAS will not be affected by the proposed programs.

The new framework measures contained in Amendment 2 will result in no direct economic impact. The addition of transferable monkfish DAS, measures to minimize the impact of the monkfish fishery on endangered or protected species, and measures to implement bycatch reduction devices to the list of frameworkable measures is administrative in nature. The economic impact of each measure will be analyzed in the associated framework action implementing the measure(s).

**Small Entity Compliance Guide**

Section 212 of the Small Business Regulatory Enforcement Fairness Act of 1996 states that, for each rule or group of related rules for which an agency is required to prepare a FRFA, the agency shall publish one or more guides to assist small entities in complying with the rule, and shall designate such publications as ''small entity compliance guides.'' The agency shall explain the actions a small entity is required to take to comply with a rule or group of rules. As part of this rulemaking process, a small entity compliance guide was prepared. The guide will be sent to all vessels issued a Federal monkfish permit (limited access and incidental), and to all Federal dealers issued a monkfish permit. In addition, copies of this final rule and guide (i.e., permit holder letter) are available from the Regional Administrator (see **ADDRESSES**) and are also available at the following web site: *http://www.nmfs.gov/ro/doc/nero.html*.

This rule contains 17 new collection-of-information requirements subject to the PRA, which have been approved by OMB under control number 0648–0202. The public reporting burden for the collection-of-information requirements includes the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection-of-information requirements. Send comments regarding these burden estimates or any other aspect of this data collection, including suggestions for reducing the burden, to NMFS (see **ADDRESSES**) and by e-mail to *David_Rostker@omb.eop.gov*, or fax to (202) 395–7285.

The new reporting requirements under OMB Control Number 0648–0202 and the estimated time for a response are as follows:

1. Annual declaration into the Offshore Fishery Program on initial vessel permit application or vessel permit renewal application, (30 min/response);
2. VMS purchase and installation, (1 hr/response);
3. VMS proof of installation, (5 min/response);
4. Automated VMS polling of vessel position once per hour while fishing under a monkfish DAS in the Offshore Fishery Program, (5 sec/response);
5. Request to power down VMS unit for a minimum of 30 days, (5 min/response);
6. Initial application for a limited access monkfish permit (Category G or H) under program for vessels fishing south of 38°20′ N. lat., (45 min/response);
7. Renewal of limited access monkfish permit (Category G or H) under program for vessels fishing south of 38°20′ N. lat., (30 min/response);
8. Appeal of denial of a limited access monkfish permit (Category G or H) under the program for vessels fishing south of 38°20′ N. lat., (2 hr/response);
9. Application for a vessel operator permit for new limited access monkfish vessels, (1 hr/response);
10. Vessel replacement or upgrade application for new limited access monkfish vessels, (3 hr/response);
11. Confirmation of permit history application for new limited access monkfish vessels, (30 min/response);
12. DAS reporting requirements (call-in/call-out) for new limited access monkfish vessels, (2 min/response);
13. Application for Good Samaritan DAS credit for new limited access monkfish vessels, (30 min/response);
14. Annual gillnet declaration and tag order request, (10 min/response);
15. Requests for additional gillnet tags, (2 min/response);

16. Notification of lost tags and request for replacement tags, (2 min/response); and

17. Requests for a letter of authorization to fish for monkfish in the NAFO Regulatory Area under the proposed exemption program, (5 min/response).

Notwithstanding any other provision of the law, no person is required to respond to, nor shall any person be subject to the penalty for failure to comply with, a collection-of-information subject to the requirements of the PRA, unless that collection-of-information displays a currently valid OMB control number.

**List of Subjects**

*15 CFR Part 902*

Reporting and recordkeeping requirements.

*50 CFR Part 648*

Fisheries, Fishing, Recordkeeping and reporting requirements.

Dated: April 21, 2005.

**Rebecca Lent,**

*Deputy Assistant Administrator for Regulatory Programs, National Marine Fisheries Service.*

■ For the reasons stated in the preamble, 15 CFR part 902 is amended as follows:

## PART 902—NOAA INFORMATION COLLECTION REQUIREMENTS UNDER THE PAPERWORK REDUCTION ACT: OMB CONTROL NUMBERS

■ 1. The authority citation for part 902 continues to read as follows:

**Authority:** 44 U.S.C. 3501 *et seq.*

■ 2. In § 902.1, the table in paragraph (b) under ''50 CFR'' is amended by adding a new entry to read as follows:

**§ 902.1 OMB control numbers assigned pursuant to the paperwork Reduction Act**

* * * * *

| CFR part or section where the information collection requirement is located | Current OMB control number the information (All numbers begin with 0648–) |
|---|---|
| * * * * | * |
| 50 CFR | |
| * * * * | * |
| 648.95 | –0202 |
| * * * * | * |

■ For the reasons stated in the preamble, 50 CFR part 648 is amended as follows:

## PART 648—FISHERIES OF THE NORTHEASTERN UNITED STATES

■ 3. The authority citation for part 648 continues to read as follows:

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

■ 4. In § 648.2, the definition of ''Prior to leaving port'' is revised to read as follows:

**§ 648.2 Definitions.**

* * * * *

*Prior to leaving port*, with respect to the call-in notification system for NE multispecies, and the call-in notification system for monkfish vessels that are fishing under the limited access monkfish Category C, D, F, G, or H permit provisions that are also fishing under a NE multispecies DAS, means no more than 1 hour prior to the time a vessel leaves the last dock or mooring in port from which that vessel departs to engage in fishing, including the transport of fish to another port. With respect to the call-in notification system for monkfish vessels that are fishing under the limited access monkfish Category A or B permit provisions, it means prior to the last dock or mooring in port from which a vessel departs to engage in fishing, including the transport of fish to another port.

* * * * *

■ 5. In § 648.4, the heading of paragraph (a)(9)(i) is revised; paragraphs (a)(9)(i)(B), (a)(9)(i)(M), (a)(9)(i)(N)(*1*), and (a)(9)(i)(N)(*3*) are revised; and paragraphs (a)(9)(i)(A)(*5*) through (a)(9)(i)(A)(*7*), and (a)(9)(i)(E)(*4*) are added to read as follows:

**§ 648.4 Vessel permits.**

(a) * * *

(9) * * *

(i) *Limited access monkfish permits.*

(A) * * *

(*5*) *Category F permit (vessels electing to participate in the Offshore Fishery Program*). To fish in the Offshore Fishery Program, as described under § 648.95, vessels must apply for and be issued a Category F permit and fish under this permit category for the entire fishing year. The owner of a vessel, or authorized representative, may change the vessel's limited access monkfish permit category within 45 days of the effective date of the vessel's permit, provided the vessel has not fished under the monkfish DAS program during that fishing year. If such a request is not received within 45 days, the vessel owner may not request a change in permit category and the vessel's permit category will remain unchanged for the duration of the fishing year.

(*6*) *Category G permit (vessels restricted to fishing south of 38°20′ N. lat. as described in § 648.92(b)(9) that do not qualify for a monkfish limited access Category A, B, C, or D permit*). The vessel landed at least 50,000 lb (22,680 kg) tail weight or 166,000 lb (75,296 kg) whole weight of monkfish in the area south of 38°00′ N. lat. during the period March 15 through June 15 in the years 1995 to 1998.

(*7*) Category H permit (vessels restricted to fishing south of 38°20′ N. lat. as described in § 648.92(b)(9) that do not qualify for a monkfish limited access Category A, B, C, D, or G permit). The vessel landed at least 7,500 lb (3,402 kg) tail weight or 24,900 lb (11,294 kg) whole weight of monkfish in the area south of 38°00′ N. lat. during the period March 15 through June 15 in the years 1995 to 1998.

(B) *Application/renewal restrictions.* No one may apply for an initial limited access monkfish permit for a vessel after November 7, 2000, unless otherwise allowed in this paragraph (a)(9)(i)(B). Vessels applying for an initial limited access Category G or H permit, as described in paragraphs (a)(9)(i)(A)(*6*) and (*7*) of this section, must do so on or before April 30, 2006.

* * * * *

(E) * * *

* * * * *

(*4*) A vessel that replaced a vessel that fished for and landed monkfish between March 15 through June 15 in the years 1995 through 1998, may use the replaced vessel's history in lieu of, or in addition to, such vessel's fishing history to meet the qualification criteria set forth in paragraphs (a)(9)(i)(A)(6) and (7) of this section, unless the owner of the replaced vessel retained the vessel's permit or fishing history, or such vessel no longer exists and was replaced by another vessel according to the provision of paragraph (a)(1)(i)(D) of this section.

* * * * *

(M) *Notification of eligibility for Category G and H permits.* (*1*) NMFS will attempt to notify all owners of vessels for which NMFS has credible evidence available to inform them that they meet the qualification criteria described in paragraph (a)(9)(i)(A)(6) or (7) of this section and that they qualify for a limited access monkfish Category G or H permit. Vessel owners that pre-qualify for a Category G or H permit must apply for the limited access permit for which they pre-qualified on or before April 30, 2006, to meet the qualification requirements.

(*2*) If a vessel owner has not been notified that the vessel is eligible to be issued a limited access monkfish Category G or H permit, and the vessel

owner believes that there is credible evidence that the vessel does qualify under the pertinent criteria, the vessel owner may apply for a limited access monkfish Category G or H permit on or before April 30, 2006, by submitting written evidence that the vessel meets the qualification requirements described in paragraph (a)(9)(i)(A)(6) or (7) of this section.

(N) * * *

(*1*) An applicant denied a limited access monkfish Category G or H permit may appeal to the Regional Administrator within 30 days of the notice of denial. Any such appeal shall be in writing. The only ground for appeal is that the Regional Administrator erred in concluding that the vessel did not meet the criteria described in paragraph (a)(9)(i)(A)(6) or (7) of this section. The appeal shall set forth the applicant's belief that the Regional Administrator made an error.

* * * * *

(*3*) * * *

(*i*) A vessel denied a limited access monkfish Category G or H permit may fish under the monkfish DAS program, provided that the denial has been appealed, the appeal is pending, and the vessel has on board a letter from the Regional Administrator authorizing the vessel to fish under the monkfish DAS program. The letter of authorization must be carried on board the vessel. A vessel with such a letter of authorization shall not exceed the annual allocation of monkfish DAS as specified in § 648.92(b)(1) and must report the use of monkfish DAS according to the provisions of § 648.10(b) or (c), whichever applies. If the appeal is finally denied, the Regional Administrator shall send a notice of final denial to the vessel owner; the letter authorizing temporary participation in the monkfish fishery shall become invalid 5 days after receipt of the notice of denial, but no later than 10 days from the date of the denial letter. If the appeal is approved, any DAS used during pendency of the appeal shall be deducted from the vessel's annual allocation of monkfish DAS for that fishing year.

(*ii*) *Monkfish incidental catch vessels (Category E).* A vessel of the United States that is subject to these regulations and that has not been issued a limited access monkfish permit under paragraph (a)(9)(i)(A) of this section, is eligible for and may be issued a monkfish incidental catch (Category E) permit to fish for, possess, or land monkfish subject to the restrictions in § 648.94(c).

* * * * *

■ 6. In § 648.9, paragraph (c)(1) introductory text is revised to read as follows:

**§ 648.9 VMS requirements.**

* * * * *

(c) * * *

(1) Except as provided in paragraph § 648.95(e)(4) and paragraph (c)(2) of this section, or unless otherwise required by § 648.60(f) or paragraph (c)(1)(ii) of this section, all required VMS units must transmit a signal indicating the vessel's accurate position, as specified under paragraph (c)(1)(i) of this section.

* * * * *

■ 7. In § 648.10, paragraph (b)(2)(v) is removed, paragraphs (c)(1) and (c)(3) are revised, and paragraph (b)(1)(ix) is added, to read as follows:

**§ 648.10 DAS notification requirements.**

* * * * *

(b) * * *

(1) * * *

(ix) A limited access monkfish vessel electing to fish in the Offshore Fishery Program in the SFMA, as provided in § 648.95.

* * * * *

(c) * * *

(1) Less than 1 hour prior to leaving port, for vessels issued a limited access NE multispecies DAS permit or, for vessels issued a limited access NE multispecies DAS permit and a limited access monkfish permit (Category C, D, F, G, or H), unless otherwise specified in this paragraph (c)(1), and, prior to leaving port for vessels issued a limited access monkfish Category A or B permit, the vessel owner or authorized representative must notify the Regional Administrator that the vessel will be participating in the DAS program by calling the Regional Administrator and providing the following information: Owner and caller name and phone number; vessel name and permit number; type of trip to be taken; port of departure; and that the vessel is beginning a trip. A DAS begins once the call has been received and a confirmation number is given by the Regional Administrator, or when a vessel leaves port, whichever occurs first, unless otherwise specified in paragraph (b)(2)(iii) of this section. Vessels issued a limited access monkfish Category C, D, F, G, or H permit that are allowed to fish as a Category A or B vessel in accordance with the provisions of § 648.92(b)(2)(i), are subject to the call-in notification requirements for limited access monkfish Category A or B vessels specified under this paragraph (c)(1) for those monkfish DAS where there is not a concurrent NE multispecies DAS.

* * * * *

(3) At the end of a vessel's trip, upon its return to port, the vessel owner or owner's representative must call the Regional Administrator and notify him/her that the trip has ended by providing the following information: Owner and caller name and phone number, vessel name, permit number, port of landing, and that the vessel has ended its trip. A DAS ends when the call has been received and confirmation has been given by the Regional Administrator, unless otherwise specified in paragraph (b)(2)(iii) of this section.

* * * * *

■ 8. In § 648.14, the introductory text of paragraph (y) is revised; paragraphs (a)(125), (x)(8), (y)(1)(iii), (y)(3), (y)(7) and (y)(21) are revised; and paragraph (y)(1)(iv) is added to read as follows:

**§ 648.14 Prohibitions.**

(a) * * *

(125) For vessels issued a limited access NE multispecies permit, or those issued a limited access NE multispecies permit and a limited access monkfish permit (Category C, D, F, G, or H), but are not fishing under the limited access monkfish Category A or B provisions as allowed under § 648.92(b)(2), call into the DAS program prior to 1 hour before leaving port.

* * * * *

(x) * * *

(8) *Monkfish.* All monkfish retained or possessed on a vessel issued any permit under § 648.4 are deemed to have been harvested from the EEZ, unless the preponderance of evidence demonstrates that such fish were harvested by a vessel that fished exclusively in the NAFO Regulatory Area, as authorized under § 648.17.

* * * * *

(y) In addition to the general prohibitions specified in § 600.725 of this chapter and in paragraph (a) of this section, it is unlawful for any person owning or operating a vessel that engages in fishing for monkfish to do any of the following, unless otherwise fishing in accordance with, and exempted under, the provisions of § 648.17:

(1) * * *

(iii) The monkfish were harvested in or from the EEZ by a vessel not issued a Federal monkfish permit that engaged in recreational fishing; or

(iv) The monkfish were harvested from the NAFO Regulatory Area in accordance with the provisions specified under § 648.17.

* * * * *

(3) Sell, barter, trade, or otherwise transfer, or attempt to sell, barter, trade, or otherwise transfer for a commercial purpose, any monkfish without having been issued a valid monkfish vessel permit, unless the vessel fishes for monkfish exclusively in state waters, or exclusively in the NAFO Regulatory Area in accordance with the provisions specified under § 648.17.

* * * * *

(7) Fail to comply with the area restrictions applicable to limited access Category G and H vessels specified under § 648.92(b)(9).

* * * * *

(21) Fail to comply with the area declaration requirements specified at §§ 648.93(b)(2) and 648.94(f) when fishing under a scallop, NE multispecies, or monkfish DAS exclusively in the NFMA under the less restrictive monkfish possession limits of that area.

* * * * *

■ 9. Section 648.17 is revised to read as follows:

**§ 648.17 Exemptions for vessels fishing in the NAFO Regulatory Area.**

(a) *Fisheries included under exemption*—(1) *NE multispecies.* A vessel issued a valid High Seas Fishing Compliance Permit under part 300 of this title and that complies with the requirements specified in paragraph (b) of this section, is exempt from NE multispecies permit, mesh size, effort-control, and possession limit restrictions, specified in §§ 648.4, 648.80, 648.82 and 648.86, respectively, while transiting the EEZ with NE multispecies on board the vessel, or landing NE multispecies in U.S. ports that were caught while fishing in the NAFO Regulatory Area.

(2) *Monkfish.* A vessel issued a valid High Seas Fishing Compliance Permit under part 300 of this title and that complies with the requirements specified in paragraph (b) of this section is exempt from monkfish permit, mesh size, effort-control, and possession limit restrictions, specified in §§ 648.4, 648.91, 648.92 and 648.94, respectively, while transiting the EEZ with monkfish on board the vessel, or landing monkfish in U.S. ports that were caught while fishing in the NAFO Regulatory Area.

(b) *General requirements.* (1) The vessel operator has a valid letter of authorization issued by the Regional Administrator on board the vessel;

(2) For the duration of the trip, the vessel fishes, except for transiting purposes, exclusively in the NAFO Regulatory Area and does not harvest fish in, or possess fish harvested in, or from, the EEZ;

(3) When transiting the EEZ, all gear is properly stowed in accordance with one of the applicable methods specified in § 648.23(b); and

(4) The vessel operator complies with the High Seas Fishing Compliance Permit and all NAFO conservation and enforcement measures while fishing in the NAFO Regulatory Area.

■ 10. In § 648.80, paragraph (b)(5)(i)(B) is revised to read as follows:

**§ 648.80 NE Multispecies regulated mesh areas and restrictions on gear and methods of fishing.**

* * * * *

(b) * * *

(5) * * *

(i) * * *

(B) All trawl nets must comply with the minimum mesh size specified under § 648.91(c)(1)(i).

* * * * *

■ 11. In § 648.82, paragraph (k)(4)(vi) is revised to read as follows:

**§ 648.82 Effort-control program for NE multispecies limited access vessels.**

* * * * *

(k) * * *

(4) * * *

(vi) *Monkfish Category C, D, F, G and H vessels.* A vessel that possesses a valid limited access NE multispecies DAS permit and a valid limited access monkfish Category C, D, F, G, or H permit and leases NE multispecies DAS to or from another vessel is subject to the restrictions specified in § 648.92(b)(2).

* * * * *

■ 12. In § 648.91, paragraphs (c)(1)(ii) and (c)(1)(iv) are revised, and paragraph (c)(3) is added to read as follows:

**§ 648.91 Monkfish regulated mesh areas and restrictions on gear and methods of fishing.**

* * * * *

(c) * * *

(1) * * *

(ii) *Trawl nets while on a monkfish and NE multispecies DAS.* Vessels issued a Category C, D, G, or H limited access monkfish permit and fishing with trawl gear under both a monkfish and NE multispecies DAS are subject to the minimum mesh size allowed under regulations governing mesh size at § 648.80(a)(3), (a)(4), (b)(2)(i), or (c)(2)(i), depending upon, and consistent with, the NE multispecies regulated mesh area being fished, unless otherwise specified in this paragraph (c)(1)(ii). Trawl vessels participating in the Offshore Fishery Program, as described in § 648.95, and that have been issued a Category F monkfish limited access permit, are subject to the minimum mesh size specified in paragraph (c)(1)(i) of this section.

* * * * *

(iv) *Authorized gear while on a monkfish and scallop DAS.* Vessels issued a Category C, D, G, or H limited access monkfish permit and fishing under a monkfish and scallop DAS may only fish with and use a trawl net with a mesh size no smaller than that specified in paragraph (c)(1)(i) of this section.

* * * * *

(3) *SFMA trawl roller gear restriction.* The roller gear diameter on any vessel on a monkfish DAS in the SFMA may not exceed 6 inches (15.2 cm) in diameter.

■ 13. In § 648.92, paragraph (b)(5) is removed and reserved, paragraphs (b)(1)(i), (b)(2), (b)(6), and (b)(8)(i)(B) are revised; and paragraphs (b)(1)(iii), (b)(1)(iv), (b)(9) and (c) are added to read as follows:

**§ 648.92 Effort-control program for monkfish limited access vessels.**

* * * * *

(b) * * *

(1) * * *

(i) *General provision.* All limited access monkfish permit holders shall be allocated monkfish DAS each fishing year to be used in accordance with the restrictions of this paragraph (b), unless modified by paragraph (b)(1)(ii) of this section according to the provisions specified at § 648.96(b)(3). The number of monkfish DAS to be allocated, before accounting for any such modification, is 40 DAS minus the amount calculated in paragraph (b)(1)(iv) of this section, unless the vessel is enrolled in the Offshore Fishery Program in the SFMA, as specified in paragraph (b)(1)(iii) of this section. Limited access NE multispecies and limited access sea scallop permit holders who also possess a valid limited access monkfish permit must use a NE multispecies or sea scallop DAS concurrently with their monkfish DAS, except as provided in paragraph (b)(2) of this section, unless otherwise specified under this subpart F.

* * * * *

(iii) *Offshore Fishery Program DAS allocation.* A vessel issued a Category F permit, as described in § 648.95, shall be allocated a prorated number of DAS as specified at § 648.95(g)(2).

(iv) *Research DAS set-aside.* A total of 500 DAS will be set aside and made available for cooperative research programs as described in paragraph (c) of this section. These DAS will be

deducted from the total number of DAS allocated to all monkfish limited access permit holders, as specified under paragraph (b)(1)(i) of this section. A per vessel deduction will be determined as follows: Allocated DAS minus the quotient of 500 DAS divided by the total number of limited access permits issued in the previous fishing year. For example, if the DAS allocation equals 40 DAS and if there are 750 limited access permits issued in FY 2004, the number of DAS allocated to each vessel in FY 2005 will be 40 DAS minus (500 DAS divided by 750 permits), or 40 DAS minus 0.7 DAS, or 39.3 DAS.

(2) *Category C, D, F, G, or H limited access monkfish permit holders.* (i) Unless otherwise specified in paragraph (b)(2)(ii) of this section, each monkfish DAS used by a limited access NE multispecies or scallop DAS vessel holding a Category C, D, F, G, or H limited access monkfish permit shall also be counted as a NE multispecies or scallop DAS, as applicable, except when a Category C, D, F, G, or H vessel with a limited access NE multispecies DAS permit has an allocation of NE multispecies Category A DAS, specified under § 648.82(d)(1), that is less than the number of monkfish DAS allocated for the fishing year May 1 through April 30. Under this circumstance, the vessel may fish under the monkfish limited access Category A or B provisions, as applicable, for the number of DAS that equal the difference between the number of its allocated monkfish DAS and the number of its allocated NE multispecies Category A DAS. For such vessels, when the total allocation of NE multispecies Category A DAS has been used, a monkfish DAS may be used without concurrent use of a NE multispecies DAS. For example, if a monkfish Category D vessel's NE multispecies Category A DAS allocation is 30, and the vessel fished 30 monkfish DAS, 30 NE multispecies Category A DAS would also be used, unless otherwise authorized under § 648.85(b)(6). However, after all 30 NE multispecies Category A DAS are used, the vessel may utilize its remaining 10 monkfish DAS to fish on monkfish, without a NE multispecies DAS being used, provided that the vessel fishes under the regulations pertaining to a Category B vessel and does not retain any regulated NE multispecies.

(ii) *Category C, D, F, G, or H vessels that lease NE multispecies DAS.* (A) A monkfish Category C, D, F, G, or H vessel that has ''monkfish-only'' DAS, as specified in paragraph (b)(2)(i) of this section, and that leases NE multispecies DAS from another vessel pursuant to § 648.82(k), is required to fish its available ''monkfish-only'' DAS in conjunction with its leased NE multispecies DAS, to the extent that the vessel has NE multispecies DAS available.

(B) A monkfish Category C, D, F, G, or H vessel that leases DAS to another vessel(s), pursuant to § 648.82(k), is required to forfeit a monkfish DAS for each NE multispecies DAS that the vessel leases, equal in number to the difference between the number of remaining NE multispecies DAS and the number of unused monkfish DAS at the time of the lease. For example, if a lessor vessel, which had 40 unused monkfish DAS and 47 allocated NE multispecies DAS, leased 10 of its NE multispecies DAS, the lessor would forfeit 3 of its monkfish DAS (40 monkfish DAS - 37 NE multispecies DAS = 3) because it would have 3 fewer multispecies DAS than monkfish DAS after the lease.

* * * * *

(5) [Reserved]

(6) *Declaring monkfish DAS.* A vessel's owner or authorized representative shall notify the Regional Administrator of a vessel's participation in the monkfish DAS program using the notification requirements specified in § 648.10.

* * * * *

(8) * * *

(i) * * *

* * * * *

(B) *Category C, D, F, G, and H vessels that possess a limited access NE multispecies permit.* A vessel issued a valid monkfish limited access Category C, D, F, G, or H permit that possesses a valid limited access NE multispecies permit and fishing under a monkfish DAS may not fish with, haul, possess, or deploy more than 150 gillnets. A vessel issued a NE multispecies limited access permit and a limited access monkfish permit, and fishing under a monkfish DAS, may fish any combination of monkfish, roundfish, and flatfish gillnets, up to 150 nets total, provided that the number of monkfish, roundfish, and flatfish gillnets is consistent with the limitations of § 648.82. Nets may not be longer than 300 ft (91.4 m), or 50 fathoms, in length.

* * * * *

(9) *Category G and H limited access permit holders.* (i) Vessels issued limited access Category G and H permits shall be restricted to fishing on a monkfish DAS in the area south of 38°20′ N. lat.

(ii) Vessels issued valid limited access monkfish Category G or H permit that also possess a limited access NE multispecies or limited access scallop permit are subject to the same provisions as Category C or D vessels, respectively, unless otherwise stated under this subpart F.

(c) *Monkfish Research*—(1) *DAS Set-Aside Program.* (i) NMFS will publish a Request for Proposals (RFP) in the **Federal Register** at least 3 months prior to the start of the upcoming fishing year, consistent with procedures and requirements established by the NOAA Grants Office, to solicit proposals from industry for the upcoming fishing year, based on research priorities identified by the Councils.

(ii) NMFS shall convene a review panel that may include members of the Councils' Monkfish Oversight Committee, the Council's Research Steering Committee, and other technical experts, to review proposals submitted in response to the RFP.

(A) Each panel member shall recommend which research proposals should be authorized to utilize the research DAS set aside in accordance with paragraph (b)(1)(iv) of this section, based on the selection criteria described in the RFP.

(B) The Regional Administrator shall consider each panel member's recommendation, provide final approval of the projects, and notify applicants of the grant award through written notification to the project proponent. The Regional Administrator may exempt selected vessel(s) from regulations specified in each of the respective FMPs throughthe exempted fishing permit (EFP) process specified under § 600.745(b)(2).

(iii) The grant awards approved under the RFPs shall be for the upcoming fishing year. Proposals to fund research that would start prior to the fishing year are not eligible for consideration. Multi-year grant awards may be approved under an RFP for an upcoming fishing year, so long as the research DAS available under subsequent RFPs are adjusted to account for the approval of multi-year awards. All research trips shall be completed within the fishing year(s) for which the research grant was awarded.

(iv) Research projects shall be conducted in accordance with provisions approved and provided in an EFP issued by the Regional Administrator, as authorized under § 600.745(b)(2).

(v) If the Regional Administrator determines that the annual allocation of research DAS will not be used in its entirety once all of the grant awards have been approved, the Regional Administrator shall reallocate the unallocated research DAS as exempted DAS to be authorized as described in

paragraph (c)(2) of this section, and provide notice of the reallocation of DAS in the **Federal Register**. Any unused research DAS may not be carried over into the next fishing year.

(vi) For proposals that require other regulatory exemptions that extend beyond the scope of the analysis contained in the Monkfish FMP, subsequent amendments, or framework adjustments, applicants may be required to provide additional analysis of the impacts of the requested exemptions before issuance of an EFP will be considered.

(2) *DAS Exemption Program.* (i) Vessels that seek to conduct monkfish research within the current fishing year, and that were not selected in the RFP process during the previous fishing year, may seek exemptions from monkfish DAS for the purpose of conducting exempted fishing activities, as authorized at § 600.745(b), under the following conditions and restrictions:

(A) The request for a monkfish DAS exemption must be submitted along with a complete application for an EFP to the Regional Administrator. The requirements for submitting a complete EFP application are provided in § 600.745(b)(2);

(B) Exempted DAS must be available for usage. Exempted DAS shall only be made available by the Regional Administrator if it is determined that the annual set-aside of research DAS will not be used in its entirety, as described in paragraph (c)(1)(v) of this section. If exempted DAS are not available for usage, the applicant may continue to seek an exemption from monkfish DAS, but may be required to conduct an analysis of the impacts associated with the monkfish DAS exemption request before issuance of the EFP application will be considered; and

(C) For EFP applications that require other regulatory exemptions that extend beyond the scope of the analysis contained in the Monkfish FMP, subsequent amendments, or framework adjustments, applicants may be required to provide additional analysis of the impacts of the requested exemptions before issuance of an EFP will be considered.

(ii) Monkfish DAS exemption requests shall be reviewed and approved by the Regional Administrator in the order in which they are received.

■ 14. In § 648.93, paragraph (b) is revised to read as follows:

**§ 648.93 Monkfish minimum fish sizes.**

* * * * *

(b) *Minimum fish size.* The minimum fish size for all vessels is 17 inches (43.2 cm) total length or 11 inches (27.9 cm) tail length.

■ 15. In § 648.94, paragraphs (b)(2)(i) through (b)(2)(iii), the heading of (b)(3) and paragraphs (b)(3)(i), (b)(3)(ii), (b)(4), (b)(5), (b)(6), (c) and (e) are revised, and paragraph (b)(2)(iv) is added to read as follows:

**§ 648.94 Monkfish possession and landing restrictions.**

* * * * *

(b) * * *

(2) * * *

(i) *Category A, C, and G vessels.* Category A, C, and G vessels fishing under the monkfish DAS program in the SFMA may land up to 550 lb (250 kg) tail weight or 1,826 lb (828 kg) whole weight of monkfish per monkfish DAS (or any prorated combination of tail weight and whole weight based on the conversion factor for tail weight to whole weight of 3.32), unless modified pursuant to § 648.96(b)(2)(ii).

(ii) *Category B, D, and H vessels.* Category B, D and H vessels fishing under the monkfish DAS program in the SFMA may land up to 450 lb (204 kg) tail weight or 1,494 lb (678 kg) whole weight of monkfish per monkfish DAS (or any prorated combination of tail weight and whole weight based on the conversion factor for tail weight to whole weight of 3.32), unless modified pursuant to § 648.96(b)(2)(ii).

(iii) *Category F vessels.* Vessels issued a Category F permit are subject to the possession and landing restrictions specified at § 648.95(g)(1).

(iv) *Administration of landing limits.* A vessel owner or operator may not exceed the monkfish trip limits as specified in paragraphs (b)(2)(i) through (iii) of this section per monkfish DAS fished, or any part of a monkfish DAS fished.

(3) *Category C, D, F, G, and H vessels fishing under the multispecies DAS program.*—(i) *NFMA*—(A) *Category C and D vessels.* There is no monkfish trip limit for a Category C or D vessel that is fishing under a NE multispecies DAS exclusively in the NFMA.

(B) Category F, G, and H vessels. Vessels issued a Category F, G, or H permit that are fishing under a NE multispecies DAS in the NFMA are subject to the incidental catch limit specified in paragraph (c)(1)(i) of this section.

(ii) *SFMA*—(A) *Category C, D, and F vessels.* If any portion of a trip is fished only under a NE multispecies DAS, and not under a monkfish DAS, in the SFMA, a Category C, D, or F vessel may land up to 300 lb (136 kg) tail weight or 996 lb (452 kg) whole weight of monkfish per DAS if trawl gear is used exclusively during the trip, or 50 lb (23 kg) tail weight or 166 lb (75 kg) whole weight per DAS if gear other than trawl gear is used at any time during the trip.

(B) *Category G and H vessels.* Vessels issued a Category G or H permit that are fishing under a NE multispecies DAS in the SFMA are subject to the incidental catch limit specified in paragraph (c)(1)(ii) of this section.

* * * * *

(4) *Category C, D, F, G, or H vessels fishing under the scallop DAS program.* A Category C, D, F, G, or H vessel fishing under a scallop DAS may land up to 300 lb (136 kg) tail weight or 996 lb (452 kg) whole weight of monkfish per DAS (or any prorated combination of tail weight and whole weight based on the conversion factor for tail weight to whole weight of 3.32).

(5) *Category C, D, F, G, or H scallop vessels declared into the monkfish DAS program without a dredge on board, or not under the net exemption provision.* Category C, D, G, or H vessels that have declared into the monkfish DAS program and that do not fish with or have a dredge on board, or that are not fishing with a net under the net exemption provision specified in § 648.51(f), are subject to the same landing limits as specified in paragraphs (b)(1) and (b)(2) of this section, or the landing limit specified in § 648.95(g)(1), if issued a Category F permit. Such vessels are also subject to provisions applicable to Category A and B vessels fishing only under a monkfish DAS, consistent with the provisions of this part.

(6) *Vessels not fishing under a NE multispecies, scallop, or monkfish DAS.* The possession limits for all limited access monkfish vessels when not fishing under a multispecies, scallop, or monkfish DAS are the same as the possession limits for a vessel issued a monkfish incidental catch permit specified under paragraphs (c)(3) through (c)(6) of this section.

* * * * *

(c) *Vessels issued a monkfish incidental catch permit*—(1) Vessels fishing under a NE multispecies DAS—(i) *NFMA.* Vessels issued a monkfish incidental catch (Category E) permit, or issued a valid limited access Category F, G, or H permit, fishing under a NE multispecies DAS exclusively in the NFMA, may land up to 400 lb (181 kg) tail weight or 1,328 lb (602 kg) whole weight of monkfish per DAS, or 50 percent (where the weight of all monkfish is converted to tail weight) of the total weight of fish on board, whichever is less. For the purpose of converting whole weight to tail weight,

the amount of whole weight possessed or landed is divided by 3.32.

(ii) *SFMA.* If any portion of the trip is fished by a vessel issued a monkfish incidental catch (Category E) permit, or issued a valid limited access Category G or H permit, under a NE multispecies DAS in the SFMA, the vessel may land up to 50 lb (23 kg) tail weight or 166 lb (75 kg) whole weight of monkfish per DAS (or any prorated combination of tail weight and whole weight based on the conversion factor).

(2) *Scallop vessels fishing under a scallop DAS.* A scallop vessel issued a monkfish incidental catch (Category E) permit fishing under a scallop DAS, may land up to 300 lb (136 kg) tail weight or 996 lb (452 kg) whole weight of monkfish per DAS (or any prorated combination of tail weight and whole weight based on the conversion factor).

(3) *Vessels fishing with large mesh and not fishing under a DAS*—(i) A vessel issued a valid monkfish incidental catch (Category E) permit or a limited access monkfish permit (Category A, B, C, D, F, G, or H) fishing in the GOM or GB RMAs, or the SNE RMA east of the MA Exemption Area boundary with mesh no smaller than specified at § § 648.80(a)(3)(i), (a)(4)(i), and (b)(2)(i), respectively, while not on a monkfish, NE multispecies, or scallop DAS, may possess, retain, and land monkfish (whole or tails) only up to 5 percent (where the weight of all monkfish is converted to tail weight) of the total weight of fish on board. For the purpose of converting whole weight to tail weight, the amount of whole weight possessed or landed is divided by 3.32.

(ii) A vessel issued a valid monkfish incidental catch (Category E) permit or a limited access monkfish permit (Category A, B, C, D, F, G, or H) fishing in the SNE or MA RMAs west of the MA Exemption Area boundary with mesh no smaller than specified at § 648.104(a)(1) while not on a monkfish, NE multispecies, or scallop DAS, may possess, retain, and land monkfish (whole or tails) only up to 5 percent (where the weight of all monkfish is converted to tail weight) of the total weight of fish on board, but not to exceed 450 lb (204 kg) tail weight or 1,494 lb (678 kg) whole weight of monkfish. For the purpose of converting whole weight to tail weight, the amount of whole weight possessed or landed is divided by 3.32.

(4) *Vessels fishing with small mesh and not fishing under a DAS.* A vessel issued a valid monkfish incidental catch (Category E) permit or a limited access monkfish permit (Category A, B, C, D, F, G, or H) fishing with mesh smaller than the mesh size specified by area in paragraph (c)(3) of this section, while not on a monkfish, NE multispecies, or scallop DAS, may possess, retain, and land only up to 50 lb (23 kg) tail weight or 166 lb (75 kg) whole weight of monkfish per day or partial day, not to exceed 150 lb (68 kg) tail weight or 498 lb (226 kg) whole weight per trip.

(5) *Small vessels.* A vessel issued a limited access NE multispecies small vessel category permit and a valid monkfish incidental catch (Category E) permit that is less than 30 ft (9.1 m) in length and that elects not to fish under the NE multispecies DAS program, may possess, retain, and land up to 50 lb (23 kg) tail weight or 166 lb (75 kg) whole weight of monkfish per day or partial day, not to exceed 150 lb (68 kg) tail weight or 498 lb (226 kg) whole weight per trip.

(6) Vessels fishing with handgear. A vessel issued a valid monkfish incidental catch (Category E) permit or a limited access monkfish permit (Category A, B, C, D, F, G, or H) and fishing exclusively with rod and reel or handlines with no other fishing gear on board, while not on a monkfish, NE multispecies, or scallop DAS, may possess, retain, and land up to 50 lb (23 kg) tail weight or 166 lb (75 kg) whole weight of monkfish per day or partial day, not to exceed 150 lb (68 kg) tail weight or 498 lb (226 kg) whole weight per trip.

(7) *Vessels fishing with surfclam or ocean quahog dredge gear.* A vessel issued a valid monkfish incidental catch (Category E) permit and a valid surfclam or ocean quahog permit, while fishing exclusively with a hydraulic clam dredge or mahogany quahog dredge, may possess, retain, and land up to 50 lb (23 kg) tail weight or 166 lb (75 kg) whole weight of monkfish per day or partial day, not to exceed 150 lb (68 kg) tail weight or 498 lb (226 kg) whole weight per trip.

(8) *Scallop vessels not fishing under a scallop DAS with dredge gear.* A vessel issued a valid monkfish incidental catch (Category E) permit and a valid General Category scallop permit or a limited access scallop vessel not fishing under a scallop DAS, while fishing exclusively with scallop dredge as specified in § 648.51(b), may possess, retain, and land up to 50 lb (23 kg) tail weight or 166 lb (75 kg) whole weight of monkfish per day or partial day, not to exceed 150 lb (68 kg) tail weight or 498 lb (226 kg) whole weight per trip.

* * * * *

(e) *Transiting.* A vessel that has declared into the NFMA for the purpose of fishing for monkfish under the less restrictive measures of the NFMA, may transit the SFMA provided that the vessel does not harvest or possess monkfish, or any other fish, from the SFMA, and the vessel's gear is properly stowed and not available for immediate use in accordance with the regulations specified under § 648.23(b).

* * * * *

■ 16. Section 648.95 is added to read as follows:

**§ 648.95 Offshore Fishery Program in the SFMA.**

(a) *General.* Any vessel issued a valid monkfish limited access permit is eligible to apply for a Category F permit in order to fish in the Offshore Fishery Program in the SFMA.

(1) A vessel issued a Category F permit is subject to the specific provisions and conditions of this section while fishing on a monkfish DAS.

(2) When not fishing on a monkfish DAS, a Category F vessel may fish under the regulations applicable to the monkfish incidental catch (Category E) permit, specified under paragraph § 648.94(c). When fishing on a NE multispecies DAS in the NFMA, a Category F vessel that also possesses a NE multispecies limited access permit is subject to the possession limits applicable to vessels issued an incidental catch permit as described in § 648.94(c)(1)(i).

(3) Limited access Category C or D vessels that apply for and are issued a Category F permit remain subject to the provisions specific to Category C and D vessels, unless otherwise specified under this subpart F.

(b) *Declaration.* To fish in the Offshore Fishery Program, a vessel must obtain a monkfish limited access Category F permit and fish under this permit for the entire fishing year, subject to the conditions and restrictions specified under this part. The owner of a vessel, or authorized representative, may change the vessel's limited access monkfish permit category within 45 days of the effective date of the vessel's permit, provided the vessel has not fished under the monkfish DAS program during that fishing year. If such a request is not received within 45 days, the vessel owner may not request a change in permit category and the vessel's permit category will remain unchanged for the duration of the fishing year.

(c) *Offshore Fishery Program Area.* The Offshore Fishery Program Area is bounded on the south by 38°00′ N. lat., and on the north, west, and east by the area coordinates specified in § 648.23(a).

(d) *Season.* October 1 through April 30 each year.

(e) *Restrictions.* (1) Except for the transit provisions provided for in paragraph (f) of this section, a vessel issued a valid Category F permit may only fish for, possess, and land monkfish in or from the Offshore Fishery Program Area while on a monkfish DAS.

(2) A vessel enrolled in the Offshore Fishery Program is restricted to fishing under its monkfish DAS during the season in paragraph (d) of this section.

(3) A vessel issued a Category F permit that is fishing on a monkfish DAS is subject to the minimum mesh size requirements applicable to limited access monkfish Category A and B vessels, as specified under § 648.91(c)(1)(i) and (c)(1)(iii), as well as the other gear requirements specified in paragraphs (c)(2) and (c)(3).

(4) A vessel issued a Category F permit must have installed on board an operational VMS unit that meets the minimum performance criteria specified in §§ 648.9 and 648.10 during the entire season established under paragraph (d) of this section. Unless otherwise required to maintain an operational VMS unit under the VMS notification requirements specified at § 648.10(b)(1), a vessel issued a Category F permit may turn off its VMS unit outside of this season.

(f) *Transiting.* A vessel issued a Category F permit and fishing under a monkfish DAS that is transiting to or from the Offshore Fishery Program Area, described in paragraph (c)(1) of this section, shall have all gear stowed and not available for immediate use in accordance with the gear stowage provisions specified under § 648.23(b).

(g) *Monkfish possession limits and DAS allocations.* (1) A vessel issued a Category F permit may land up to 1,600 lb (726 kg) tail weight or 5,312 lb (2,409 kg) whole weight of monkfish per monkfish DAS (or any prorated combination of tail weight and whole weight based on the conversion factor of 3.32).

(2) The monkfish DAS allocation for vessels issued a Category F permit shall be equal to the trip limit applicable to the vessel's monkfish limited access permit category divided by the fixed daily possession limit specified in paragraph (g)(1) of this section, and then multiplied by the DAS allocation for limited access monkfish vessels not issued Category F permits, specified under § 648.92(b)(1). For example, if a vessel has a limited access monkfish Category C permit, and the applicable trip limit is 800 lb (363 kg) for this category, and the vessel has an annual allocation of 40 monkfish DAS, then the monkfish DAS allocated to that vessel when issued a Category F permit would be 20 monkfish DAS (800 lb divided by 1,600 lb, multiplied by 40 monkfish DAS equals 20 DAS). Any carryover monkfish DAS will be included in the calculation of monkfish DAS for Category F vessels.

(3) Vessels issued a Category F permit that are fishing under a NE multispecies DAS in the NFMA are subject to the incidental catch limit specified in paragraph (c)(1)(i) of this section.

(h) *DAS usage by NE multispecies or sea scallop limited access permit holders.* A vessel issued a Category F permit that also has been issued either a NE multispecies or sea scallop limited access permit, and is fishing on a monkfish DAS, is subject to the DAS usage requirements specified in § 648.92(b)(2).

■ 17. In § 648.96, paragraph (c)(1)(i) is revised to read as follows:

**§ 648.96 Monkfish annual adjustment process and framework specifications.**

* * * * *

(c) * * *

(1) * * *

(i) Based on their annual review, the MFMC may develop and recommend, in addition to the target TACs and management measures established under paragraph (b) of this section, other options necessary to achieve the Monkfish FMP's goals and objectives, which may include a preferred option. The MFMC must demonstrate through analysis and documentation that the options it develops are expected to meet the Monkfish FMP goals and objectives. The MFMC may review the performance of different user groups or fleet sectors in developing options. The range of options developed by the MFMC may include any of the management measures in the Monkfish FMP, including, but not limited to: Closed seasons or closed areas; minimum size limits; mesh size limits; net limits; liver-to-monkfish landings ratios; annual monkfish DAS allocations and monitoring; trip or possession limits; blocks of time out of the fishery; gear restrictions; transferability of permits and permit rights or administration of vessel upgrades, vessel replacement, or permit assignment; measures to minimize the impact of the monkfish fishery on protected species; gear requirements or restrictions that minimize bycatch or bycatch mortality; transferable DAS programs; and other frameworkable measures included in §§ 648.55 and 648.90.

* * * * *

■ 18. Section 648.97 is added to subpart F to read as follows:

**§ 648.97 Closed areas.**

(a) *Oceanographer Canyon Closed Area.* No fishing vessel or person on a fishing vessel may enter, fish, or be in the area known as Oceanographer Canyon Closed Area (copies of a chart depicting this area are available from the Regional Administrator upon request), as defined by straight lines connecting the following points in the order stated, while on a monkfish DAS:

OCEANOGRAPHER CANYON CLOSED AREA

| Point | N. Lat. | W. Long. |
|---|---|---|
| (1) OC1 | 40°10′ | 68°12′ |
| (2) OC2 | 40°24′ | 68°09′ |
| (3) OC3 | 40°24′ | 68°08′ |
| (4) OC4 | 40°10′ | 67°59′ |
| (5) OC1 | 40°10′ | 68°12′ |

(b) *Lydonia Canyon Closed Area.* No fishing vessel or person on a fishing vessel may enter, fish, or be in the area known as Lydonia Canyon Closed Area (copies of a chart depicting this area are available from the Regional Administrator upon request), as defined by straight lines connecting the following points in the order stated, while on a monkfish DAS:

LYNDONIA CANYON CLOSED AREA

| Point | N. Lat. | W. Long. |
|---|---|---|
| (1) LC1 | 40°16′ | 67°34′ |
| (2) LC2 | 40°16′ | 67°42′ |
| (3) LC3 | 40°20′ | 67°43′ |
| (4) LC4 | 40°27′ | 67°40′ |
| (5) LC5 | 40° 27′ | 67°38′ |
| (6) LC1 | 40°16′ | 67°34′ |

[FR Doc. 05–8450 Filed 4–26–05; 2:21 pm]

BILLING CODE 3510–22–S

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Food and Drug Administration

### 21 CFR Part 522

### Implantation or Injectable Dosage Form New Animal Drugs; Penicillin G Benzathine and Penicillin G Procaine Sterile Suspension

**AGENCY:** Food and Drug Administration, HHS.

**ACTION:** Final rule.

**SUMMARY:** The Food and Drug Administration (FDA) is amending the animal drug regulations to reflect approval of a supplemental new animal drug application (NADA) filed by Cross Vetpharm Group Ltd. The supplemental NADA provides for the addition of

statements to labeling of an injectable penicillin suspension warning against the use of this product in calves to be processed for veal. FDA is also amending the regulations to correctly identify approved indications for use for several penicillin products. This action is being taken to improve the accuracy of the regulations.

**DATES:** This rule is effective April 28, 2005.

**FOR FURTHER INFORMATION CONTACT:** Joan C. Gotthardt, Center for Veterinary Medicine (HFV–130), Food and Drug Administration, 7500 Standish Pl., Rockville, MD 20855, 301–827–7571, e-mail: *joan.gotthardt@fda.gov*.

**SUPPLEMENTARY INFORMATION:** Cross Vetpharm Group Ltd., Broomhill Rd., Tallaght, Dublin 24, Ireland, filed a supplement to NADA 65–506 that provides for the addition of statements to labeling of COMBI–PEN–48 (penicillin G benzathine and penicillin G procaine) injectable suspension warning against the use of this product in calves to be processed for veal. The supplemental NADA is approved as of March 23, 2005, and the regulations are amended in § 522.1696a (21 CFR 522.1696a) to reflect the approval. FDA is also amending § 522.1696a to correct an error in the indications for use for several penicillin products which was introduced during reformatting of this section in 2001 (66 FR 711, January 4, 2001). This is being done to improve the accuracy of the regulations.

In accordance with the freedom of information provisions of 21 CFR part 20 and 21 CFR 514.11(e)(2)(ii), a summary of safety and effectiveness data and information submitted to support approval of this application may be seen in the Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852, between 9 a.m. and 4 p.m., Monday through Friday.

The agency has determined under 21 CFR 25.33(a)(1) that this action is of a type that does not individually or cumulatively have a significant effect on the human environment. Therefore, neither an environmental assessment nor an environmental impact statement is required.

This rule does not meet the definition of ''rule'' in 5 U.S.C. 804(3)(A) because it is a rule of ''particular applicability.'' Therefore, it is not subject to the congressional review requirements in 5 U.S.C. 801–808.

### List of Subjects in 21 CFR Part 522

Animal drugs.

■ Therefore, under the Federal Food, Drug, and Cosmetic Act and under authority delegated to the Commissioner of Food and Drugs and redelegated to the Center for Veterinary Medicine, 21 CFR part 522 is amended as follows:

## PART 522—IMPLANTATION OR INJECTABLE DOSAGE FORM NEW ANIMAL DRUGS

■ 1. The authority citation for 21 CFR part 522 continues to read as follows:

**Authority:** 21 U.S.C. 360b.

■ 2. Section 522.1696a is amended by revising the section heading and paragraphs (b)(2), (b)(3), and (d)(2)(iii) to read as follows:

**§ 522.1696a Penicillin G benzathine and penicillin G procaine suspension.**

* * * * *

(b) * * *

(2) Nos. 010515, 059130, and 061623 for use as in paragraphs (d)(2)(i), (d)(2)(ii)(A), and (d)(2)(iii) of this section.

(3) Nos. 000856 and 049185 for use as in paragraphs (d)(2)(i), (d)(2)(ii)(B), and (d)(2)(iii) of this section.

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(d) * * *

(2) * * *

(iii) *Limitations*. Limit treatment to two doses. Not for use within 30 days of slaughter. For Nos. 010515, 049185, 059130, and 061623: A withdrawal period has not been established for this product in preruminating calves. Do not use in calves to be processed for veal.

Dated: April 8, 2005.

**Stephen D. Vaughn,**

*Director, Office of New Animal Drug Evaluation, Center for Veterinary Medicine.*

[FR Doc. 05–8510 Filed 4–27–05; 8:45 am]

BILLING CODE 4160–01–S

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## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Food and Drug Administration

### 21 CFR Part 872

**[Docket No. 2002P–0520] (formerly Docket No. 02P–0520)**

## Dental Devices; Reclassification of Tricalcium Phosphate Granules and Classification of Other Bone Grafting Material for Dental Bone Repair

**AGENCY:** Food and Drug Administration, HHS.

**ACTION:** Final rule.

**SUMMARY:** The Food and Drug Administration (FDA) is reclassifying tricalcium phosphate (TCP) granules for dental bone repair from class III to class II (special controls), classifying into class II (special controls) other bone grafting material for dental indications, and revising the classification name and identification of the device type. Bone grafting materials that contain a drug that is a therapeutic biologic will remain in class III and continue to require a premarket approval application. The classification identification includes materials such as hydroxyapatite, tricalcium phosphate, polylactic and polyglycolic acids, or collagen. This action is being taken to establish sufficient regulatory controls that will provide reasonable assurance of the safety and effectiveness of these devices. Elsewhere in this issue of the **Federal Register**, FDA is announcing the availability of the guidance document that will serve as the special control for the class II devices.

**EFFECTIVE DATE:** May 31, 2005.

**FOR FURTHER INFORMATION CONTACT:** Michael E. Adjodha, Center for Devices and Radiological Health (HFZ–480), Food and Drug Administration, 9200 Corporate Blvd., Rockville, MD 20850, 301–827–5283, e-mail: *michael.adjodha@fda.hhs.gov*.

**SUPPLEMENTARY INFORMATION:**

### I. Background

The Federal Food, Drug, and Cosmetic Act (the act) (21 U.S.C. 301 *et seq.*), as amended by the Medical Device Amendments of 1976 (the 1976 amendments) (Public Law 94–295), the Safe Medical Devices Act of 1990 (Public Law 101–629), the Food and Drug Administration Modernization Act of 1997 (Public Law 105–115), and the Medical Device User Fee and Modernization Act of 2002 (Public Law 107–250) established a comprehensive system for the regulation of medical devices intended for human use. Section 513 of the act (21 U.S.C. 360c) established three categories (classes) of devices, depending on the regulatory controls needed to provide reasonable assurance of their safety and effectiveness. The three categories of devices are class I (general controls), class II (special controls), and class III (premarket approval).

Under section 513 of the act, devices that were in commercial distribution before May 28, 1976 (the date of enactment of the 1976 amendments), generally referred to as preamendments devices, are classified after the following requirements are met: (1) FDA has received a recommendation from a device classification panel (an FDA advisory committee); (2) FDA has published the panel's recommendation

for comment, along with a proposed regulation classifying the device; and (3) FDA has published a final regulation classifying the device. FDA has classified most preamendments devices under these procedures.

Under section 520(l) of the act (21 U.S.C. 360j(l)), devices formerly regulated as new drugs are automatically classified into class III, unless FDA, in response to a reclassification petition or on its own initiative, has classified the device into class I or II.

## II. Regulatory History of the Device

In the **Federal Register** of June 30, 2004 (69 FR 39377), FDA proposed to reclassify TCP granules for dental bone repair from class III to class II (special controls). Concurrently, FDA proposed to classify into class II (special controls) all other bone grafting material for dental indications, except those that contained a drug or biologic component; and to revise the classification name and identification of the device. In the proposed rule, FDA identified the device type as bone grafting material such as hydroxyapatite, tricalcium phosphate, demineralized bone additives, collagen, or polylactic acid intended to fill, augment, or reconstruct periodontal or bony defects of the oral and maxillofacial region.

The **SUPPLEMENTARY INFORMATION** section of the June 30, 2004, proposed rule presented information on the classification recommendations of the Dental Products Advisory Panel (the panel), a summary of the reasons for the recommendations, a summary of the data upon which the recommendations were based, and an assessment of the device's risks to public health.

Also in the **Federal Register** of June 30, 2004 (69 FR 39485), FDA announced the availability of the draft guidance document entitled ''Class II Special Controls Guidance Document: Dental Bone Grafting Material'' that FDA intended to serve as the special control for TCP and other bone grafting materials, if FDA classified and reclassified this device type. FDA gave interested persons until September 28, 2004, to comment on the proposed regulation and special controls draft guidance document.

## III. Analysis of the Comment and FDA's Response

FDA received one comment on the proposed rule and guidance document. The comment said that TCP granules should remain in class III (premarket approval) and that all other bone grafting materials for dental indications should be regulated in class III because the commenter believed the special controls (composition, physical properties, and compliance with the American Society for Testing and Materials (ASTM) composition standards) described in the draft guidance document were not sufficient to provide a reasonable assurance of safety and effectiveness for these devices. The comment states that only evidence from clinical studies is sufficient to provide a reasonable assurance of safety and effectiveness for these devices.

FDA disagrees in part with the comment. In most cases, FDA believes that there is sufficient human experience with the dental bone grafting material devices being reclassified and classified into class II to establish a special controls guidance to provide reasonable assurance of safety and effectiveness through the 510(k) process without the submission of clinical data. FDA has determined that this experience supports the conclusion that information on composition, physical properties, and compliance with ASTM composition standards in a 510(k) will provide adequate information for FDA review of the device, if there is no change in the formulation, design, technology, or indication for use of the device. In cases in which there is such a change, however, the special controls guidance clearly states that FDA recommends the submission of clinical data in the 510(k) to support a substantial equivalence determination. If the manufacturer cannot demonstrate that the new device is substantially equivalent, the device will be found not substantially equivalent and a premarket approval application may be required. This approach is consistent with the general recommendations of the panel in 1995 and in 2003. Therefore, FDA believes that special controls, in addition to general controls, will provide a reasonable assurance of the safety and effectiveness of these devices and these devices can be classified in class II. Bone grafting material devices that contain a drug that is a therapeutic biologic will remain in class III and continue to require a premarket approval application.

## IV. Summary of Final Rule

Therefore, under sections 513 and 520(l) of the act, FDA is adopting the summary of reasons for the panel's recommendation, the summary of data upon which the panel's recommendations are based, and the assessment of the risks to public health stated in the proposed rule published on June 30, 2004. Furthermore, FDA is issuing this final rule, § 872.3930 (21 CFR 872.3930), that reclassifies TCP granules for dental bone repair from class III to class II (special controls); classifies into class II (special controls) other bone grafting material for dental indications; and revises the classification name and identification of the device. Bone grafting materials that contain a drug that is a therapeutic biologic will remain in class III and continue to require a premarket approval application.

FDA is making the following changes to the identification of bone grafting material:

- Removing the phrase ''a naturally or synthetically derived'' because it does not apply to all the examples that follow.
- Removing ''demineralized bone additives.'' Minimally manipulated demineralized bone is regulated as human cells, tissues, and cellular and tissue-based products under section 361 of the Public Health Service Act (21 CFR 1271.10). Human demineralized bone with additives is regulated as a medical device and is subject to premarket notification procedures. FDA intends to publish a separate rule for human demineralized bone with additives to classify the device into class II and establish a special control.
- Adding ''polyglycolic'' to ''polylactic acids'' to more clearly identify these materials as a class of poly(alpha-hydroxy) acids because they are often supplied as a mixture.
- Clarifying that bone grafting materials that contain a drug that is a therapeutic biologic are the devices that will remain in class III. Therapeutic biologics are biological response modifiers, such as growth factors, cytokines, and certain monoclonal antibodies that are regulated as drugs. Because insufficient information exists to determine that general controls and special controls are sufficient to provide a reasonable assurance of their safety and effectiveness, these devices will remain in class III and continue to require premarket approval applications.

FDA is also revising paragraph (c) in § 872.3930 to clarify the status of the devices described in paragraph (b)(2) that contain a drug that is a therapeutic biologic. Devices that were not in commercial distribution prior to May 28, 1976, generally referred to as postamendments devices, are classified automatically by statute (section 513(f) of the act (21 U.S.C. 360c(f)) into class III without any FDA rulemaking process. Those devices remain in class III and require a premarket approval application, unless and until the device is reclassified into class I or II or FDA

issues an order finding the device to be substantially equivalent, under section 513(i) of the act (21 U.S.C. 360c(i)), to a predicate device that does not require premarket approval. The agency determines whether new devices are substantially equivalent to predicate devices by means of premarket notification procedures in section 510(k) of the act (21 U.S.C. 360(k)) and 21 CFR part 807 of the regulations. FDA has previously found the devices described in paragraph (b)(2) to be postamendments devices and not substantially equivalent to devices that do not require premarket approval. Therefore, these devices are in class III by operation of the statute and require premarket approval. FDA has revised paragraph (c) to reflect this.

This action is being taken to establish sufficient regulatory controls to provide reasonable assurance of the safety and effectiveness of the devices in class II. The guidance document entitled ''Class II Special Controls Guidance Document: Dental Bone Grafting Material Devices'' will serve as the special control for the device. Elsewhere in this issue of the **Federal Register**, FDA is announcing the availability of this guidance. Following the effective date of the final rule, any firm submitting a 510(k) premarket notification for this device will need to address the issues covered in the special controls guidance document. However, the firm need only show that its device meets the recommendations of the guidance or in some other way provides equivalent assurances of safety and effectiveness.

The special controls guidance document contains recommendations with regard to the information and testing that should be included in a premarket notification. The guidance document addresses the following topics: Material characterization, biocompatibility, sterilization, and labeling. Adequate characterization of the composition, physical properties, and in vivo performance can address the risk of ineffective bone formation. Adequate biocompatibility can address the risk of adverse tissue reaction. Sterilization can address the risk of infection, and labeling can address the risk of improper use.

The agency is not exempting this device from the premarket notification requirements of the act, as permitted by section 510(m) of the act (21 U.S.C. 360(m)). FDA believes that it needs to review information in a premarket notification submission that addresses the risks identified in the guidance document in order to assure that a new device is at least as safe and effective as legally marketed devices of this type.

## V. Environmental Impact

FDA has determined under 21 CFR 25.34(b) that this classification and reclassification action does not individually or cumulatively have a significant effect on the human environment. Therefore, neither an environmental assessment nor an environmental impact statement is required.

## VI. Analysis of Impacts

FDA has examined the impacts of the final rule under Executive Order 12866, the Regulatory Flexibility Act (5 U.S.C. 601–612), and the Unfunded Mandates Reform Act of 1995 (Public Law 104–4). Executive Order 12866 directs agencies to assess all costs and benefits of available regulatory alternatives and, when regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety, and other advantages; distributive impacts; and equity). The agency believes that this final rule is not a significant regulatory action under the Executive order.

The Regulatory Flexibility Act requires agencies to analyze regulatory options that would minimize any significant impact of a rule on small entities. FDA believes that manufacturers of the devices being reclassified or classified into class II are already substantially in compliance with the recommendations in the guidance document. Because manufacturers of the devices subject to the special control are being relieved of the burden of submitting a premarket approval application, the agency certifies that the final rule will not have a significant economic impact on a substantial number of small entities.

Section 202(a) of the Unfunded Mandates Reform Act of 1995 requires that agencies prepare a written statement, which includes an assessment of anticipated costs and benefits, before proposing ''any rule that includes any Federal mandate that may result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of $100,000,000 or more (adjusted annually for inflation) in any one year.'' The current threshold after adjustment for inflation is $115 million, using the most current (2003) Implicit Price Deflator for the Gross Domestic Product. FDA does not expect this final rule to result in any 1-year expenditure that would meet or exceed this amount.

## VII. Federalism

FDA has analyzed the final rule in accordance with the principles set forth in Executive Order 13132. FDA has determined that the rule does not contain policies conferring 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. Accordingly, FDA has concluded that the rule does not contain policies that have federalism implications as defined in the Executive order. As a result, a federalism summary impact statement is not required.

## VIII. Paperwork Reduction Act of 1995

FDA concludes that the final rule contains no collections of information. Therefore, clearance by the Office of Management and Budget, according to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520) is not required.

## List of Subjects in 21 CFR Part 872

Medical devices.

■ Therefore, under the Federal Food, Drug, and Cosmetic Act and under authority delegated to the Commissioner of Food and Drugs, 21 CFR part 872 is amended as follows:

## PART 872—DENTAL DEVICES

■ 1. The authority citation for 21 CFR part 872 continues to read as follows:

**Authority:** 21 U.S.C. 351, 360, 360c, 360e, 360j, 371.

■ 2. Section 872.3930 is revised to read as follows:

### § 872.3930 Bone grafting material.

(a) *Identification.* Bone grafting material is a material such as hydroxyapatite, tricalcium phosphate, polylactic and polyglycolic acids, or collagen, that is intended to fill, augment, or reconstruct periodontal or bony defects of the oral and maxillofacial region.

(b) *Classification.* (1) Class II (special controls) for bone grafting materials that do not contain a drug that is a therapeutic biologic. The special control is FDA's ''Class II Special Controls Guidance Document: Dental Bone Grafting Material Devices.'' (See § 872.1(e) for the availability of this guidance document.)

(2) Class III (premarket approval) for bone grafting materials that contain a drug that is a therapeutic biologic. Bone grafting materials that contain a drug that is a therapeutic biologic, such as biological response modifiers, require premarket approval.

(c) *Date premarket approval application (PMA) or notice of product development protocol (PDP) is required.* Devices described in paragraph (b)(2) of

this section shall have an approved PMA or a declared completed PDP in effect before being placed in commercial distribution.

Dated: April 4, 2005.

**Linda S. Kahan,**

*Deputy Director, Center for Devices and Radiological Health.*

[FR Doc. 05–8467 Filed 4–27–05; 8:45 am]

**BILLING CODE 4160–01–S**

## DEPARTMENT OF THE INTERIOR

### Bureau of Indian Affairs

### 25 CFR Parts 31 and 36

**RIN 1076–AE54**

### Conforming Amendments to Implement the No Child Left Behind Act of 2001

**AGENCY:** Bureau of Indian Affairs, Interior.

**ACTION:** Final rule.

**SUMMARY:** This final rule deletes provisions of parts 31 and 36 that will become obsolete on May 31, 2005, the effective date of the final rule implementing the No Child Left Behind Act of 2001.

**DATES:** *Effective Date:* May 31, 2005.

**FOR FURTHER INFORMATION CONTACT:** Catherine Freels, Designated Federal Official, P.O. Box 1430, Albuquerque, NM 87103–1430; phone: 505–248–7240; e-mail: *cfreels@bia.edu.*

**SUPPLEMENTARY INFORMATION:** Today the Bureau of Indian Affairs is publishing elsewhere in the **Federal Register** the final rule implementing the No Child Left Behind Act of 2001. The Bureau developed this rule using a negotiated rulemaking process that considered the views of all affected tribes and types of schools. This final rule implementing the No Child Left Behind Act affects several provisions in other areas of 25 CFR. This rule removes these conflicting provisions in order to remove potential conflicts from title 25.

### Compliance Information

1. Regulatory Planning and Review (E.O. 12866). This document is not a significant rule and the Office of Management and Budget has not reviewed this rule under Executive Order 12866.

(1) This rule will not have an effect of $100 million or more on the economy. It will not adversely affect in a material way the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities.

(2) This rule will not create a serious inconsistency or otherwise interfere with an action taken or planned by another agency.

(3) This rule does not alter the budgetary effects of entitlements, grants, user fees, or loan programs or the rights or obligations of their recipients.

(4) This rule does not raise novel legal or policy issues. It makes only changes necessary to ensure that these sections of 25 CFR conform to the changes made by the new rule being published in final today.

2. *Regulatory Flexibility Act.* The Department of the Interior certifies that this document will not have a significant economic effect on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*).

3. *Small Business Regulatory Enforcement Fairness Act (SBREFA).* This rule is not a major rule under 5 U.S.C. 804(2), the Small Business Regulatory Enforcement Fairness Act. This rule:

a. Does not have an annual effect on the economy of $100 million or more.

b. Will not cause a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions.

c. Does not have significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of U.S.-based enterprises to compete with foreign-based enterprises.

4. *Unfunded Mandates Reform Act.* This rule does not impose an unfunded mandate on State, local, or tribal governments or the private sector of more than $100 million per year. The rule does not have a significant or unique effect on State, local, or tribal governments or the private sector. The rule makes only changes necessary to ensure that these sections of 25 CFR conform to the changes made by the new rule being published in final today.

5. *Takings (E.O. 12630).* In accordance with Executive Order 12630, the rule does not have significant takings implications. No rights, property or compensation has been, or will be taken. A takings implication assessment is not required.

6. *Federalism (E.O. 13132).* In accordance with Executive Order 13132, this rule does not have federalism implications that warrant the preparation of a Federalism Assessment.

7. *Civil Justice Reform (E.O. 12988).* In accordance with Executive Order 12988, the Office of the Solicitor has determined that this rule does not unduly burden the judicial system and meets the requirements of sections 3(a) and 3(b)(2) of the Order.

8. *Consultation with Indian tribes (E.O. 13175).* In accordance with Executive Order 13175, we have evaluated this rule and determined that it has no potential negative effects on federally recognized Indian tribes. In drafting the No Child Left Behind rule published today, we consulted extensively with tribes; tribal members of the negotiated rulemaking committee participated in the writing of the rule. These conforming amendments make only changes necessary to ensure that the remainder of 25 CFR is consistent with the provisions of the No Child Left Behind rule.

9. *Paperwork Reduction Act.* This regulation does not require an information collection from 10 or more parties and a submission under the Paperwork Reduction Act is not required. An OMB form 83–I is not required.

10. *National Environmental Policy Act.* This rule does not constitute a major Federal action significantly affecting the quality of the human environment.

11. *Justification for Issuing a Direct Final Rule.*

The Department has determined that the public notice and comment provisions of the Administrative Procedure Act, 5 U.S.C. 553(b), do not apply to this rule because of the good cause exception under 5 U.S.C. 553(b)(3)(B). This exception allows the agency to suspend the notice and public procedure requirements when the agency finds for good cause that those requirements are impractical, unnecessary, and contrary to the public interest. This rule deletes provisions made obsolete by rules published today by the Department; it makes no other substantive changes. Failure to immediately revoke these rules would lead to confusion and cause errors in vital educational programs. For these reasons, public comments is unnecessary and good cause exists for publishing this change as a direct final rule.

### List of Subjects in 25 CFR Parts 31 and 36

Elementary and secondary education programs, Government programs—education, Indians—education, Schools.

Dated: April 20, 2005.

**Michael D. Olsen,**

*Acting Principal Deputy Assistant, Secretary—Indian Affairs.*

■ For the reasons given in the preamble, parts 31 and 36 of title 25 of the Code of

Federal Regulations are amended as set forth below.

## PART 31—FEDERAL SCHOOLS FOR INDIANS

■ 1. The authority for part 31 continues to read as follows:

**Authority:** Sec. 1, 41 Stat. 410; 25 U.S.C. 282, unless otherwise noted.

■ 2. Section 31.1 is removed.

■ 3. Section 31.5 is removed.

## PART 36—MINIMUM ACADEMIC STANDARDS FOR THE BASIC EDUCATION OF INDIAN CHILDREN AND NATIONAL CRITERIA FOR DORMITORY SITUATIONS

■ 4. The authority for part 36 continues to read as follows:

**Authority:** Section 502, 25 U.S.C. 2001; section 5101, 25 U.S.C. 2001; Section 1101, 25 U.S.C. 2002; 5 U.S.C. 301; 25 U.S.C. 2 and 9; 25 S.C. 2901, Title I of P.L. 101–477.

■ 5. In § 36.1, paragraph (b) is removed and paragraph (c) is redesignated as paragraph (b).

■ 6. In § 36.2, paragraphs (a), (b), (d), and (e) are removed and the designation ''(c)'' is removed from the beginning of paragraph (c).

■ 7. In § 36.11, paragraph (c) is removed and paragraph (d) is redesignated as paragraph (c).

■ 8. In § 36.20, paragraphs (a) and (b) are removed and paragraphs (c) through (e) are redesignated as paragraphs (a) through (c).

■ 9. Subpart G, consisting of §§ 36.60 and 36.61, is removed.

■ 10. Subpart H is redesignated as subpart G.

[FR Doc. 05–8257 Filed 4–27–05; 8:45 am]

BILLING CODE 4310–02–P

## DEPARTMENT OF JUSTICE

## 28 CFR Part 28

**[Docket No. OAG 109; A.G. Order No. 2762–2005]**

**RIN 1105–AB10**

## Preservation of Biological Evidence Under 18 U.S.C. 3600A

**AGENCY:** Department of Justice.

**ACTION:** Interim rule with request for comments.

**SUMMARY:** The Department of Justice is publishing this interim rule to implement 18 U.S.C. 3600A. That statute requires the Federal Government to preserve biological evidence in Federal criminal cases in which defendants are under sentences of imprisonment, subject to certain limitations and exceptions. Subsection (e) of the statute requires the Attorney General to promulgate regulations to implement and enforce the statute. This rule adds a new subpart C to 28 CFR part 28 to effect the required implementation and enforcement of 18 U.S.C. 3600A. The new provisions added by this rule explain and interpret the evidence preservation requirement of 18 U.S.C. 3600A, and include provisions concerning sanctions for violations of that requirement.

**DATES:** *Effective Date:* This interim rule is effective April 28, 2005.

*Comment Date:* Comments must be received by June 27, 2005.

**ADDRESSES:** Comments may be mailed to David J. Karp, Senior Counsel, Office of Legal Policy, Room 4509, Main Justice Building, 950 Pennsylvania Avenue, NW., Washington, DC 20530. To ensure proper handling, please reference OAG Docket No. 109 on your correspondence. You may view an electronic version of this interim rule at *http://www.regulations.gov.* You may also comment via the Internet to the Justice Department's Office of Legal Policy (OLP) at *olpregs@usdoj.gov* or by using the *www.regulations.gov* comment form for this regulation. When submitting comments electronically you must include OAG Docket No. 109 in the subject box.

**SUPPLEMENTARY INFORMATION:** Public Law 108–405, the Justice for All Act of 2004, was enacted on October 30, 2004. Section 411 of that Act added two sections to title 18 of the United States Code. One of these, 18 U.S.C. 3600 (hereafter, ''section 3600''), is a new postconviction remedy by means of which persons convicted and imprisoned for Federal offenses may seek DNA testing in support of claims that they are actually innocent of the crimes for which they were convicted. The Act also added 18 U.S.C. 3600A (hereafter, ''section 3600A''), which requires the Government to preserve biological evidence—defined to mean ''sexual assault forensic examination kit[s]'' and ''semen, blood, saliva, hair, skin tissue, or other identified biological material''—that was secured in the investigation or prosecution of a Federal offense for which a defendant is under a sentence of imprisonment, subject to certain limitations and exceptions. The general purpose of section 3600A is to preserve biological evidence for possible DNA testing under section 3600. If a court orders, pursuant to section 3600, DNA testing of biological evidence that has been preserved in the case, the test results may shed light on the defendant's guilt or innocence of the offense by including or excluding the defendant as the source of the biological material.

Subsection (e) of section 3600A directs the Attorney General to promulgate within 180 days of the date of enactment (*i.e.*, October 30, 2004) regulations to implement and enforce section 3600A, including appropriate disciplinary sanctions to ensure compliance by employees. This interim rule carries out that direction. It adds a new Subpart C, entitled ''Preservation of Biological Evidence,'' to 28 CFR Part 28; the general subject of 28 CFR Part 28 is ''DNA Identification System.'' The new Subpart C comprises §§ 28.21 through 28.28.

The first seven sections of the new Subpart, §§ 28.21 through 28.27, primarily explain and interpret the biological evidence preservation requirement of section 3600A. This will ensure that Federal agencies clearly understand their obligations under section 3600A, including both the positive extent of the requirement to preserve biological evidence and the limitations on and exceptions to that requirement under the statute. The final section of the new Subpart, § 28.28, concerns sanctions for violations. The provisions of the regulations are as follows:

### Section 28.21

Section 28.21 notes the biological evidence preservation requirement of section 3600A, its general purpose to preserve such evidence for possible DNA testing under 18 U.S.C. 3600, and the requirement of section 3600A(e) to promulgate regulations to implement and enforce section 3600A.

### Section 28.22

Section 28.22 provides explanation concerning the applicability, duration, and meaning of the biological evidence preservation requirement, construing subsection (a) of section 3600A.

*Paragraph (a)*

Paragraph (a) in § 28.22 notes that the biological evidence preservation requirement applies to evidence retained in cases predating the enactment of section 3600A or the promulgation of this rule, as well as to evidence secured in pending and future cases. This reflects the effective date and applicability provision in section 411 of the Justice for All Act, which states that the provisions enacted by that section (including 18 U.S.C. 3600A) ''shall apply with respect to any offense committed, and to any judgment of

conviction entered, before, on, or after [the] date of enactment.'' Public Law 108–405, section 411(c).

*Paragraph (b)*

Paragraph (b) in § 28.22 interprets and specifies a number of consequences of the language in section 3600A that requires the preservation of biological evidence secured in the investigation or prosecution of a Federal offense ''if a defendant is under a sentence of imprisonment for such offense.'' 18 U.S.C. 3600A(a). The general consequence of this limitation is that section 3600A's requirement to preserve biological evidence begins to apply when a defendant is sentenced to imprisonment for the offense in whose investigation or prosecution the evidence was secured, and ceases to apply at the end of such imprisonment.

In some cases the prison terms served by defendants are extended because of convictions for additional offenses, beyond those involving the biological evidence whose preservation is required by section 3600A. This does not change the principle that the biological evidence preservation period under section 3600A(a) continues until the end of imprisonment. For example, consider a case in which a defendant is sentenced to 10 years of imprisonment for a rape in violation of 18 U.S.C. 2241, and the biological evidence is a sexual assault forensic examination kit taken from the victim of that rape. Suppose further that, before the prison term for the rape is completed, the defendant is convicted and sentenced to a consecutive 10 years of imprisonment for some other offense—*e.g.*, a commercial fraud—that was separately investigated and prosecuted and is unrelated to the rape and the biological evidence. The defendant would then not be released on completion of the 10 years of incarceration that would have resulted from the rape conviction alone, but rather is subject to an aggregate prison term of 20 years.

In such a case, the 10-year prison term the defendant received for the rape is merged into the aggregate prison term of 20 years under 18 U.S.C. 3584, and the defendant is deemed to be under a sentence of imprisonment for the rape for purposes of section 3600A's biological evidence preservation requirement until he is released following imprisonment, though that will not occur until a longer period than 10 years has elapsed. Regardless of any effect on the duration of imprisonment resulting from conviction for multiple offenses, the rule is that the biological evidence preservation period under section 3600A(a) begins when a defendant is sentenced to imprisonment for an offense in whose investigation or prosecution the evidence was secured, and ends on release of the defendant or defendants following imprisonment.

Subparagraphs (1) and (2) of paragraph (b) notes two specific consequences of the ''under a sentence of imprisonment'' limitation of section 3600A—inapplicability of the biological evidence preservation requirement of section 3600A at the investigative stage of criminal cases, preceding the conviction and sentencing to imprisonment of a defendant, and inapplicability of the biological evidence preservation requirement to cases in which the defendants receive only non-incarcerative sentences, since in these circumstances no defendant is ''under a sentence of imprisonment'' for the offense.

Paragraph (b)(3) of the regulation explains that as a further consequence of the ''under a sentence of imprisonment'' language, the biological evidence preservation requirement of section 3600A ceases to apply once the defendant or defendants are released following imprisonment, either unconditionally or under supervision. In other words, the biological evidence preservation requirement does not apply even if a defendant remains on supervised release or parole following his release. The legislative history of section 3600A confirms that the ''under a sentence of imprisonment'' language in the statute refers to circumstances in which a defendant remains incarcerated and that the biological evidence retention requirement applies only in such circumstances. See H. Rep. No. 711, 108th Cong., 2d Sess. 2 (2004) (section 3600A requires preservation of biological evidence ''while the defendant remains incarcerated''); id. at 14 (''while a defendant remains incarcerated''); H. Rep. No. 321, 108th Cong., 1st Sess. 19 (2003) (''while the defendant remains incarcerated''); id. at 29 (''while a defendant remains incarcerated''); 149 Cong. Rec. H10357 (daily ed. Nov. 5, 2003) (statement of Rep. Sensenbrenner) (''where the defendant remains incarcerated''); 149 Cong. Rec. S12296 (daily ed. Oct. 1, 2003) (section-by-section analysis inserted in record by Sen. Hatch) (''while a defendant remains incarcerated''). Release on parole, as well as release on supervised release, terminates the requirement to preserve biological evidence under section 3600A(a) in light of the clear legislative intent to have that requirement apply only while a defendant remains incarcerated, even though a parolee may validly be regarded as still in custody under the sentence imposed by the court for other purposes.

Federal agencies will be able to determine whether and when a defendant has been released following imprisonment by asking the Federal Bureau of Prisons. Several federal law enforcement agencies maintain Memorandums of Agreement with the Bureau of Prisons whereby they may directly access computer records of federal inmates to determine their incarceration status. Absent such a relationship, anyone may use the Bureau of Prisons' inmate locator service, which is available on its internet site at: *http://www.bop.gov/inmate_locator/index.jsp.* As a last resort, Bureau of Prisons staff in the Central Office's inmate locator center may be contacted at 202–307–3126.

In general, the Bureau of Prisons determines an imprisoned defendant's release date by applying the prison term specified by the court in sentencing, subject to any good conduct credit awarded under 18 U.S.C. 3624(b) and any credit for prior custody under 18 U.S.C. 3585(b). See 18 U.S.C. 3585, 3624(a). Subsequent modification of a sentence of imprisonment by the court, or reduction of the period of custody by the Bureau of Prisons as authorized by provisions relating to successful completion of drug treatment or shock incarceration programs (18 U.S.C. 3621(e)(2)(B), 4046(c)), are also given effect by the Bureau of Prisons in determining the time of release. However, subsequent occurrences that do not terminate the Bureau of Prisons' custody over a convicted defendant—such as temporary release under 18 U.S.C. 3622 or placement in a halfway house under 18 U.S.C. 3624(c)—do not constitute release following imprisonment in the relevant sense and do not terminate the requirement to preserve biological evidence under section 3600A, since the defendant remains under a sentence of imprisonment for the offense in these circumstances. In contrast to a prisoner who is released at the conclusion of imprisonment, either unconditionally or under supervision, a prisoner furloughed under 18 U.S.C. 3622 remains in the custody of the Bureau of Prisons, and a prisoner given the benefit of 18 U.S.C. 3624(c) likewise is only afforded placement in a different type of confinement near the end of his prison term while remaining in the custody of the Bureau of Prisons.

Paragraph (b)(4) of the regulation explains that the ''under a sentence of imprisonment for such offense'' language in section 3600A(a) refers to imprisonment pursuant to the sentence

imposed upon conviction, and not to imprisonment that occurs later on because of the revocation of probation, supervised release, or parole. Thus, section 3600A does not require the preservation of biological evidence when a probationer, supervised releasee, or parolee is imprisoned on revocation of release. Considerations that support this understanding of the statute include the following:

While imprisonment following a revocation of release is legally part of the penalty for the offense of conviction, see, *e.g., Johnson* v. *United States,* 529 U.S. 694, 700–01 (2000); *United States* v. *Huerta-Moran,* 352 F.3d 766, 770 (2d Cir. 2003), it is a distinct question what Congress intended in section 3600A(a) in stating that biological evidence preservation is required ''if a defendant is under a sentence of imprisonment for such offense.'' In ascertaining the legislative intent, one relevant consideration is that the statute clearly does not require the preservation of biological evidence in a case in which the defendant is only sentenced to probation and remains out on probation. This limitation is in tension with an assumption that 3600A was meant to apply for the benefit of probationers who later violate release conditions and are imprisoned following revocation, because there is no limitation under the statute on disposing of the evidence prior to the time when such a revocation occurs. Hence, the evidence could no longer exist by the time the probationer was imprisoned, making any intended benefit under the statute illusory. Likewise, section 3600A's inapplicability following the release of an initially incarcerated convict—*see* § 28.22(b)(3) in the regulations—would arguably be incongruous had Congress intended to benefit supervised releasees or parolees who violate release conditions and have their release revoked, because there is no inhibition under the statute on destroying the evidence prior to such revocation during the period of postrelease supervision.

The legislative history of title IV of the Justice for All Act (*i.e.*, the ''Innocence Protection Act'') sheds additional light on the legislative intent. The corresponding provision in the version of the Innocence Protection Act that the Senate Judiciary Committee reported in the 107th Congress used broader language—''subject to incarceration''—that could readily have been interpreted to require biological evidence preservation for the benefit of persons released on probation, supervised release, or parole in light of the possibility of later incarceration based on violations of release conditions. *See* S. 486, Rep. No. 315, 107th Cong., 2d Sess. (2002) (proposed 28 U.S.C. 2292(a) in section 101) (evidence that could be subjected to DNA testing must be preserved ''for not less than the period of time that any person remains subject to incarceration in connection with the investigation or prosecution''). Congress rejected this broader language in formulating the provisions that were ultimately enacted by the Justice for All Act, and instead adopted the narrower language that appears in section 3600A. *See* 18 U.S.C. 3600A(a) (biological evidence secured in investigation or prosecution of offense must be preserved ''if a defendant is under a sentence of imprisonment for such offense''). This supports the understanding of section 3600A as not intended to provide any benefit for defendants who are released under probation, supervised release, or parole.

The more immediate legislative history of section 3600A provides additional support for understanding the statute as concerned only with imprisonment pursuant to the original sentence, as opposed to imprisonment dependent on later release condition violations. The references to section 3600A in the legislative history do not state that biological evidence preservation is required whenever a convicted defendant is imprisoned, but rather consistently characterize section 3600A as requiring the preservation of biological evidence while a convicted defendant ''remains incarcerated.'' H. Rep. No. 711, 108th Cong., 2d Sess. 2, 14 (2004); H. Rep. No. 321, 108th Cong., 1st Sess. 19, 29 (2003); 149 Cong. Rec. H10357 (daily ed. Nov. 5, 2003) (statement of Rep. Sensenbrenner); 149 Cong. Rec. S12296 (daily ed. Oct. 1, 2003) (section-by-section analysis inserted in record by Sen. Hatch). This language (''remains incarcerated'') most naturally suggests an intention to provide a benefit or protection for defendants who are initially sentenced to incarceration, which remains applicable for as long as the incarceration continues (subject to the statute's limitations and exceptions to the preservation requirement). It does not suggest an intent to provide any benefit for a probationer who does not ''remain[] incarcerated,'' because he is not sentenced to incarceration in the first place, and only is imprisoned later on because he violates a condition of release. Likewise, it does not suggest an intent to provide any benefit to a convict who has completed the full term of imprisonment for the offense to which he was sentenced by the court; who thereafter does not ''remain[] incarcerated,'' because he is released on supervised release; and later is imprisoned again because of a release condition violation. Nor does it suggest an intent to provide any benefit to a convict eligible for parole (because the offense occurred before November 1, 1987) who does not ''remain[] incarcerated,'' but rather is released on parole, and later is reimprisoned for violating a condition of parole.

Distinguishing between convicted defendants who are under a sentence of imprisonment for the offense to which the biological evidence relates, and those who are subsequently imprisoned because they violate release conditions, is also intelligible in terms of the underlying policies of section 3600A. The general purpose of section 3600A is to preserve biological evidence for possible post-conviction DNA testing. In formulating the statute, however, Congress did not create an unqualified requirement to preserve such evidence, but rather balanced the strength of defendants' interest in the potential availability of post-conviction DNA testing against the costs and burdens of requiring that evidence be retained following conviction in criminal cases, notwithstanding the fact that the defendants in these cases have already been proven guilty beyond a reasonable doubt or have pleaded guilty. *See* 18 U.S.C. 3600A(a) (limiting preservation requirement to circumstances in which defendant is under sentence of imprisonment for offense in whose investigation or prosecution the biological evidence was secured); 18 U.S.C. 3600A(c) (specifying several exceptions to the preservation requirement).

In striking this balance, the strength of defendants' interests is defined in part in terms of the severity and likelihood of the sanctions to which they are subject. For example, section 3600A is expressly inapplicable in relation to convicts whose sanctions include only non-incarcerative sentences, such as fines, probation, or payment of restitution, because in these circumstances no defendant is ''under a sentence of imprisonment.'' 18 U.S.C. 3600A(a). While a defendant under a sentence of probation may be confined, see 18 U.S.C. 3563(b)(9)–(11), (19), and may later be imprisoned if he violates release conditions, *see* 18 U.S.C. 3565, the statute does not treat these interests as sufficient to warrant mandating that biological evidence be preserved when a defendant is on probation. Likewise, a convicted defendant who is released following completion of the term of

imprisonment to which he was sentenced for the offense is not entitled under section 3600A to the continued preservation of biological evidence relating to the offense—*see* section 28.22(b)(3) in the regulations—though he may remain under supervision following his release because of the conviction; his release may be revoked and he may be reimprisoned if he violates release conditions; and his conviction may later be relied on for sentencing enhancement if he is subsequently convicted for other crimes.

Section 28.2(b)(4) in the regulations understands section 3600A as reflecting a similar legislative judgment in relation to the class of convicted defendants whose release is revoked. The interest of this class of convicts in the preservation of biological evidence is limited by the consideration that the resulting exposure to serious sanctions is generally much less than on original sentencing for an offense. On revocation of supervised release, for example, the convict is not resentenced for the original offense at all, but rather is exposed only to relatively limited periods of imprisonment in lieu of supervision as provided in 18 U.S.C. 3583(e)(3). As a practical matter, for both probation and supervised release violations, the resulting periods of imprisonment are normally limited in duration, and usually reflect the nature of the release condition violation and the convict's criminal history, rather than the character of the offense of conviction. *See* USSG § 7B1.4. The reimprisonment of parolees on revocation of parole is provisional in character, bounded by the time remaining from the maximum prison term allowed under the original sentence, and subject to periodic reconsideration by the U.S. Parole Commission. *See* 18 U.S.C. 4208(a), (h), 4210. Moreover, in decisions about reparole following revocation, the violation of a release condition that resulted in revocation, rather than the original offense of conviction, is normally treated as the current offense to which the post-revocation imprisonment relates. *See* 28 CFR 2.21.

The foregoing considerations support the conclusion that, in the context of section 3600A, Congress would have regarded imprisonment on revocation of release as a sanction pertaining primarily to the release condition violation on which the revocation is premised, rather than ''a sentence of imprisonment for [the] offense'' of conviction in the sense of subsection (a) of section 3600A. Hence, § 28.2(b)(4) in the regulations explains that the reference in section 3600A(a) to a defendant ''under a sentence of imprisonment for such offense'' refers to a defendant who remains incarcerated pursuant to the sentence imposed by the court upon the defendant's conviction of the offense, as opposed to being incarcerated following some period of release based on a later violation of release conditions.

In addition to constituting the most plausible understanding based on the direct indicia of legislative intent, this reading of section 3600A simplifies and facilitates the implementation and administration of the statute's biological evidence preservation requirement. A contrary reading of the statute would mean that the applicability of the biological evidence preservation requirement could repeatedly come and go in the same case—inapplicable when the defendant initially receives a non-incarcerative sentence or is released following imprisonment, but later applicable, potentially following a lapse of years, if the convicted defendant violates a release condition and release is revoked. This complication in determining whether the biological evidence preservation requirement of section 3600A applies is avoided under the reading of the statute adopted in this rule.

*Paragraph (c)*

Paragraph (c) of § 28.22 explains that the requirement to ''preserve'' biological evidence under section 3600A means that such evidence cannot be destroyed or thrown away, but does not otherwise limit agency discretion concerning the storage or handling of such evidence. The statute requires that biological evidence be preserved in the circumstances it specifies, but does not purport to regulate agency practices relating to the conditions under which evidence is maintained. Agencies accordingly have the same discretion in such practices as they did prior to the enactment of section 3600A. Also, section 3600A requires that ''the Government'' preserve biological evidence under specified circumstances, but does not require that this function be assigned to any particular agency. There are accordingly no resulting restrictions on interagency transfers of biological evidence.

**Section 28.23**

Section 28.23 explains what types of evidence constitute ''biological evidence'' within the scope of section 3600A, construing the definition of ''biological evidence'' in subsection (b) of that section.

In approaching this issue, the regulations start from a recognition of the fact that practically anything secured in the investigation or prosecution of a criminal case will contain, or consist of, some matter derived from a living organism. For example, almost any object will at least have microorganisms on its surface, and if it has been in contact with human beings, it will also contain microscopic biological residues from that contact, such as sloughed off skin cells. Other items secured in a criminal case will often themselves consist of organic matter in a broad sense because the material they are made of is derived from living things—for example, paper made from wood pulp, or drugs like cocaine or opiates that are derived from plant material.

Hence, misunderstanding section 3600A as requiring the preservation of all evidence that is or contains something of a ''biological'' nature would effectively erase the distinction between ''biological evidence'' whose preservation is required under the statute and other forms of evidence, and would potentially entail the retention of vast amounts of evidence having no relationship to the legislative purpose underlying the enactment of section 3600A—*i.e.*, preserving biological evidence for the purpose of possible DNA testing under 18 U.S.C. 3600. Care is accordingly required in reading the textual definition of covered ''biological evidence'' in subsection (b) of section 3600A and, to the extent that the definition is not fully explicit concerning some interpretive issues, in resolving those issues in a manner that reflects the legislative intent.

Section 28.23 in the regulations notes the statutory definition's self-explanatory coverage of ''sexual assault forensic examination kit[s]'' as biological evidence in subsection (b)(1) of section 3600A, and provides the necessary explanation and elaboration of the general definition of biological evidence in subsection (b)(2) (''semen, blood, saliva, hair, skin tissue, or other identified biological material''). Paragraph (b) in the regulation explicates the general definition as reflecting two key limitations:

First, only identified biological material is covered. This follows from section 3600A(b)(2), which defines covered biological evidence as ''identified biological material,'' and lists by way of illustration ''semen, blood, saliva, hair, [and] skin tissue.'' This limitation is significant because the human body is continually sloughing off skin cells and, as a result, virtually any physical object or thing that has been in contact with or sufficiently near human beings will contain microscopic

biological residues from their bodies. The statutory requirement is not to preserve any and all physical things secured in criminal cases merely because it is known on theoretical grounds that human organic matter is present on their surfaces, but rather applies only to biological material that is detected and identified as such.

Second, biological material within the scope of the definition is limited to organic matter that may derive from the body of a perpetrator of the crime, and hence might be able to shed light on guilt or innocence through DNA testing under 18 U.S.C. 3600 by including or excluding the defendant as the source of the DNA in the material. This understanding follows from the legislative intent indicated by the listing of examples in section 3600A(b)(2)—''semen, blood, saliva, hair, skin tissue''—which covers the types of organic matter that are most likely to be left in identifiable form by perpetrators at crime scenes; from the enactment of section 3600A as a companion statute to 18 U.S.C. 3600, which authorizes post-conviction DNA testing in support of claims of actual innocence by applicants to determine whether they are the source of DNA in specific evidence; and from the underlying purpose of section 3600A to preserve evidence for possible DNA testing under 18 U.S.C. 3600. *See* section 3600A(c)(1), (3), (5) (requirement to preserve biological evidence does not apply if a court has denied a section 3600 motion for DNA testing of the evidence, if the defendant does not file a section 3600 motion within 180 days of notice that the evidence may be destroyed, or if the results of DNA testing under section 3600 include the defendant as the source of the evidence); 18 U.S.C. 3600(f)(1)–(2), (g)(1) (specifying consequences of DNA testing based on whether the test results are inconclusive, show that the applicant was the source of the DNA evidence, or exclude the applicant as the source of the DNA evidence).

**Sections 28.24 Through 28.26**

Sections 28.24, 28.25, and 28.26 concern the exceptions to the biological evidence preservation requirement that appear in subsection (c) of section 3600A.

Section 28.24 notes the exceptions in subsection (c)(1) and (5) of the statute, which make the biological evidence retention requirement inapplicable if a court has denied a motion for DNA testing under 18 U.S.C. 3600 and no appeal is pending, or if there has been DNA testing under 18 U.S.C. 3600 and the results included the defendant as the source of the evidence. In such cases, the underlying purpose of section 3600A to preserve evidence for possible DNA testing under 18 U.S.C. 3600 is not served, and the statute accordingly provides that the evidence preservation requirement does not apply in these circumstances.

Section 28.25 explains the exceptions in subsection (c)(2)–(3) of the statute relating to waiver of DNA testing by the defendant, and to situations in which the defendant is given notice that biological evidence may be destroyed and does not file a motion for DNA testing under 18 U.S.C. 3600 within 180 days. Section 28.25, in paragraph (b)(3), also includes specifications concerning the procedures for notifying defendants concerning the potential destruction of biological evidence and for determining whether or not a motion under 18 U.S.C. 3600 has been filed within 180 days of such notice. Paragraph (b)(3) provides that notice may be provided by certified mail, and that the Federal Bureau of Prisons (BOP) is to create a record concerning its delivery. Existing BOP procedures already comply with this requirement. *See Dusenberry* v. *United States,* 534 U.S. 161, 180 (2002) (BOP procedures require prisoner to sign log book acknowledging delivery of certified mail, and documentation by prison officer if the prisoner refuses to sign). The agency providing the notice accordingly can obtain confirmation of its delivery to the inmate to which it is addressed and the date of the delivery by asking BOP, and paragraph (b)(3) in the regulation so provides. The post-conviction DNA testing provisions in 18 U.S.C. 3600 require that proceedings under that section be conducted in the court in which the applicant was convicted of the relevant offense. 18 U.S.C. 3600(a). Paragraph (b)(3) in the regulation accordingly provides that an agency may ascertain whether a defendant has filed a motion under 18 U.S.C. 3600 within 180 days of receiving notice that biological evidence may be destroyed by checking court records or checking with the United States Attorney's office in the district in which the defendant was convicted.

Section 28.26 explains and discusses the application of the exception in subsection (c)(4) of the statute, which provides that biological evidence need not be retained if it must be returned to its owner or its retention is impracticable, so long as portions are preserved sufficient to permit DNA testing. Paragraphs (a) and (b) of § 28.26 identify common situations in which section 3600A(c)(4) does not have to be relied on to justify disposing of evidence that must be returned to its owner or whose retention is impracticable—and does not require the preservation of portions of such evidence if it is disposed of—because circumstances exist that make section 3600A entirely inapplicable to the evidence. The specific situations addressed are those in which the evidence is not retained past the investigative stage of a case and those in which the evidence does not constitute biological evidence as defined in section 3600A. Paragraph (c) of § 28.26 addresses situations in which section 3600A(c)(4) does have to be relied on to dispose of evidence that must be returned to the owner or whose retention is impracticable, and the requirement to preserve portions sufficient for future DNA testing in these situations.

**Section 28.27**

This section of the regulations notes the specification in subsection (d) of section 3600A that section 3600A's biological evidence preservation requirement does not preempt or supersede other requirements to preserve evidence.

**Section 28.28**

The final section of the new Subpart, § 28.28, concerns sanctions for violations. At a practical level, the greatest impact of the requirement of section 3600A and these regulations to preserve biological evidence secured in the investigation or prosecution of Federal offenses will be on the Department of Justice, because Department of Justice investigative agencies, and particularly the FBI, conduct most investigations of Federal offenses in which biological evidence may be secured, and because the litigating components of the Department of Justice conduct all prosecutions of Federal offenses. However, section 3600A requires ''the Government''—not just agencies within the Department of Justice—to preserve biological evidence. Section 3600A and its implementing rule accordingly are not limited in their application to Justice Department components, but potentially affect all agencies of the Federal Government that may secure biological evidence in the investigation or prosecution of Federal offenses, or may become holders or custodians of such evidence after it is secured. All such agencies provide disciplinary sanctions for violations of statutory or regulatory requirements by their employees, and paragraph (a) of § 28.28 provides that employees who violate the provisions of section 3600A or this rule shall be subject to the disciplinary sanctions authorized by the

rules or policies of their employing agencies.

Section 3600A and these regulations will not, however, generally affect the Department of Defense and its components, since their investigative and prosecutorial jurisdiction relates to offenses under the Uniform Code of Military Justice (UCMJ), committed by members of the Armed Forces, who would be prosecuted in court martial proceedings. These are not investigations or prosecutions for a ''Federal offense'' within the meaning of 18 U.S.C. 3600A. Among other considerations, this is clear from the formulation of section 3600A's companion statute, 18 U.S.C. 3600, which requires that an application for post-conviction DNA testing be made to the court that entered the judgment of conviction for the relevant ''Federal offense.'' See 18 U.S.C. 3600(a). This is impossible in relation to UCMJ offenses, which are adjudicated by courts martial that are convened to try particular cases, and do not exist as permanent courts. Moreover, pre-enactment versions of the Innocence Protection Act would have applied the post-conviction DNA testing and biological evidence retention provisions to UCMJ offenses, dealing with the nonexistence of permanent military trial courts by specifying that postconviction DNA testing applications by military offenders would be presented to the district court having jurisdiction over the place where the court martial was convened. See S. 486, Rep. No. 315, 107th Cong., 2d Sess. (2002) (proposed 28 U.S.C. 2291(a), (i), 2292(a) in section 101). But the enacted statutes substituted provisions that include no affirmative mention of UCMJ offenses and whose application to UCMJ offenses is literally impossible. Hence, it is clear that Congress rejected the application of the new postconviction DNA testing and biological evidence preservation requirements in contexts that would affect the Department of Defense.

Paragraph (b) of § 28.28 notes that violations of section 3600A are also subject to criminal sanctions in certain circumstances, pursuant to subsection (f) of section 3600A.

Subsection (g) of section 3600A states that ''[n]othing in this section shall provide a basis for relief in any Federal habeas corpus proceeding.'' The inclusion of this provision in the statute reflects a legislative intent that section 3600A's requirements are to be enforced through the disciplinary sanctions referenced in subsection (e) of the statute and the criminal sanctions authorized by subsection (f) of the statute, rather than by enlarging the grounds for overturning criminal convictions in postconviction proceedings. Hence, a failure to preserve biological evidence as required by section 3600A does not provide any basis for a convict to challenge his or her conviction for the offense to which the evidence relates. Paragraph (c) of § 28.28 notes the means that are available and the means that are unavailable for the enforcement of section 3600A.

**Administrative Procedure Act**

The implementation of this rule as an interim rule, with provision for post-promulgation public comments, is based on the exception found at 5 U.S.C. 553(a)(2) for ''matter[s] relating to * * * public property,'' and on the ''good cause'' exceptions found at 5 U.S.C. 553(b)(3)(B).

The ''public property'' exception found at 5 U.S.C. 553(a)(2) applies to ''property held by the United States in trust or as guardian,'' as well as to property owned by the Federal Government. H.R. Rep. No. 1980, 79th Cong., 2d Sess. 23 (1946); Attorney General's Manual on the Administrative Procedure Act 27 (1947). This rule concerns the requirement of 18 U.S.C. 3600A that the Government preserve biological evidence secured in the investigation or prosecution of Federal offenses. Hence, the rule is about the Government's management of property in its possession, and it involves matters relating to such property ''clearly and directly.'' H.R. Rep. No. 1980, 79th Cong, 2d Sess. 23 (1946). ''Biological evidence'' in the relevant sense is defined to mean ''sexual assault forensic examination kit[s]'' and ''semen, blood, saliva, hair, skin tissue, or other identified biological material.'' 18 U.S.C. 3600A(b). Normally, the Government exercises exclusive ownership of such property, in that no private party claims any right to or interest in its possession; the Government retains the property for as long as it is needed for evidentiary purposes; and the Government ultimately decides whether and when to dispose of the property, subject to legal requirements. Occasionally, biological evidence in the relevant sense is embedded in some larger object or item that must be returned to its owner—for example, blood-stained upholstery in a stolen car that was used in the commission of a crime.

Even in such a case, however, the Government acquires a sufficient proprietary interest in the item to function as its guardian while it is needed for evidentiary purposes, and to remove and preserve portions of it sufficient to permit DNA testing. See 42 U.S.C. 10607(c)(6) (Government to ensure that property of victim is maintained in good condition and returned when ''it is no longer needed for evidentiary purposes''); 18 U.S.C. 3600A(c)(4) (Government to preserve portions sufficient to permit DNA testing where evidence must be returned to owner). The requirements of 5 U.S.C. 553 accordingly do not apply to this rule because it involves ''matter[s] relating to * * * public property.'' 5 U.S.C. 553(a)(2).

There are also features of 18 U.S.C. 3600A that indicate that Federal agencies need not implement the evidence preservation requirement until the Attorney General issues regulations, see 18 U.S.C. 3600A(e), and affected Federal agencies will have no authoritative guidance concerning the meaning of 18 U.S.C. 3600A's provisions until the Attorney General issues such regulations. Hence, delay in the issuance of an effective implementing rule could result in the loss or destruction of biological evidence that would otherwise be preserved pursuant to 18 U.S.C. 3600A. To the extent this occurred, it would thwart the objective of 18 U.S.C. 3600A to preserve biological evidence for purposes of possible DNA testing under 18 U.S.C. 3600—testing that might exonerate an innocent defendant who was wrongly convicted, or confirm guilt if the defendant was in fact the perpetrator. It would accordingly be contrary to the public interest to adopt this rule with the prior notice and comment period normally required under 5 U.S.C. 553(b) or with the delayed effective date normally required under 5 U.S.C. 553(d).

The Department will carefully consider comments that it receives on this interim rule and will issue a final rule in as timely a manner as feasible. The Department seeks comment on an appropriate performance standard to ensure that biological evidence is preserved in a manner that will allow for effective DNA testing.

**Regulatory Flexibility Act**

The Attorney General, in accordance with the Regulatory Flexibility Act (5 U.S.C. 605(b)), has reviewed this regulation and by approving it certifies that this regulation will not have a significant economic impact on a substantial number of small entities for the following reason: The regulation concerns the preservation by the Federal Government of biological evidence secured in the investigation or prosecution of Federal offenses.

**Executive Order 12866**

This regulation has been drafted and reviewed in accordance with Executive Order 12866, ''Regulatory Planning and Review,'' section 1(b), Principles of Regulation. The Department of Justice has determined that this rule is a ''significant regulatory action'' under Executive Order 12866, section 3(f), and accordingly this rule has been reviewed by the Office of Management and Budget.

**Executive Order 13132**

This regulation 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. Therefore, in accordance with Executive Order 13132, it is determined that this rule does not have sufficient federalism implications to warrant the preparation of a Federalism Assessment.

**Executive Order 12988—Civil Justice Reform**

This regulation meets the applicable standards set forth in sections 3(a) and 3(b)(2) of Executive Order 12988.

**Unfunded Mandates Reform Act of 1995**

This rule will not result in the expenditure by State, local and tribal governments, in the aggregate, or by the private sector, of $100 million or more in any one year, and it will not significantly or uniquely affect small governments. Therefore, no actions were deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995.

**Small Business Regulatory Enforcement Fairness Act of 1996**

This rule is not a major rule as defined by section 251 of the Small Business Regulatory Enforcement Fairness Act of 1996. 5 U.S.C. 804. This rule will not result in an annual effect on the economy of $100 million or more; a major increase in costs or prices; or significant adverse effects on competition, employment, investment, productivity, or innovation, or on the ability of United States-based companies to compete with foreign-based companies in domestic and export markets.

**List of Subjects in 28 CFR Part 28**

Crime, Information, Law enforcement, Prisons, Prisoners, Records, Probation and parole.

■ For the reasons stated in the preamble, the Department of Justice amends 28 CFR chapter I, part 28, as follows:

## PART 28—DNA IDENTIFICATION SYSTEM

■ 1. The authority citation for part 28 is revised to read as follows:

**Authority:** 28 U.S.C. 509, 510; 42 U.S.C. 14132, 14135a, 14135b; 10 U.S.C. 1565; 18 U.S.C. 3600A; Pub. L. 106–546, 114 Stat. 2726; Pub. L. 107–56, 115 Stat. 272; Pub. L. 108–405, 118 Stat. 2260.

■ 2. Part 28 is amended by adding a new Subpart C, as follows:

### Subpart C—Preservation of Biological Evidence

Sec.
28.21 Purpose.
28.22 The requirement to preserve biological evidence.
28.23 Evidence subject to the preservation requirement.
28.24 Exceptions based on the results of judicial proceedings.
28.25 Exceptions based on a defendant's conduct.
28.26 Exceptions based on the nature of the evidence.
28.27 Non-preemption of other requirements.
28.28 Sanctions for violations.

## Subpart C—Preservation of Biological Evidence

### § 28.21 Purpose.

Section 3600A of title 18 of the United States Code (''section 3600A'') requires the Government to preserve biological evidence that was secured in the investigation or prosecution of a Federal offense, if a defendant is under a sentence of imprisonment for such offense, subject to certain limitations and exceptions. The general purpose of this requirement is to preserve biological evidence for possible DNA testing under 18 U.S.C. 3600. Subsection (e) of section 3600A requires the Attorney General to promulgate regulations to implement and enforce section 3600A, including appropriate disciplinary sanctions to ensure that employees comply with such regulations.

### § 28.22 The requirement to preserve biological evidence.

(a) Applicability in general. The requirement of section 3600A to preserve biological evidence applies to evidence that has been retained in cases in which the offense or conviction occurred prior to the enactment of section 3600A or the adoption of this subpart, as well as to evidence secured in pending and future cases.

(b) Limitation to circumstances in which a defendant is under a sentence of imprisonment for the offense. The requirement of section 3600A to preserve biological evidence secured in the investigation or prosecution of a Federal offense begins to apply when a defendant is convicted and sentenced to imprisonment for the offense, and ceases to apply when the defendant or defendants are released following such imprisonment. The evidence preservation requirement of section 3600A does not apply in the following situations:

(1) Inapplicability at the investigative stage. The requirement of section 3600A to preserve biological evidence does not apply at the investigative stage of criminal cases, occurring prior to the conviction and sentencing to imprisonment of a defendant. Biological evidence may be collected and preserved in the investigation of Federal offenses prior to the sentencing of a defendant to imprisonment, reflecting sound investigative practice and the need for evidence in trial proceedings that may result from the investigation, but section 3600A does not govern these activities.

(2) Inapplicability to cases involving only non-incarcerative sentences. The requirement of section 3600A to preserve biological evidence does not apply in cases in which defendants receive only nonincarcerative sentences, such as probation, fines, or payment of restitution.

(3) Inapplicability following release. The requirement of section 3600A to preserve biological evidence ceases to apply when the defendant or defendants are released following imprisonment, either unconditionally or under supervision. The requirement does not apply during any period following the release of the defendant or defendants from imprisonment, even if the defendant or defendants remain on supervised release or parole.

(4) Inapplicability following revocation of release. The requirement of section 3600A to preserve biological evidence applies during a defendant's imprisonment pursuant to the sentence imposed upon conviction of the offense, as opposed to later imprisonment resulting from a violation of release conditions. The requirement does not apply during any period in which the defendant or defendants are imprisoned based on the revocation of probation, supervised release, or parole.

(c) Conditions of preservation. The requirement of section 3600A to preserve biological evidence means that such evidence cannot be destroyed or disposed of under the circumstances in which section 3600A requires its preservation, but does not limit agency

discretion concerning the conditions under which biological evidence is maintained or the transfer of biological evidence among different agencies.

**§ 28.23 Evidence subject to the preservation requirement.**

(a) Biological evidence generally. The evidence preservation requirement of section 3600A applies to ''biological evidence,'' which is defined in section 3600A(b). The covered evidence is sexual assault forensic examination kits under section 3600A(b)(1) and semen, blood, saliva, hair, skin tissue, or other identified biological material under section 3600A(b)(2).

(b) Biological evidence under section 3600A(b)(2). Biological evidence within the scope of section 3600A(b)(2) is identified biological material that may derive from a perpetrator of the offense, and hence might be capable of shedding light on the question of a defendant's guilt or innocence through DNA testing to determine whether the defendant is the source of the material. In greater detail, evidence within the scope of section 3600A(b)(2) encompasses the following:

(1) Identified biological material. Beyond sexual assault forensic examination kits, which are specially referenced in section 3600A(b)(1), section 3600A requires preservation only of evidence that is detected and identified as semen, blood, saliva, hair, skin tissue, or some other type of biological material. Section 3600A's preservation requirement does not apply to an item of evidence merely because it is known on theoretical grounds that physical things that have been in proximity to human beings almost invariably contain unidentified and imperceptible amounts of their organic matter.

(2) Material that may derive from a perpetrator of the crime. Biological evidence within the scope of section 3600A(b)(2) must constitute ''biological material.'' In the context of section 3600A, this term does not encompass all possible types of organic matter, but rather refers to organic matter that may derive from the body of a perpetrator of the crime, and hence might be capable of shedding light on a defendant's guilt or innocence by including or excluding the defendant as the source of its DNA.

*Example 1.* In a murder case in which the victim struggled with the killer, scrapings of skin tissue or blood taken from under the victim's fingernails would constitute biological material in the sense of section 3600A(b)(2), and would be subject to section 3600A's requirement to preserve biological evidence, assuming satisfaction of the statute's other conditions. Such material, which apparently derives from the perpetrator of the crime, could potentially shed light on guilt or innocence through DNA testing under 18 U.S.C. 3600 to determine whether a defendant was the source of this material.

*Example 2.* Biological material in the sense of section 3600A(b)(2) would not include the body of a murder victim who was shot from a distance, the carcasses of cattle in a meat truck secured in an investigation of the truck's hijacking, a quantity of marijuana seized in a drug trafficking investigation, or articles made from wood or from wool or cotton fiber. While such items of evidence constitute organic matter in a broader sense, they are not biological material within the scope of section 3600A(b)(2), because they do not derive from the body of a perpetrator of the crime, and hence could not shed light on a defendant's guilt or innocence through DNA testing under 18 U.S.C. 3600 to determine whether the defendant is the source of the evidence.

**§ 28.24 Exceptions based on the results of judicial proceedings.**

Subsection (c) of section 3600A makes the biological evidence preservation requirement inapplicable in two circumstances relating to the results of judicial proceedings:

(a) Judicial denial of DNA testing. Section 3600A(c)(1) exempts situations in which a court has denied a motion for DNA testing under 18 U.S.C. 3600 and no appeal is pending.

(b) Inclusion of defendant as source. Section 3600A(c)(5) exempts situations in which there has been DNA testing under 18 U.S.C. 3600 and the results included the defendant as the source of the evidence.

**§ 28.25 Exceptions based on a defendant's conduct.**

Subsection (c) of section 3600A makes the biological evidence preservation requirement inapplicable in two circumstances relating to action (or inaction) by the defendant:

(a) Waiver by defendant. Section 3600A(c)(2) makes the biological evidence preservation requirement inapplicable if the defendant knowingly and voluntarily waived DNA testing in a court proceeding conducted after the date of enactment, *i.e.*, after October 30, 2004. Hence, for example, if a defendant waives DNA testing in the context of a plea agreement, in a pretrial colloquy with the court, in the course of discovery in pretrial proceedings, or in a postconviction proceeding, and the proceeding in which the waiver occurs takes place after October 30, 2004, the biological evidence preservation requirement of section 3600A does not apply.

(b) Notice to defendant. (1) Section 3600A(c)(3) makes the biological evidence preservation requirement inapplicable if the defendant is notified that the biological evidence may be destroyed ''after a conviction becomes final and the defendant has exhausted all opportunities for direct review of the conviction,'' and ''the defendant does not file a motion under section 3600 within 180 days of receipt of the notice.''

(2) Effective notice concerning the possible destruction of biological evidence for purposes of section 3600A(c)(3) cannot be given if the case is pending on direct review of the conviction before a court of appeals or the Supreme Court, if time remains for the defendant to file a notice of appeal from the judgment of conviction in the court of appeals, or if time remains for the defendant to file a petition for certiorari to the Supreme Court following the court of appeals' determination of an appeal of the conviction.

(3) Once direct review has been completed, or the time for seeking direct review has expired, section 3600A(c)(3) allows notice to the defendant that biological evidence may be destroyed. The biological evidence preservation requirement of section 3600A thereafter does not apply, unless the defendant files a motion under 18 U.S.C. 3600 within 180 days of receipt of the notice. Notice to a defendant that biological evidence may be destroyed may be provided by certified mail, and the Federal Bureau of Prisons shall create a record concerning the delivery of such mail to an inmate. To determine whether a defendant has filed a motion under 18 U.S.C. 3600 within 180 days of receipt of such a notice, the agency providing the notice may obtain confirmation of delivery and the date of delivery by inquiry with the Federal Bureau of Prisons, and may ascertain whether the defendant has filed a motion under 18 U.S.C. 3600 within 180 days of that date by checking the records of the district court which entered the judgment of conviction of the defendant for the offense or asking the United States Attorney's office in that district.

**§ 28.26 Exceptions based on the nature of the evidence.**

Subsection (c)(4) of section 3600A provides that the section's biological evidence preservation requirement does not apply if ''the evidence must be returned to its rightful owner, or is of such a size, bulk, or physical character as to render retention impracticable.'' This exception is subject to the condition that the Government must ''take[] reasonable measures to remove and preserve portions of the material

evidence sufficient to permit future DNA testing.''

(a) Evidence not retained beyond the investigative stage. Section 3600A(c)(4) has no application if items of the sort it describes—*e.g.*, items that must be returned to the rightful owner, or items that are so large that their retention is impracticable—are not kept until the time when a defendant is convicted and sentenced to imprisonment. Investigative agents may take samples from such items during the investigative stage of the case, in accordance with their judgment about what is needed for purposes of DNA testing or other evidentiary use, or may conclude that the nature of the items does not warrant taking such samples, and the items themselves may then be returned to the owners or otherwise disposed of prior to the trial, conviction, or sentencing of any defendant. In such cases, section 3600A is inapplicable, because its evidence preservation requirement does not apply at all until a defendant is sentenced to imprisonment, as noted in § 28.22(b)(1).

(b) Evidence not constituting biological material. It is rarely the case that a bulky item of the sort described in section 3600A(c)(4), or a large part of such an item, constitutes biological evidence as defined in section 3600A(b). If such an item is not biological evidence in the relevant sense, it is outside the scope of section 3600A. For example, the evidence secured in the investigation of a bank robbery may include a stolen car that was used in the getaway, and there may be some item in the car containing biological material that derives from a perpetrator of the crime, such as saliva on a discarded cigarette butt. Even if the vehicle is kept until a defendant is sentenced to imprisonment, section 3600A's preservation requirement would not apply to the vehicle as such, because the vehicle is not biological material. It would be sufficient for compliance with section 3600A to preserve the particular items in the vehicle that contain identified biological material or portions of them that contain the biological material.

(c) Preservation of portions sufficient for DNA testing. If evidence described in section 3600A(c)(4) is not otherwise exempt from the preservation requirement of section 3600A, and section 3600A(c)(4) is relied on in disposing of such evidence, reasonable measures must be taken to preserve portions of the evidence sufficient to permit future DNA testing. For example, considering a stolen car used in a bank robbery, it may be the case that one of the robbers was shot during the getaway and bled all over the interior of the car. In such a case, if the car is kept until a defendant is sentenced to imprisonment for the crime, there would be extensive biological material in the car that would potentially be subject to section 3600A's requirement to preserve biological evidence. Moreover, the biological material in question could not be fully preserved without retaining the whole car or removing and retaining large amounts of matter from the interior of the car. Section 3600A(c)(4) would be relevant in such a case, given that fully retaining the biological evidence is likely to be impracticable or inconsistent with the rightful owner's entitlement to the return of the vehicle. In such a case, section 3600A(c)(4) could be relied on, and its requirements would be satisfied if samples of the blood were preserved sufficient to permit future DNA testing. Preserving such samples would dispense with any need under section 3600A to retain the vehicle itself or larger portions thereof.

**§ 28.27 Non-preemption of other requirements.**

Section 3600A's requirement to preserve biological evidence applies cumulatively with other evidence retention requirements. It does not preempt or supersede any statute, regulation, court order, or other provision of law that may require evidence, including biological evidence, to be preserved.

**§ 28.28 Sanctions for violations.**

(a) Disciplinary sanctions. Violations of section 3600A or of this subpart by Government employees shall be subject to the disciplinary sanctions authorized by the rules or policies of their employing agencies for violations of statutory or regulatory requirements.

(b) Criminal sanctions. Violations of section 3600A may also be subject to criminal sanctions as prescribed in subsection (f) of that section. Section 3600A(f) makes it a felony offense, punishable by up to five years of imprisonment, for anyone to knowingly and intentionally destroy, alter, or tamper with biological evidence that is required to be preserved under section 3600A with the intent to prevent that evidence from being subjected to DNA testing or prevent the production or use of that evidence in an official proceeding.

(c) No effect on validity of convictions. Section 3600A's requirements are enforceable through the disciplinary sanctions and criminal sanctions described in paragraphs (a) and (b) of this section. A failure to preserve biological evidence as required by section 3600A does not provide a basis for relief in any postconviction proceeding.

Dated: April 25, 2005.

**Alberto R. Gonzales,**

*Attorney General.*

[FR Doc. 05–8556 Filed 4–26–05; 11:30 am]

BILLING CODE 4410–19–P

## ENVIRONMENTAL PROTECTION AGENCY

## 40 CFR Part 52

**[R01–OAR–2004–ME–0004; A–1–FRL–7900–6]**

## Approval and Promulgation of Air Quality Implementation Plans; Maine; Low Emission Vehicle Program

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Final rule.

**SUMMARY:** EPA is approving a State Implementation Plan (SIP) revision submitted by the State of Maine on February 25, 2004 and December 9, 2004 which includes the Maine Low Emission Vehicle (LEV) Program. It was proposed for approval on January 24, 2005 (70 FR 3335). EPA received an adverse comment on the proposal, which is addressed in this action. The regulations adopted by Maine include the California LEV I light-duty motor vehicle emission standards beginning with model year 2001, the California LEV II light-duty motor vehicle emission standards effective in model year 2004, the California LEV I medium-duty standards effective in model year 2003, and the smog index label specification effective model year 2002. The Maine LEV regulation submitted does not include any zero emission vehicle (ZEV) requirements. Maine has adopted these revisions to reduce emissions of volatile organic compounds (VOC) and nitrogen oxides ($NO_X$) in accordance with the requirements of the Clean Air Act (CAA). In addition, they have worked to ensure that their program is identical to California's, as required by section 177 of the CAA. The intended effect of this action is to approve the Maine LEV program. This action is being taken under section 110 of the Clean Air Act.

**DATES:** Effective Date: This rule will become effective on May 31, 2005.

**ADDRESSES:** EPA has established a docket for this action under Regional Material in EDocket (RME) Docket ID Number R01-OAR–2004-ME–0004. All documents in the docket are listed in

the Regional Material in EDocket (RME) index at *http://docket.epa.gov/rmepub/,* once in the system, select ''quick search,'' then key in the appropriate RME Docket identification number. Although listed in the electronic docket, 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 Regional Material in EDocket or in hard copy at the Office of Ecosystem Protection, U.S. Environmental Protection Agency, EPA New England Regional Office, One Congress Street, Suite 1100, Boston, MA. EPA requests that if at all possible, you contact the contact listed in the **FOR FURTHER INFORMATION CONTACT** section to schedule your inspection. The Regional Office's official hours of business are Monday through Friday, 8:30 to 4:30 excluding Federal Holidays.

Copies of the documents relevant to this action are also available for public inspection during normal business hours, by appointment at the Air and Radiation Docket and Information Center, U.S. Environmental Protection Agency, Room B–108, 1301 Constitution Avenue, NW., Washington, DC; and the Bureau of Air Quality Control, Department of Environmental Protection, First Floor of the Tyson Building, Augusta Mental Health Institute Complex, Augusta, ME 04333–0017.

**FOR FURTHER INFORMATION CONTACT:** Robert C. Judge, Air Quality Unit, U.S. Environmental Protection Agency, EPA New England Regional Office, One Congress Street, Suite 1100 (CAQ), Boston, MA 02114–2023, (617) 918–1045, *judge.robert@epa.gov.*

**SUPPLEMENTARY INFORMATION:** EPA is approving a State Implementation Plan (SIP) revision submitted by the State of Maine on February 25, 2004 and December 9, 2004 which includes the Maine Low Emission Vehicle (LEV) Program. It was proposed for approval on January 24, 2005 (70 FR 3335). EPA received an adverse comment on the proposal from PretiFlaherty, a law firm representing the Maine Automobile Dealers Association (MADA) by letter dated February 22, 2005. MADA had two comments.

First, MADA argued that ''Maine's LEV program is not consistent with the requirement of the Clean Air Act because Maine's program does not contain a denial of registration provision.'' And as a result, this effects the level of emission reductions from the program and as such is not identical to California's program as required by section 177 of the Clean Air Act. Second, MADA takes exception to our reference to Executive Order 13132, where we assert that this will not affect the distribution of power between Maine and EPA under the Clean Air Act, because, in MADA's opinion, the fact that it is approved into the SIP ''gives EPA veto power/approval control over any subsequent amendments * * *'' to Maine's regulations.

On the first point, MADA contends that Maine's enforcement scheme is less effective than one which denies registration to new vehicles which are not LEV certified. EPA and Maine agree, which is why Maine suggested and EPA proposed that Maine should achieve 90 percent of the benefit that a program which does deny registration to a vehicle which is not certified as LEV. However, the Clean Air Act does not require that these LEV programs include registration denial for new vehicles in a given State which are not LEV certified. In order to achieve the full environmental benefits of the LEV program, California did not and does not allow new vehicles which are not LEV certified to be registered in their State. When Massachusetts and New York adopted their versions of the California LEV program, they enforced it the same way. EPA approved those programs into the SIP, and provided those States with emission reduction credit assuming all newer vehicles in those States would be California certified. Since Maine is not assured of that same fact, it was not proposed to be awarded the same amount of credit. (As stated in the NPR , EPA currently estimates that a registration-based California LEV program will provide about 1 percent additional reductions in mobile source VOC and 2 percent in air toxics over the Federal Tier 2 program in 2020 with the program beginning in 2004. We expect no discernible $NO_X$ benefit. As such, Maine would achieve about a 0.9% VOC and 1.8% air toxic by its implementation of the LEV program.)

Section 177 of the Clean Air Act requires any State which is adopting a new motor vehicle emissions program, to adopt standards which are identical to those in California. This section does not require the adopting State to incorporate all the provisions contained in California's emissions program. Enforcement provisions, for example, need not be identical. However, section 177 prohibits States from adopting any standards which could have the effect of creating a third vehicle. As Maine's program is enforced, no such ''third vehicle'' would be created by the fact that new Federal tier 2 vehicles might be registered in Maine based on their enforcement scheme. It does not establish a new standard for vehicle manufacturers to meet. It is also instructive to note that, in the cases of California, Massachusetts and New York, used vehicles which have more than 7,500 miles on the odometer, may be registered in these States, regardless of whether or not they are LEV certified. Because of the fact that used vehicles may be sold into these States at different rates could effect each programs' actual benefits. Further, even minor differences in each State's ability to ensure that only California-certified new vehicles are registered could also effect each programs' benefits. However, we do not believe that this in any way creates a third car or violates the intent of section 177 of the CAA regarding identicality.

It is instructive to note that no automobile manufacturer or association supported MADA's contention regarding this issue of creating a ''third car.'' EPA does believe that the Federal tier 2 program is an effective pollution control strategy, achieving most of the reductions that the California program achieves. We agree with MADA that the Maine LEV program would be more effective in Maine at achieving pollution reductions if such a registration-based program were implemented. However, EPA does not believe that Maine's lack of such an enforcement scheme in any way violates section 177 of the CAA.

On the second point, we do not agree. EPA is approving an existing state rule, and EPA's approval of that rule does not in any way effect the rule that has been promulgated by the State. Chapter 127 is presently in effect in Maine, and EPA's approval does not impact the distribution of power between EPA and Maine, as discussed in Executive Order 13132. It is true that if, in the future, Maine utilizes the emission reductions from this program as part of its strategy to ensure clean air for its citizens as part of its State Implementation Plan (SIP), EPA may object to subsequent State-initiated changes to this rule which relax the level of pollution reductions from the strategy. But EPA would only do so if the State were not replacing the emission reductions which were incorporated into the SIP. In all cases, except when the Clean Air Act prescribes a specific control measure, States are free to modify their air quality strategies in the SIP as long as they maintain the level of reductions necessary to achieve its clean air

objectives for its citizens, as provided by section 110(l) of the CAA. This is true of the Low Emission Vehicle Program. If the State so chose in the future, it may modify this program, subject to the limitation described above. But it does not give EPA veto power or approval control over subsequent changes to the program, including the entire program's repeal.

Other specific requirements of Maine's program and the rationale for EPA's proposed action are explained in the NPR and will not be restated here.

*Final Action:* EPA is approving a SIP revision at the request of the Maine DEP. This version of the rule entitled ''Chapter 127: New motor Vehicle Emission Standards'' was adopted by Maine with an effective date of December 31, 2000. It was submitted to EPA for approval on February 25, 2004. That submittal was later clarified on December 9, 2004 to justify the level of emission reductions expected from this program. This approves the State achieving 90 percent of the credit achieved by States that implement the California LEV program through a registration-based enforcement system. The regulation adopted by Maine includes the LEV I light-duty program beginning with model year 2001 in Maine, the California LEV II light-duty motor vehicle emission standards effective in model year 2004, the California LEV I medium-duty standards effective in model year 2003, and the smog index label specification effective model year 2002. EPA is approving the Maine low emission vehicle program requirements into the SIP because EPA has found that the requirements are consistent with the CAA.

**Statutory and Executive Order Reviews**

Under Executive Order 12866 (58 FR 51735, October 4, 1993), this action is not a ''significant regulatory action'' and therefore is not subject to review by the Office of Management and Budget. For this reason, this action is also not subject to Executive Order 13211, ''Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use'' (66 FR 28355, May 22, 2001). This action merely approves state law as meeting Federal requirements and imposes no additional requirements beyond those imposed by state law. Accordingly, the Administrator certifies that this rule will not have a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). Because this rule approves pre-existing requirements under state law and does not impose any additional enforceable duty beyond that required by state law, it does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4).

This rule also does not have tribal implications because it will not have a substantial direct effect on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes, as specified by Executive Order 13175 (65 FR 67249, November 9, 2000). This action also does not have Federalism implications because it does not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132 (64 FR 43255, August 10, 1999), because it merely approves a state rule implementing a Federal standard, and does not alter the relationship or the distribution of power and responsibilities established in the Clean Air Act. This rule also is not subject to Executive Order 13045 ''Protection of Children from Environmental Health Risks and Safety Risks'' (62 FR 19885, April 23, 1997), because it is not economically significant.

In reviewing SIP submissions, EPA's role is to approve state choices, provided that they meet the criteria of the Clean Air Act. In this context, in the absence of a prior existing requirement for the State to use voluntary consensus standards (VCS), EPA has no authority to disapprove a SIP submission for failure to use VCS. It would thus be inconsistent with applicable law for EPA, when it reviews a SIP submission, to use VCS in place of a SIP submission that otherwise satisfies the provisions of the Clean Air Act. Thus, the requirements of section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) do not apply. This rule does not impose an information collection burden under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*)

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

Under section 307(b)(1) of the Clean Air Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by June 27, 2005. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this rule for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements. (See section 307(b)(2).)

**List of Subjects in 40 CFR Part 52**

Environmental protection, Air pollution control, Carbon monoxide, Incorporation by reference, Intergovernmental relations, Nitrogen dioxide, Ozone, Reporting and recordkeeping requirements, Volatile organic compounds.

Dated: April 7, 2005.

**Robert W. Varney,**

*Regional Administrator, EPA New England.*

■ Part 52 of chapter I, title 40 of the Code of Federal Regulations is amended as follows:

## PART 52—[AMENDED]

■ 1. The authority citation for part 52 continues to read as follows:

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

## Subpart U—Maine

■ 2. Section 52.1020 is amended by adding paragraph (c)(58) to read as follows:

### § 52.1020 Identification of plan.

* * * * *

(c) * * *

(58) Revisions to the State Implementation Plan submitted by the Maine Department of Environmental Protection on February 25, 2004 and December 9, 2004 submitting Maine's Low Emission Vehicle Program.

(i) Incorporation by reference.

(A) Chapter 127 of the Maine Department of Environmental Protection rules entitled ''New Motor Vehicle Emission Standards'' with an effective

date of December 31, 2000, including the Basis Statements and Appendix A.

■ 3. In § 52.1031 Table 52.1031 is amended by adding a new state citation for Maine Chapter 127; ''New Motor Vehicle Emission Standards'' to read as follows:

**§ 52.1031—EPA—approved Maine regulations.**

* * * * *

TABLE 52.1031.—EPA-APPROVED RULES AND REGULATIONS

| State | Title/subject | Date adopted by State | Date approved by EPA | Federal Register citation | 52.1020 | |
|---|---|---|---|---|---|---|
| * | * | * | * | * | * | * |
| 127 ..... | New Motor Vehicle Emission Standards. | December 31, 2000. | April 28, 2005 ..... | [Insert FR citiation published date. | (c)(58) | Low emission vehicle program, with no ZEV requirements. Program achieves 90% of full LEV benefits. |
| * | * | * | * | * | * | * |

Note.—1. The regulations are effective statewide unless stated otherwise in comments section.

[FR Doc. 05–8528 Filed 4–27–05; 8:45 am]

**BILLING CODE 6560–50–P**

## ENVIRONMENTAL PROTECTION AGENCY

## 40 CFR Part 180

**[OPP–2005–0083; FRL–7706–7]**

## Bacillus thuringiensis VIP3A Protein and the Genetic Material Necessary for its Production; Temporary Exemption From the Requirement of a Tolerance

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Final rule.

**SUMMARY:** This regulation establishes an extension of the temporary exemption from the requirement of a tolerance for residues of *Bacillus thuringiensis* VIP3A protein and the genetic material necessary for its production on cotton when applied/used as a plant-incorporated protectant. Syngenta Seeds submitted a petition to EPA under the Federal Food, Drug, and Cosmetic Act (FFDCA), as amended by the Food Quality Protection Act of 1996 (FQPA), requesting this extension. This regulation eliminates the need to establish a maximum permissible level for residues of *Bacillus thuringiensis* VIP3A protein and the genetic material necessary for its production on cotton. The temporary tolerance exemption will expire on May 1, 2006.

**DATES:** This regulation is effective April 28, 2005. Objections and requests for hearings must be received on or before June 27, 2005.

**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 identification (ID) number OPP–2005–0083. 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:** Sharlene Matten, Biopesticides and Pollution Prevention Division (7511C), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001; telephone number: (703) 605–0514; e-mail address: *matten.sharlene@epa.gov*.

**SUPPLEMENTARY INFORMATION:**

### I. General Information

*A. Does this Action Apply to Me?*

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

- Crop production (NAICS code 111)
- Animal production (NAICS code 112)
- Food manufacturing (NAICS code 311)
- Pesticide manufacturing (NAICS code 32532)

This listing is not intended to be exhaustive, but rather provides a guide for readers regarding entities likely to be affected by this action. Other types of entities not listed in this unit could also be affected. The North American Industrial Classification System (NAICS) codes have been provided to assist you and others in determining whether this action might apply to certain entities. 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 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

On July 26, 2004, Syngenta Seeds, 3054 Cornwallis Road, Research Triangle Park, NC 27709–2257 submitted a petition (PP 3G6547) to EPA under the Federal Food, Drug, and Cosmetic Act (FFDCA), as amended by the Food Quality Protection Act of 1996 (FQPA), requesting that the temporary tolerance exemption for *Bacillus thuringiensis* VIP3A protein and the genetic material necessary for its

production in cotton found at 40 CFR 180.1247 be amended to include all VIP3A events (VIP stands for vegetative insecticidal protein). As it turns out, however, this particular request was unnecessary as the temporary tolerance exemption found at 40 CFR 180.1247 already includes all VIP3A events. In a subsequent letter dated July 29, 2004, Syngenta Seeds also petitioned the Agency to amend the temporary tolerance exemption found at 40 CFR 180.1247 by extending it from May 1, 2005 to May 1, 2006.

On September 15, 2004, EPA published a Notice in the **Federal Register** (69 FR 55605; FRL–7675–1) announcing the filing of the Syngenta Seeds petition. This Notice of Filing, however, was incorrect in two respects. First, it reiterated in summary fashion Syngenta Seeds request that the temporary tolerance exemption found at 40 CFR 180.1247 be amended to include all VIP3A events. As noted above, this was unnecessary since that temporary tolerance exemption already includes all VIP3A events. Second, the Notice failed to include Syngenta Seeds' petition to extend the approved time frame for the temporary exemption. In the **Federal Register** of March 16, 2005 (70 FR 12879) (FRL–7703–3), EPA published a Notice of Correction clarifying that the pesticide petition, 3G6547 from Syngenta Seeds, as summarized and presented in the Agency's September 15, 2004 Notice of Filing, is solely a proposal to amend the temporary tolerance exemption found at 40 CFR 180.1247 by extending it from May 1, 2005 to May 1, 2006.

The National Cotton Council and a private citizen each submitted comments in response to the September 15, 2004 Notice. That same private citizen also submitted similar comments in response to the March 16, 2005 Notice. In addition, a second private citizen submitted comments in response to the March 16, 2005 Notice. The National Cotton Council supported issuance of the temporary tolerance. The first private citizen, however, objected to the issuance of the temporary tolerance based on unspecified environmental and human health effects. The second private citizen objected to the issuance of the temporary tolerance based on possible environmental and health effects of programmed cell death. The Agency understands the commenters' concerns. Pursuant to its authority under the Federal Food, Drug, and Cosmetic Act (FFDCA), EPA has conducted an assessment of the VIP3A insect control proteins and the genetic material necessary for their production in cotton. EPA has concluded that there is a reasonable certainty that no harm will result from dietary exposure to this protein as expressed in cotton.

Section 408(c)(2)(A)(i) of the FFDCA allows EPA to establish an exemption from the requirement for a tolerance (the legal limit for a pesticide chemical residue in or on a food) only if EPA determines that the exemption is ''safe.'' Section 408(c)(2)(A)(ii) of 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. Pursuant to section 408(c)(2)(B), in establishing or maintaining in effect an exemption from the requirement of a tolerance, EPA must take into account the factors set forth in section 408(b)(2)(C), which require EPA to give special consideration to exposure of infants and children to the pesticide chemical residue in establishing a tolerance and to ''ensure that there is a reasonable certainty that no harm will result to infants and children from aggregate exposure to the pesticide chemical residue. . . .'' Additionally, section 408(b)(2)(D) of the FFDCA requires that the Agency consider ''available information concerning the cumulative effects of a particular pesticide's residues'' and ''other substances that have a common mechanism of toxicity.''

EPA performs a number of analyses to determine the risks from aggregate exposure to pesticide residues. First, EPA determines the toxicity of pesticides. Second, EPA examines exposure to the pesticide through food, drinking water, and through other exposures that occur as a result of pesticide use in residential settings.

## III. Toxicological Profile

Consistent with section 408(b)(2)(D) of the FFDCA, EPA has reviewed the available scientific data and other relevant information in support of this action and considered its validity, completeness, and reliability and the relationship of this information to human risk. EPA has also considered available information concerning the variability of the sensitivities of major identifiable subgroups of consumers, including infants and children.

Data have been submitted demonstrating the lack of mammalian toxicity at high levels of exposure to the pure VIP3A proteins. This is similar to the Agency position regarding toxicity of *Bacillus thuringiensis* products from which this vegetative-insecticidal protein is derived. The requirement for residue data for the derivative protein is consistent with residue data requirements in 40 CFR 158.740(b)(2)(i). For microbial products, further toxicity testing and residue data are triggered by significant acute effects in studies such as the mouse oral toxicity study, to verify the observed effects and clarify the source of these effects (Tiers II and III). The acute oral toxicity data submitted support the prediction that the VIP3A protein would be non-toxic to humans. Male and female mice (11 of each) were dosed with the test material 5,050 milligrams/kilogram/body weight (mg/kg/bwt) (3,675 mg of pure VIP3A protein per kg body weight). Outward clinical signs were observed and body weights recorded throughout the 14–day study. No mortality or clinical signs attributed to the test substance were noted during the study. When proteins are toxic, they are known to act via acute mechanisms and at very low doses (Sjoblad, R.D., J.T. McClintock and R. Engler (1992)). Therefore, since no effects were shown to be caused by this vegetative-insecticidal protein, even at relatively high does levels, it is not considered toxic. The amino acid sequence of VIP3A is not homologous to that of any known or putative allergens described in public data bases. Since VIP3A is a protein, allergenic sensitivities were considered. Current scientific knowledge suggests that common food allergens tend to be resistant to degradation by heat, acid, and proteases, and may be glycosylated and present at high concentrations in the food. Data have been submitted that demonstrate that the VIP3A protein appears to be present in multiple commercial formulations of *Bt* microbial insecticides at concentrations estimated to be ca. 0.4 to 32 parts per million (ppm). This conclusion is based on the presence of proteins of the appropriate molecular weight and immunoreactivity (by SDS-PAGE and western blot), and quantitation by ELISA. Therefore, it is conceivable that small quantities of VIP3A protein already are present in the food supply because VIP3A (or a very similar protein, based on size and immunoreactivity) appears to be present in currently registered insecticide products used on food crops, including fresh market produce. These commercial *Bt* products are all exempt from food and feed tolerances.

## IV. Aggregate Exposures

In examining aggregate exposure, section 408 of the FFDCA directs EPA to consider available information

concerning exposures from the pesticide residue in food and all other non-occupational exposures, including drinking water from ground water or surface water and exposure through pesticide use in gardens, lawns, or buildings (residential and other indoor uses).

*A. Dietary Exposure*

The Agency has considered available information on the aggregate exposure levels of consumers (and major identifiable subgroups of consumers) to the pesticide chemical residue and to other related substances. These considerations include dietary exposure under the tolerance exemption and all other tolerances or exemptions in effect for the vegetative-insecticidal protein chemical residue, and exposure from non-occupational sources.

1. *Food*. Oral exposure, at very low levels, may occur from ingestion of processed cotton seed by products. However, a lack of mammalian toxicity and the digestibility of the vegetative-insecticidal protein have been demonstrated. The use sites of the VIP3A proteins are all agricultural for control of insects.

2. *Drinking water exposure*. Oral exposure, at very low levels, may occur from drinking water. However, a lack of mammalian toxicity and the digestibility of the vegetative-insecticidal protein have been demonstrated. The use sites for the VIP3A proteins are all agricultural for control of insects.

*B. Other Non-Occupational Exposure*

1. *Dermal exposure*. Exposure via the skin is not likely since the vegetative-insecticidal protein is contained within plant cells, which essentially eliminates this exposure route or reduces these exposure routes to negligible.

2. *Inhalation exposure*. Exposure via inhalation is not likely since the vegetative-insecticidal protein is contained within plant cells, which essentially eliminates this exposure route or reduces this exposure route to negligible.

## V. Cumulative Effects

Pursuant to FFDCA section 408(b)(2)(D)(v), EPA has considered available information on the cumulative effects of such residues and other substances that have a common mechanism of toxicity. These considerations included the cumulative effects on infants and children of such residues and other substances with a common mechanism of toxicity. Because there is no indication of mammalian toxicity to the VIP3A protein, it is reasonable to conclude that there are no cumulative effects for this vegetative-insecticidal protein.

## VI. Determination of Safety for U.S. Population, Infants, and Children

FFDCA section 408(b)(2)(C) provides that EPA shall assess the available information about consumption patterns among infants and children, special susceptibility of infants and children to pesticide chemical residues and the cumulative effects on infants and children of the residues and other substances with a common mechanism of toxicity. In addition, FFDCA section 408(B)(2)(C) also 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 unless EPA determines that a different margin of safety (MOS) will be safe for infants and children. In this instance, based on the available data, the Agency concludes that there is a finding of no toxicity for VIP3A proteins and the genetic material necessary for their production. In the absence of any threshold effects of concern, the Agency has determined that the additional margin of safety is not necessary to protect infants and children. Further, the provisions of consumption patterns, special susceptibility, and cumulative effects do not apply.

## VII. Other Considerations

*A. Endocrine Disruptors*

The safety data submitted show no adverse effects in mammals, even at very high dose levels, and support the prediction that the VIP3A protein would be non-toxic to humans. Therefore no effects on the immune or endocrine systems are expected.

*B. Analytical Method(s)*

Validated methods for extraction and direct ELISA analysis of VIP3A in cotton seed have been submitted and found acceptable by the Agency.

*C. Codex Maximum Residue Level*

No Codex maximum residue levels exist for the vegetative-insecticidal protein *Bacillus thuringiensis* VIP3A protein and genetic material necessary for its production in cotton.

## VIII. 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 –2005 –0083 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 June 27, 2005.

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 VIII.A., you should also send a copy of your request to the PIRIB for its inclusion in the official record that is described in **ADDRESSES**. Mail your copies, identified by docket ID number OPP–2005–0083, to: Public Information and Records Integrity Branch, Information Resources and Services Division (7502C), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001. In person or by courier, bring a copy to the location of the PIRIB described in **ADDRESSES**. You may also send an electronic copy of your request via e-mail to: *opp-docket@epa.gov*. Please use an ASCII file format and avoid the use of special characters and any form of encryption. Copies of electronic objections and hearing requests will also be accepted on disks in WordPerfect 6.1/8.0 or ASCII file format. Do not include any CBI in your electronic copy. You may also submit an electronic copy of your request at many Federal Depository Libraries.

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

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

## IX. Statutory and Executive Order Reviews

This final rule establishes an extension of the temporary exemption from the tolerance requirement 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 exemption in this final rule, do not require the issuance of a proposed rule, the requirements of the Regulatory Flexibility Act (RFA) (5 U.S.C. 601 *et seq.*) do not apply. In addition, the Agency has determined that this action will not have a substantial direct effect on States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132, entitled *Federalism* (64 FR 43255, August 10, 1999). Executive Order 13132 requires EPA to develop an accountable process to ensure ''meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications.'' ''Policies that have federalism implications'' is defined in the Executive Order to include regulations that have ''substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government''. This final rule directly regulates growers, food processors, food handlers and food retailers, not States. This action does not alter the relationships or distribution of power and responsibilities established by Congress in the preemption provisions of section 408(n)(4) of 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.

## X. Congressional Review Act

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

## List of Subjects in 40 CFR Part 180

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

Dated: April 21, 2005.

**Janet L. Andersen,**

*Director, Biopesticides and Pollution Prevention Division, Office of Pesticide Programs.*

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

## PART 180—[AMENDED]

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

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

■ 2. Section 180.1247 is revised to read as follows:

**§ 180.1247 Bacillus thuringiensis VIP3A protein and the genetic material necessary for its production in cotton is exempt from the requirement of a tolerance.**

*Bacillus thuringiensis* VIP3A protein and the genetic material necessary for its production in cotton is exempt from the requirement of a tolerance when used as a vegetative-insecticidal protein in the food and feed commodities, cotton seed, cotton oil, cotton meal, cotton hay, cotton hulls, cotton forage, and cotton gin byproducts. Genetic material necessary for its production means the genetic material which comprise genetic encoding the VIP3A protein and its regulatory regions. Regulatory regions are the genetic material, such as promoters, terminators, and enhancers, that control expression of the genetic material encoding the VIP3A protein. This time-limited exemption from the requirement of a tolerance expires May 1, 2006.

[FR Doc. 05–8530 Filed 4–27–05; 8:45 am]

BILLING CODE 6560–50–S

## ENVIRONMENTAL PROTECTION AGENCY

### 40 CFR Part 300

**[FRL–7905–2]**

### National Oil and Hazardous Substances Pollution Contingency Plan; National Priorities List

**AGENCY:** Environmental Protection Agency.

**ACTION:** Deletion of the Syosset Landfill Superfund Site from the National Priorities List.

**SUMMARY:** The Environmental Protection Agency (EPA) Region 2 Office announces the deletion of the Syosset Landfill Superfund Site, in the Town of Oyster Bay, Nassau County, New York from the National Priorities List (NPL). The NPL is appendix B to the National Oil and Hazardous Substances Pollution Contingency Plan (NCP), 40 CFR part 300, which EPA promulgated pursuant to section 105 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), as amended. EPA and the State of New York, through the Department of Environmental Conservation (NYSDEC), have determined that responsible parties or other persons have implemented all appropriate response actions required. In addition, EPA and the NYSDEC have determined that the remedial measures taken at the Syosset Landfill Site protect public health, welfare, and the environment.

**EFFECTIVE DATE:** April 28, 2005.

**FOR FURTHER INFORMATION CONTACT:** Sherrel D. Henry, Remedial Project Manager, U.S. Environmental Protection Agency, Region 2, 290 Broadway, 20th Floor, New York, New York 10007–1866, (212) 637–4273.

**SUPPLEMENTARY INFORMATION:** The site to be deleted from the NPL is: Syosset Landfill Superfund Site, Town of Oyster Bay, Nassau County, New York.

A Notice of Intent to Delete for this site was published in the **Federal Register** on February 15, 2005 (70 FR 7708). The closing date for comments on the Notice of Intent to Delete was March 17, 2005. No comments were received.

The EPA maintains the NPL as the list of those sites that appear to present a significant risk to public health or the environment. Sites on the NPL can have remedial actions financed by the Hazardous Substances Response Fund. As described in § 300.425(e)(3) of the NCP, any site or portion thereof deleted from the NPL remains eligible for Fund-financed remedial actions in the unlikely event that conditions at the site warrant such action in the future. Deletion of a site from the NPL does not affect responsible party liability or impede agency efforts to recover costs associated with response efforts.

### List of Subjects in 40 CFR Part 300

Environmental protection, Air pollution controls, Chemicals, Hazardous substances, Hazardous waste, Intergovernmental relations, Penalties, Reporting and recordkeeping requirements, Superfund, Water pollution control, Water supply.

Dated: April 19, 2005.

**George Pavlou,**

*Acting Regional Administrator, Region 2.*

■ For the reasons set out in the preamble, 40 CFR part 300, is amended as follows:

### PART 300—[AMENDED]

■ 1. The authority citation for part 300 continues to read as follows:

**Authority:** 42 U.S.C. 9601–9657; 33 U.S.C. 1321(c)(2); E.O. 12777, 56 FR 54757, 3 CFR, 1991 Comp., p. 351; E.O. 12580, 52 FR 2923, 3 CFR, 1987 Comp., p. 193.

### Appendix B—[Amended]

■ 2. Table 1 of Appendix B to part 300 is amended by removing the entry ''Syosset Landfill'' found in the list of sites in NY State along with the city/county name ''Oyster Bay.''

[FR Doc. 05–8527 Filed 4–27–05; 8:45 am]

BILLING CODE 6560–50–P

## DEPARTMENT OF THE INTERIOR

### Fish and Wildlife Service

### 50 CFR Part 17

**RIN 1018–AU10**

### Endangered and Threatened Wildlife and Plants; Amendment of Lower St. Johns River Manatee Refuge in Florida

**AGENCY:** Fish and Wildlife Service, Interior.

**ACTION:** Final rule.

**SUMMARY:** The Fish and Wildlife Service is amending a portion of the Lower St. Johns River Manatee Refuge area in Duval County, Florida, to provide for both improved public safety and increased manatee protection through improved marking and enforcement of the manatee protection area. Specifically, that portion of this manatee protection area which lies downstream of the Hart Bridge to Reddie Point will be modified to allow watercraft to travel up to 25 miles per hour (mph) in a broader portion of the St. Johns River to include areas adjacent to but outside of the navigation channel. Watercraft traveling near the banks of the river will be required to travel at slow speed much as they do now. The primary exception will be around Exchange Island where the coverage of the existing State and local slow-speed zones will be expanded. However, in the main portion of the river, watercraft will be allowed to travel at speeds up to 25 mph. The manatee protection area will also be expanded approximately one mile further downstream, to the extent it was originally proposed (68 FR 16602; April 4, 2003), in order to be consistent with existing State and local governmental manatee protection measures and thereby facilitate compliance. This modification is supported by State and local government and parties to the March 18, 2003, Stipulated Order which resulted in the initial rulemaking for this manatee protection area.

The current configuration of the manatee protection area is not supported by the State of Florida or Duval County. While the Service is committed to enforcing these current protection measures, State and local government would normally provide a substantial portion of the enforcement

effort. This rulemaking, through a minor modification in a small portion of the manatee protection area, resolves State and local objections and gains their support through education and enforcement throughout the extent of the manatee protection area. The modification will provide a substantial benefit to manatee conservation.

Establishment of manatee protection areas is authorized under the Endangered Species Act of 1973, as amended (ESA), and the Marine Mammal Protection Act of 1972, as amended (MMPA), to further recovery of the Florida manatee (Trichechus manatus latirostris) by preventing the taking of one or more manatees. We also announce the availability of a final environmental assessment for this action. Under authority of 5 U.S.C. 553, we find good cause to make this rule final without prior opportunity for public comment because public notice and comment on the rule is contrary to the public interest. However, the public may provide comments on this final rule at any time to the address in the **ADDRESSES** caption below.

**DATES:** This rule is effective April 28, 2005.

**ADDRESSES:** The complete file for this rule is available for inspection, by appointment, during normal business hours at the Jacksonville Field Office, U.S. Fish and Wildlife Service, 6620 Southpoint Drive, South, Suite 310, Jacksonville, Florida 32216.

**FOR FURTHER INFORMATION CONTACT:** David Hankla or Chuck Underwood (see **ADDRESSES** section), telephone 904/232–2580; or visit our website at *http://northflorida.fws.gov.*

**SUPPLEMENTARY INFORMATION:** The West Indian manatee is federally listed as an endangered species under the ESA (16 U.S.C. 1531 *et seq.*) (32 FR 4001), and the species is further protected as a depleted stock under the MMPA (16 U.S.C. 1361–1407). Florida manatees, a native subspecies of the West Indian manatee (Domning and Hayek, 1986), live in freshwater, brackish, and marine habitats in coastal and inland waterways of the southeastern United States. The majority of the population can be found in Florida waters throughout the year, and nearly all manatees use the waters of peninsular Florida during the winter months. The manatee is a cold-intolerant species and requires warm water temperatures generally above 20 °Celsius (68 °Fahrenheit) to survive during periods of cold weather. During the winter months, most manatees rely on warm water from industrial discharges and natural springs for warmth. In warmer months, they expand their range and occasionally are seen as far north as Rhode Island on the Atlantic Coast and as far west as Texas on the Gulf Coast.

Human activities, and particularly waterborne activities, are resulting in the incidental take of manatees. Take, as defined by the ESA, means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, collect, or to attempt to engage in any such conduct. Harm means an act which kills or injures wildlife (50 CFR 17.3). Such an act may include significant habitat modification or degradation that kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding, or sheltering. Harass includes intentional or negligent acts or omissions that create the likelihood of injury to wildlife by annoying it to such an extent as to significantly disrupt normal behavioral patterns, which include, but are not limited to, breeding, feeding, or sheltering (50 CFR 17.3).

The MMPA sets a general moratorium, with certain exceptions, on the take and importation of marine mammals and marine mammal products (section 101(a)) and makes it unlawful for any person to take, possess, transport, purchase, sell, export, or offer to purchase, sell, or export, any marine mammal or marine mammal product unless authorized. Take, as defined by section 3(13) of the MMPA means to harass, hunt, capture, or kill, or attempt to harass, hunt, capture, or kill any marine mammal. Harassment is defined under the MMPA as any act of pursuit, torment, or annoyance which—(i) has the potential to injure a marine mammal or marine mammal stock in the wild; or (ii) has the potential to disturb a marine mammal or marine mammal stock in the wild by causing disruption of behavioral patterns, including, but not limited to, migration, breathing, nursing, breeding, feeding, or sheltering.

Humans can cause take of manatees by both direct and indirect means. Direct takings include injuries and deaths from watercraft collisions, deaths from water control structure operations, lethal and sublethal entanglements with recreational and commercial fishing gear, and alterations of behavior due to harassment. Indirect takings can result from habitat alteration and destruction, such as the creation and/or subsequent cessation of artificial warm water refuges, decreases in the quantity and quality of warm water in natural spring areas, changes in water quality in various parts of the State, the introduction of marine debris, and other, more general disturbances. Indirect takings may also result from the construction of docks, boat ramps, and marinas if they lead to increased boat traffic in areas of regular manatee use and manatee protection measures are not in place.

Collisions with watercraft are the largest cause of human-related manatee deaths. Data collected during manatee carcass salvage operations in Florida indicate that more than 1,200 manatees are confirmed victims of collisions with watercraft from 1980 through 2004. Collisions with watercraft comprise nearly 25 percent of all manatee mortalities in that timeframe. Approximately 75 percent of watercraft-related manatee mortality has taken place in 11 Florida counties (Brevard, Lee, Collier, Duval, Volusia, Broward, Palm Beach, Charlotte, Hillsborough, Citrus, and Sarasota) (Florida Fish and Wildlife Commission's Florida Wildlife Research Institute Manatee Mortality Database, 2005).

To minimize the number of injuries and deaths associated with watercraft activities, we and the State of Florida have designated manatee protection areas at sites throughout coastal Florida where conflicts between boats and manatees have been well documented and where manatees are known to frequently occur. Federal authority to establish protection areas for the Florida manatee is provided by the ESA and the MMPA, and is codified in 50 CFR, part 17, subpart J. We have discretion, by regulation, to establish manatee protection areas whenever substantial evidence shows such establishment is necessary to prevent the taking of one or more manatees (that is, to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, collect, or to attempt to engage in any such conduct).

We may establish two types of manatee protection areas: manatee refuges and manatee sanctuaries. A manatee refuge, as defined in 50 CFR 17.102, is an area in which we have determined that certain waterborne activities would result in the taking of one or more manatees, or that certain waterborne activities must be restricted to prevent the taking of one or more manatees, including but not limited to, a taking by harassment. A manatee sanctuary is an area in which we have determined that any waterborne activity would result in the taking of one or more manatees, including but not limited to, a taking by harassment. A waterborne activity is defined as including, but not limited to, swimming, diving (including skin and scuba diving), snorkeling, water skiing, surfing, fishing, the use of water vehicles, and dredge and fill activities.

The Lower St. Johns River Manatee Refuge was established to prevent the taking of manatees resulting from collisions with watercraft. After public review and comment, the regulation establishing the refuge was published on August 6, 2003, in the **Federal Register** (68 FR 46869). The portion of this manatee protection area downstream of the Hart Bridge requires watercraft to travel at slow speed outside of the navigation channel of the St. Johns River and at not more than 25 mph in the navigation channel.

This rulemaking revises the restrictions downstream of the Hart Bridge. Watercraft traveling within 300 feet of the left descending bank of the river will be required to travel at slow speed (see map in the rule portion of this document). Watercraft traveling within an area approximately 1,000 feet from the right descending bank of the river, including that portion of the river between Exchange Island and the right descending bank, and approximately 300 feet channel-ward of Exchange Island, will also be required to travel at slow speed. However, in the remaining portion of the river, watercraft will be allowed to travel at speeds up to 25 mph.

This modification to the current configuration will eliminate some restrictions and provide a greater margin of safety between recreational boaters proceeding at speeds up to 25 mph and large private and commercial vessels. Under the current regulation, any boats traveling at greater than slow speed must travel in the channel. This means that operators of small recreational craft must choose either to share a relatively narrow channel with very large vessels, or travel perhaps several miles at slow speed. The State and county government officials believe that many will opt to share the channel with the larger vessels, unnecessarily placing them in a more dangerous environment. The Service is required under a March 18, 2003, Stipulated Order (*Save the Manatee Club* v. *Ballard*) approved by the Court to post this area as expeditiously as possible and will complete posting in the near future. This rule will allow the area to be posted in a revised configuration and prevent this safety issue from occurring.

The manatee protection area will also be expanded approximately one mile further downstream, to the extent it was originally proposed at Reddie Point (68 FR 16601; April 4, 2003). Thus, this rule adopts the current State and local speed zone buffer configuration along the shoreline of the river which will facilitate improved signage and enforcement. There were no comments regarding the Reddie Point boundary in the initial rulemaking. We revised the initial proposed boundary here (slow speed, 25 mph in the channel) because of limitations on our ability to mark the channel boundary.

This action will also allow for some signs on wooden posts marking the boundaries of the manatee protection area to be replaced with buoys. This will reduce the danger associated with a collision with these markers.

Finally, this modification also resolves objections of State and local enforcement agencies, who have agreed to assist in enforcing this area as modified. Increased enforcement will improve the effectiveness of the protection measures not only for the benefit of manatees, but for human safety as well.

Section 553(b) of the Administrative Procedure Act (APA) (5 U.S.C. 500 *et seq.*) allows Federal agencies to proceed immediately to a final rule ''when the agency for good cause finds * * * that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.'' Due to the primary obligation of State and local officials to ensure boater safety and to avoid and minimize navigational problems in a heavily-used waterway that is shared by recreational and non-recreational vessels, we must give weight to statements from public safety and law enforcement officials when they anticipate navigational problems that present public safety concerns. The public safety component, along with the need for prompt implementation of State and local enforcement efforts to reduce or eliminate manatee injuries and mortalities from boat strikes, constitutes our basis for proceeding immediately with the final rulemaking process directly. For these reasons, we find good cause to make this rule final without prior opportunity for public comment.

The APA also provides that agencies must wait a minimum of 30 days before making a rule effective. However, as described above, this rule will modify the manatee protection area to prevent a public safety issue from occuring. The modification affects only a fraction of the overall manatee protection area and will be posted at the same time as the remainder of the area in order to meet the terms of the Stipulated Order. Because delay in implementing the revisions can only result in increased risks to both humans and manatees, it is appropriate to make the rule effective immediately. Therefore, pursuant to section 553(d)(3) of the APA, the Service is making this rule effective immediately. However, the Service will accept comments on this rule at any time.

## Required Determinations

### *Regulatory Planning and Review*

In accordance with the criteria in Executive Order 12866, this rule is not a significant regulatory action. The Office of Management and Budget makes the final determination under Executive Order 12866.

This rule will not have an annual economic impact of over $100 million or adversely affect an economic sector, productivity, jobs, the environment, or other units of government. A quantitative assessment of the costs and benefits is not required, nor is consideration of alternatives. No significant economic impacts would result from this modification of the existing manatee refuge impacting approximately 5.5 river miles in one county in the State of Florida.

The purpose of this rule is to modify an existing manatee protection area in the St. Johns River, Duval County, Florida, to provide for a greater margin of safety for recreational boaters and improve manatee protection through better enforcement and compliance. The economic impacts of this rule are due to the previously described changes in speed zone restrictions in the manatee refuge. We will experience increased administrative costs of approximately $365,000 due to modified posting requirements. Conversely, the rule may also produce some minimal though undeterminable economic benefits associated with recreational boating and commercial crabbing, as a result of faster travel times through a larger area.

The precedent to establish manatee protection areas has been established primarily by State and local governments in Florida. We recognize the important role of State and local partners, and we continue to support and encourage State and local measures to improve manatee protection.

This rule will not materially affect entitlements, grants, user fees, loan programs, or the rights and obligations of their recipients. Minimal restrictions to existing human uses of the sites will result from this rule. No entitlements, grants, user fees, loan programs or the rights and obligations of their recipients are expected to occur.

This rule will not raise novel legal or policy issues. We have previously established manatee protection areas.

### *Regulatory Flexibility Act*

For the reasons set forth in our rule of August 6, 2003 (68 FR 46896), we certify that this rule will not have a

significant economic effect on a substantial number of small entities as defined under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). An initial/final Regulatory Flexibility Analysis is not required. Accordingly, a Small Entity Compliance Guide is not required.

*Small Business Regulatory Enforcement Fairness Act*

This rule is not a major rule under 5. U.S.C. 804 (2). This rule:

a. Does not have an annual effect on the economy of $100 million or more. The primary effect of the rule is to ease restrictions on boat speeds in a portion of the river to improve safety. There will be no adverse effects on any businesses.

b. Will not cause a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions. There will be no changes in costs or prices for consumers stemming from this rule.

c. Does not have significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of U.S.-based enterprises to compete with foreign-based enterprises. There will be no adverse effects to any segment of the community.

*Energy Supply, Distribution or Use (Executive Order 13211)*

On May 18, 2001, the President issued Executive Order 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. Because this rule is not a significant regulatory action under Executive Order 12866 and has a limited effect on boat speeds, it is not expected to significantly affect energy supplies, distribution, and use. Therefore, this action is not a significant energy action and no Statement of Energy Effects is required.

*Unfunded Mandates Reform Act*

In accordance with the Unfunded Mandates Reform Act (2 U.S.C. 1501 *et seq.*):

a. This rule will not ''significantly or uniquely'' affect small governments. A Small Government Agency Plan is not required. The designation imposes no new obligations on State or local governments.

b. This rule will not produce a Federal mandate of $100 million or greater in any year, *i.e.*, it is not a ''significant regulatory action'' under the Unfunded Mandates Reform Act.

*Takings*

In accordance with Executive Order 12630, this rule does not have significant takings implications. A takings implication assessment is not required. The manatee protection area is located over State-or privately-owned submerged bottoms. Navigational access to private property is not affected.

*Federalism*

In accordance with Executive Order 13132, the rule does not have significant Federalism effects. A Federalism assessment is not required. This rule will not have substantial direct effects on the State, in the relationship between the Federal Government and the State, or on the distribution of power and responsibilities among the various levels of government. The State of Florida and local government support the development of this rule.

*Civil Justice Reform*

In accordance with Executive Order 12988, the Office of the Solicitor has determined that the rule does not unduly burden the judicial system and meets the requirements of sections 3(a) and 3(b)(2) of the Order.

*Paperwork Reduction Act*

This regulation does not contain collections of information that require approval by the Office of Management and Budget (OMB) under 44 U.S.C. 3501 *et seq.* The regulation would not impose new recordkeeping or reporting requirements on State or local governments, individuals, businesses, or organizations. We may not conduct or sponsor, and you are not required to respond to, a collection of information unless it displays a currently valid OMB control number.

*National Environmental Policy Act*

We have analyzed this rule in accordance with the criteria of the National Environmental Policy Act. This rule does not constitute a major Federal action significantly affecting the quality of the human environment. An environmental assessment has been prepared and is available for review upon request by writing to the Field Supervisor (see **ADDRESSES** section).

*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), E.O. 13175, and 512 DM 2, we have evaluated possible effects on federally recognized Indian tribes and have determined that there are no effects.

*References Cited*

A complete list of all references cited in this rule is available upon request from the Jacksonville Field Office (see **ADDRESSES** section).

*Author*

The primary author of this document is David Hankla (see **ADDRESSES** section).

*Authority*

The authority to establish manatee protection areas is provided by the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq.*), and the Marine Mammal Protection Act of 1972 (16 U.S.C. 1361–1407), as amended.

**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 follows:

## 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 § 17.108 as follows:
■ a. By removing the map at paragraph (c)(11(v) titled ''St. Johns River Bridges Area'';
■ b. By redesignating paragraph (c)(11)(v) as paragraph (c)(11)(vi);
■ c. By revising paragraphs (c)(11)(i) through (iv) and adding a new paragraph (c)(11)(v) to read as set forth below; and
■ d. By adding a new map, as set forth below, between the two existing maps in the newly designated paragraph (c)(11)(vi).

**§ 17.108 List of designated manatee protection areas.**

* * * * *

(c) * * *

(11) *The Lower St. Johns River Manatee Refuge.*

(i) The Lower St. Johns River Manatee Refuge is described as portions of the St. Johns River and adjacent waters in Duval, Clay, and St. Johns Counties from Sandfly Point (the intersection of the right descending bank of the Trout River and the left descending bank of the St. Johns River) and Reddie Point, as

marked, upstream to the mouth of Peter's Branch, including Doctors Lake, in Clay County on the western shore, and to the southern shore of the mouth of Julington Creek in St. Johns County on the eastern shore. A map showing the refuge and two maps showing specific areas of the refuge are at paragraph (11)(vi) of this section.

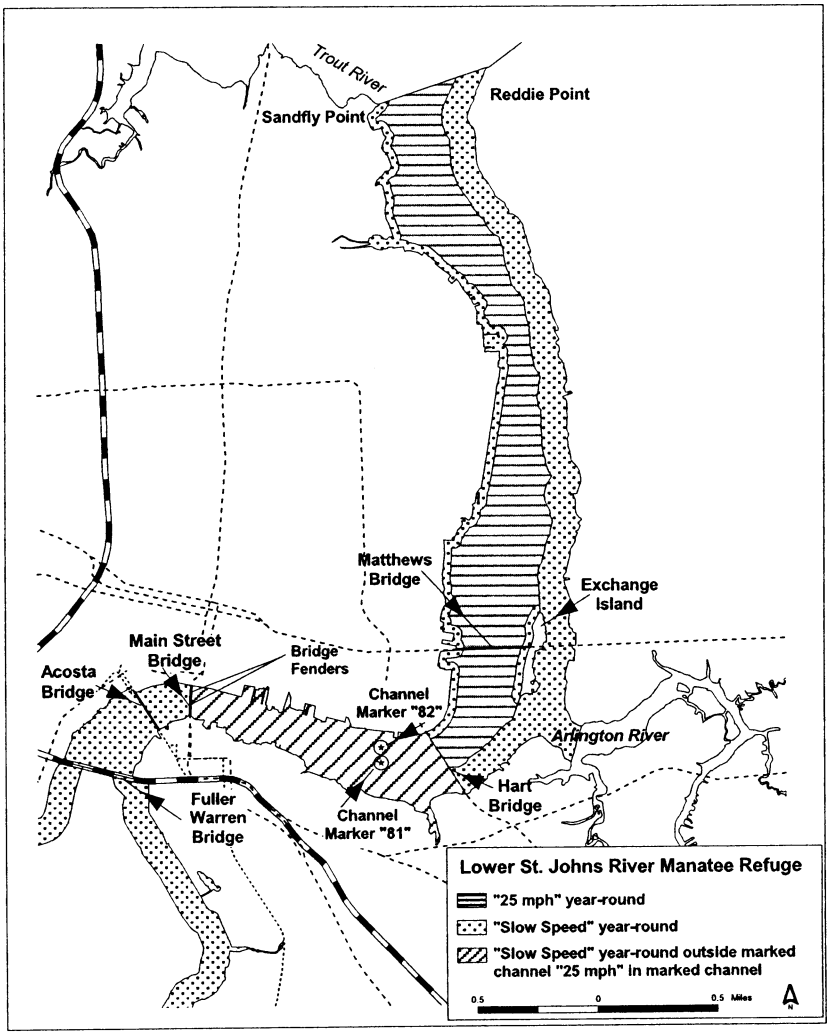
(ii) In the St. Johns River from Sandfly Point on the left descending bank of the St. Johns River and Reddie Point on the right descending bank of the St. Johns River, upstream to the Hart Bridge, a distance of approximately 5.5 miles (8.8 km), watercraft are required to proceed at slow speed, year-round, within 300 feet (91 m) of the shoreline on the left descending bank of the St. Johns River and within a buffer as marked, typically about 1,000 feet (305 m) from the shoreline along the right descending bank of the river. The slow speed designation also includes that portion of the river between Exchange Island and the right descending bank, a marked buffer approximately 300 feet (91 m) along the west (channel-ward) shoreline of Exchange Island, and a portion of the Arlington River as marked. Watercraft are also required to proceed at not more than 25 miles per hour (40 km/h), year round, in the area posted as such between these slow speed shoreline buffers. See map of ''St. Johns River Bridges Area'' in paragraph (11)(vi) of this section.

(iii) From the Hart Bridge to the Main Street Bridge, a distance of approximately 2 miles (3.2 km), watercraft are required to proceed at slow speed, year-round, outside the marked navigation channel and at speeds of not more than 25 miles per hour (40 km/h) in the marked channel (from Channel Marker ''81'' to the Main Street Bridge, the channel is defined as the line of sight extending west from Channel Markers ''81'' and ''82'' to the fenders of the Main Street Bridge). See map of ''St. Johns River Bridges Area'' in paragraph (11)(vi) of this section.

(iv) From the Main Street Bridge to the Fuller Warren Bridge, a distance of approximately 1 mile (1.6 km), shoreline to shoreline, watercraft are required to proceed at slow speed (channel included), year-round. See map of ''St. Johns River Bridges Area'' in paragraph (11)(vi) of this section.

(v) Upstream of the Fuller Warren Bridge: for a distance of approximately 19.3 miles (31.1 km) along the left descending bank of the St. Johns River, watercraft are required to proceed at slow speed, year-round, in a 700-foot (213 m) to 1,000-foot (305 m) as-marked, shoreline buffer from the Fuller Warren Bridge to the south bank of the mouth of Peter's Branch in Clay County; for a distance of approximately 20.2 miles (32.5 km) along the right descending bank of the St. Johns River, watercraft are required to proceed at slow speed, year round, in a 700-foot (213 m) to 1,000-foot (305 m) as marked, shoreline buffer from the Fuller Warren Bridge to the south bank of the mouth of Julington Creek in St. Johns County (defined as a line north of a western extension of the Nature's Hammock Road North); and in Doctors Lake in Clay County watercraft are required to proceed at slow speed, year-round, in a 700-foot (213 m) to 900-foot (274 m) as-marked, shoreline buffer (approximately 12.9 miles (20.8 km)). See map of ''Lower St. Johns River'' in paragraph (11)(vi) of this section.

(vi) * * *




St. Johns River Bridges Area

* * * * *

Dated: April 22, 2005.

**Craig Manson,**

*Assistant Secretary for Fish and Wildlife and Parks.*

[FR Doc. 05–8526 Filed 4–27–05; 8:45 am]

BILLING CODE 4310–55–P

## DEPARTMENT OF COMMERCE

## National Oceanic and Atmospheric Administration

## 50 CFR Part 648

**[Docket No. 050112008–5102–02; I.D. 010605E]**

**RIN 0648–AS23**

## Fisheries of the Northeastern United States; Atlantic Herring Fishery

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

**ACTION:** Final rule, 2005 specifications.

**SUMMARY:** NMFS announces final specifications for the 2005 fishing year for the Atlantic herring (herring) fishery, which will be maintained through the 2006 fishing year unless stock and fishery conditions change substantially. This action includes one minor regulatory language change that reflects a previously approved measure in the Fishery Management Plan for Herring (FMP). The intent of this final rule is to promote the development and conservation of the herring resource.

**DATES:** Effective May 31, 2005, through December 31, 2006.

**ADDRESSES:** Copies of supporting documents, including the Environmental Assessment, Regulatory Impact Review, Final Regulatory Flexibility Analysis (EA/RIR/FRFA), and Essential Fish Habitat Assessment are available from Paul J. Howard, Executive Director, New England Fishery Management Council (Council), 50 Water Street, Mill 2, Newburyport, MA 01950. The EA/RIR/FRFA is accessible via the Internet at *http://www.nero.noaa.gov*.

**FOR FURTHER INFORMATION CONTACT:** Eric Jay Dolin, Fishery Policy Analyst, 978–281–9259, e-mail at *eric.dolin@noaa.gov*, fax at 978–281–9135.

**SUPPLEMENTARY INFORMATION:**

### Background

Proposed 2005 specifications were published on January 31, 2005 (70 FR 4808), with public comment accepted through March 2, 2005. The final specifications are unchanged from those that were proposed. A complete discussion of the development of the specifications appears in the preamble to the proposed rule and is not repeated here.

### 2005 Final Initial Specifications

The following specifications are established by this action: Allowable

biological catch (ABC), optimum yield (OY), domestic annual harvest (DAH), domestic annual processing (DAP), total foreign processing (JVPt), joint venture processing (JVP), internal waters processing (IWP), U.S. at-sea processing (USAP), border transfer (BT), total allowable level of foreign fishing (TALFF), and total allowable catch (TAC) for each management area and subarea.

SPECIFICATIONS AND AREA TACS FOR THE 2005 (AND 2006) ATLANTIC HERRING FISHERY

| Specification | Proposed Allocation (mt) |
|---|---|
| ABC | 220,000. |
| OY | 150,000. |
| DAH | 150,000. |
| DAP | 146,000. |
| JVPt | 0. |
| JVP | 0. |
| IWP | 0. |
| USAP | 20,000 (Area 2 and 3 only). |
| BT | 4,000. |
| TALFF | 0. |
| Reserve | 0. |
| TAC - Area 1A | 60,000 (January 1 - May 31, landings, cannot exceed 6,000. |
| TAC - Area 1B | 10,000. |
| TAC - Area 2 | 30,00 (No Reserve). |
| TAC - Area 3 | 50,000. |

These specifications will be maintained for 2006, unless stock and fishery conditions change substantially. The Council's Herring Plan Development Team (PDT) will update and evaluate stock and fishery information during 2005, and the Council and NMFS may determine, based on the review by the Herring PDT, that no adjustments to the specifications are necessary for the 2006 fishing year. Maintaining the specifications for 2 years would provide the Council with an opportunity to complete the development of Amendment 1 to the FMP, which may implement a limited access program for the herring fishery in addition to other management measures, including possible adjustments to the specification process.

This action also removes references to the dates by which the proposed and final rules for the annual specifications must be published, because it is not necessary to specify these dates in regulatory text. This regulatory language change is a matter of agency procedure and is consistent with previously approved measures.

**Comments and Responses**

There were 22 comments received. Similar comments have been grouped together. Commenters included the Council, Maine Department of Marine Resources, Conservation Law Foundation, Ocean Conservancy, five recreational fishermen, three private citizens, three commercial fishermen, and one charter boat fisherman. Six industry members and associations submitted comments: Cape Seafoods, Inc.; American Pelagic Association; East Coast Pelagic Association; East Coast Tuna Association; the Coalition for the Atlantic Herring Fishery's Orderly, Informed and Responsible Long Term Development; and the Associated Fisheries of Maine.

*Comment 1:* Three commenters stated that NMFS improperly ignored the Canadian herring stock assessment in making its decision about the specifications. They noted that a recent meeting of the Transboundary Resource Assessment Committee (TRAC) did not produce an agreed-upon stock assessment. They also noted that stock size estimates are lower in the Canadian stock assessment, and they contend that NMFS ignored the Canadian estimate in favor of the more optimistic U.S. assessment.

*Response:* In setting these specifications, NMFS relied upon the best scientific information available, and neither NMFS nor the Council ignored the Canadian assessment. Because the TRAC process failed to develop a joint stock assessment for herring, the Council used a blended approach to develop a proxy for MSY, which could be used as the basis for setting OY. This approach was fully described in the EA submitted as part of the specifications package. In short, the models used by the U.S. and Canadian scientists agree on historical herring biomass estimates until about the mid–1980s, and then they diverge from about 1985 onward. At its June 19, 2003 meeting, some members of the Council's Scientific and Statistical Committee (SSC) suggested that a level of biomass consistent with the earlier period in the assessments may be the appropriate level on which to base an estimate of MSY. This is the approach that the Council utilized to develop the proxy for MSY proposed in Amendment 1.

The Council applied average herring biomass estimates from the 1960–1970 time period to form the basis for a $B_{MSY}$ proxy (from which MSY is derived). $B_{MSY}$ is the biomass level that would produce MSY. During this time period, biomass was still at a high level, and fishing mortality from foreign fishing activities had not reached peak levels. Fishing mortality from the foreign fisheries reached record-high levels in the early and mid–1970s, which is when the herring stock declined rapidly on Georges Bank. The SSC agreed that estimates of $F_{msy}$ (the fishing mortality rate consistent with producing MSY) from 0.2–0.25 are reasonable and do not appear to be sensitive to the differences between the two assessment models presented by the United States and Canada. The herring biomass averaged 1.13 million mt (1,130,000 mt) during the 1960–1970 time period. Both models agreed on this result. When developing the proposed MSY proxy of 220,000 mt, the Council rounded this historical average biomass down to 1.1 million mt. Applying the lower estimate of $F_{msy}$ to the 1.1 million mt proxy for $B_{MSY}$ results in the MSY proxy of 220,000 mt. The 220,000 mt proxy is currently proposed for inclusion in Amendment 1, which is under development by the Council, to serve as a temporary and precautionary placeholder for MSY until the next assessment for the herring stock complex is completed.

*Comment 2:* Eight commenters opposed setting the Area 1A TAC at 60,000 mt, arguing that it is not a precautionary approach, given their concerns about localized depletion of the inshore spawning component of the stock. Most of these commenters urged that the Area 1A TAC be set at 45,000 mt instead.

*Response:* Despite the current disagreement between the most recent U.S. and Canadian assessments for herring abundance, the best scientific information available indicate that the herring stock is healthy. The Council's EA noted that, despite some uncertainties regarding the total biomass of the inshore component of the stock (Area 1A), the best available data indicate that it is appropriate to maintain the Area 1A TAC at 60,000 mt. Specifically, the EA stated that,

"Available information does not provide a clear answer to the question of whether or not harvest at current levels will jeopardize the inshore component of the resource. However, harvest levels for the Atlantic herring fishery have been relatively consistent for many years, and available data suggest that the inshore component of the stock is stable and has not experienced significant declines in biomass under these harvest levels. Without any biological targets or benchmarks specifically for the inshore component of the resource, the Herring Plan Development Team/Technical Team (PDT/TC) cannot [state] with certainty that maintaining harvest of this stock component at or near current levels will not cause a decline in biomass. Nevertheless, given a long time series of relatively consistent catch and stable surveys, the PDT/TC is comfortable concluding that no significant declines in the inshore component of the resource should be expected under harvest

levels in 2005 similar to those observed in recent years.''

The SSC met on June 19, 2003, and came to a similar conclusion, which it reported to the Council:

''In general, for the stock complex as a whole, current catch levels appear to be producing a biomass that is at least stable, if not increasing over time. No severe declines in the stock complex should be expected by maintaining current levels of catches over the short-term; however, the current concentration of harvest in the inshore Gulf of Maine is of concern and may be excessive. The areal effects of the catch distribution and risks to individual stock components may overwhelm any potential risks to the resource as a whole. It is critical that the risk associated with overfishing a specific stock component be minimized. While there is little risk associated with maintaining current catch levels over the short-term, monitoring the movement of larger year classes through the fishery will be important to ensure sustainable catches over the long-term.''

Furthermore, biological concerns are not the only basis for the decision to maintain the Area 1A TAC at 60,000 mt. The Council's economic analysis predicted, ''losses of $25,000 to $238,000 per year per vessel for the Maine purse seine fleet under an Area 1A TAC of 45,000 mt...Similarly, processing plants most reliant on fish from Area 1A would experience negative impacts associated with the loss of supply and/or market and employment effects resulting from inconsistent supply under a lower TAC in Area 1A.'' NMFS agrees with the Council, ''That impacts of such magnitude are [not] justified at this time, given the lack of conclusive biological information to support such reductions.''

In light of the SSC advice, NMFS is concerned about the possibility that maintaining an inshore harvest of 60,000 mt for the long term might be excessive for the inshore stock component. NMFS concludes that the Council's specifications process, which will include the evaluation of the status of the stock and any new data in 2005, allows the Council and NMFS to ensure that the inshore stock is appropriately managed. This would provide an opportunity to reduce the Area 1A TAC if new biological information indicates that is necessary in 2006.

*Comment 3:* Twelve commenters were concerned that the herring fishery is eliminating forage that other species rely on. They contended that other important species, including cod, haddock and bluefin tuna, are likely being negatively impacted.

*Response:* Herring is an important forage species for a wide array of predators, but it is only one of many prey species that they rely on. Others, some of which are quite abundant, include sand lance, Atlantic mackerel, Atlantic menhaden, silver hake, butterfish, Atlantic saury, and Illex and Loligo squid. Furthermore, despite the differences in the herring stock estimates produced by the recent U.S. and Canadian stock assessments, the best scientific information available indicate that the herring stock is abundant. Therefore, there is no basis for concluding that herring is being eliminated.

One of the specific concerns noted by the commenters is that there has been localized depletion of herring due to fishing activity, especially mid-water trawling. There is, however, no scientific evidence that suggests that mid-water trawling causes any long-term dispersal of herring or that it is problematic with respect to the health and sustainability of the herring stock in U.S. waters, either from a fishery or an ecosystem perspective. Countless observations during herring acoustic cruises conducted by NMFS during 1997–2001 indicate nothing more than short-term disturbance of herring during mid-water trawling and acoustic surveying operations. Fishing operations by at least a dozen large mid-water trawlers conducted over a several-month period during 2001 on Georges Bank caused no apparent changes in the distribution of pre-spawning herring as evidenced by hydroacoustic surveys conducted by NMFS. In addition, a recent study of the spatial dynamics of the Gulf of Maine-Georges Bank herring complex showed that herring maintained their school structure and interschool integrity during the 1970s, despite very large reductions in stock biomass. Another recent examination of data for the inshore (Gulf of Maine) herring resource suggests that this component of the overall resource is stable and much larger than it was in the 1970s and early 1980s. NMFS, nevertheless, is continuing to monitor the impacts of the fishery on herring behavior, and the results of such monitoring will inform future management of the resource. In addition, there will be a full discussion of the importance of herring as forage for other species in Amendment 1 to the FMP, which is currently being developed by the Council.

*Comment 4:* Two commenters wanted to put a halt to fishing in Area 1A until it can be established that there is a sufficient population of herring to support commercial catches of herring.

*Response:* The catch from Area 1A has been fairly steady since the implementation of the herring FMP in 1999. And, as stated above, there is no evidence that maintaining the Area 1A TAC in the near term at 60,000 mt is inappropriate from a biological perspective.

*Comment 5:* One commenter supported the Council's initial recommendation to maintain OY and DAH at 180,000 mt, and still set TALFF at zero. The commenter disagreed with NMFS's rationale for specifying OY and DAH at 150,000 mt, arguing that the area TACs and potential increases in landings should be considered in terms of the seasonality of the fishery. The commenter contended that, in order to take this into account, the TACs for Area 1A, Area 1B, and Area 3 should be considered together, as the fish are available in these areas in the summer and fall. The Area 2 TAC should be considered separately, as that fishery takes place in the winter. The commenter believes that, if this is done, it demonstrates that the specifications proposed by NMFS would limit growth in the Area 3 fishery to 12 percent, when compared to landings in 2001. The commenter also contended that the Area 2 TAC of 30,000 mt provides little opportunity for growth in the Area 2 fishery when compared to the highest recent landings from that area of 27,198 mt in 2000.

*Response:* After reviewing the Council's justification for setting OY and DAH at 180,000 mt, NMFS concluded that it did not provide a reasonable basis for an allocation of zero TALFF. As noted in the proposed rule, if OY were set higher than DAH, it could result in TALFF, which is the portion of the OY of a fishery that will not be harvested by vessels of the United States. While NMFS agreed with the Council that there are legitimate and legally defensible reasons to set OY at a level that can be harvested by the domestic fleet, NMFS concluded that it was not reasonable to assume that the domestic fleet would harvest 180,000 mt of herring in 2005. NMFS explained at length in the proposed rule why it concluded that it was reasonable to assume that the commercial fishery would harvest 150,000 mt of herring in 2005.

While the commenter contended that the TACs proposed by NMFS provide the potential for only a 12–percent increase in landings from Area 1 and Area 3 when compared to 2001, the commenter provided no evidence that landings from those areas are expected to increase beyond that level. In addition, NMFS is unable to duplicate this calculation. In 2001, the TAC was attained in Area 1 (1A and 1B combined), with landings of 70,432 mt and a combined TAC of 70,000.

Therefore, using that year as a basis, any growth in the summer/fall fishery would have had to have occurred in Area 3. In 2001, landings in Area 3 reached 35,079 mt. An increase of 12 percent above this level would be accomodated by a TAC of 39,288 mt, while NMFS is establishing the Area 3 TAC at 50,000 mt, allowing an increase of 42 percent in harvest from the area.

The commenter also expressed concern that the Area 2 TAC of 30,000 mt is only slightly higher than the highest recent level of landings from the area, 27,198 mt in 2000. NMFS notes that the TAC of 30,000 mt allows for considerable expansion in landings when compared to landings in more recent years. While the 2001 landings levels demonstrate that the fishery is able to harvest higher amounts from Area 3, landings have not exceeded 20,266 mt since 2001. NMFS concludes that the inseason adjustment provision provides a mechanism to address any problems that could arise for the industry if landings approach the 30,000–mt level in 2005.

*Comment 6:* Two commenters oppose the reduction in OY, DAH, and DAP to 150,000 mt, arguing that the U.S. harvesting and processing sectors have the capacity to utilize 180,000 mt. They argued that demand for herring is expected to be high, and that processing plants have expanded their capacity in recent years. One of these commenters also noted that NMFS provided no biological justification for reducing the OY or the TACs in Areas 2 and 3.

*Response:* NMFS agrees that there is capacity within both the harvesting and processing sectors to utilize more than 150,000 mt of herring. However, NMFS makes a distinction between the capacity within the industry and the performance of the fishery in recent years. NMFS concluded it could not continue to justify specifications greatly in excess of fishery performance solely on the basis of the industry's intention to expand. NMFS concluded that it was far better for the development of the U.S. industry to specify DAH at a level that could reasonably be attained by the industry; and further, to specify OY to equal DAH and TALFF at zero. NMFS notes that the reductions in OY, DAH and DAP, and the resultant reductions in the TACs for Areas 2 and 3, were not due to biological concerns.

*Comment 7:* Nine commenters supported reducing the OY to 150,000 mt. Seven of them supported a different allocation of the area TACs to reflect the 30,000–mt reduction in DAH, with reductions in Area 1A, as well as in Areas 2 and 3. Most of them expressed concern that the TAC for Area 1A is too high. In addition, they noted that the reductions in TACs for Areas 2 and 3 appeared inconsistent with the PDT advice that future expansion of the fishery should be focused on offshore spawning components.

*Response:* NMFS has explained in the responses to Comments 2 and 4 why it concluded that it was appropriate to set the Area 1A TAC at 60,000 mt. The response to Comment 5 explains why NMFS concluded that TACs of 30,000 mt in Area 2 and 50,000 mt in Area 3 provide sufficient opportunities for the development of the fishery in those areas. NMFS reiterates that the inseason adjustment mechanism would allow those TACs to be increased up to the levels recommended by the Council, if it appears they will constrain the development of the fishery in those areas.

*Comment 8:* Four commenters stated that setting the Area 1A TAC at 60,000 mt violates at least two of the management objectives adopted by the Council during its current activities to develop Amendment 1 to the FMP. These are, ''To prevent the overfishing of discrete spawning components of Atlantic herring,'' and ''To provide for the orderly development of the offshore and inshore fisheries.''

*Response:* The Area 1A TAC has been set at 60,000 mt since 2001, and, as stated above, there is no evidence that harvesting this amount from Area 1A has led to overfishing of the inshore spawning component of the stock. The TAC in Area 1A has been fully utilized in recent years, and the development of the fishery in that area has been orderly in the sense that it has enabled the participants in the fishery to operate during most of the fishing year. The TACs in Areas 1B, 2, and 3 are set such that they allow for an orderly expansion of the fishery, with controls to prevent overfishing the stock.

As noted by the commenters, the Council will be examining a range of alternatives in Amendment 1 that are intended to prevent overfishing of discrete spawning components, as well as provide for the orderly development of the offshore and inshore fisheries.

*Comment 9:* Three commenters supported setting USAP at 20,000 mt, noting that it would provide additional processing capability that can be utilized by vessels that are not configured to deliver herring to shoreside processing facilities.

*Response:* NMFS is setting the USAP at 20,000 mt specifically to provide additional opportunities for U.S. vessels.

*Comment 10:* Three commenters stated that USAP should be set at zero because they believe that such an allocation could negatively impact shoreside processing operations and discourage their efforts to increase production. One commenter contended that a USAP vessel would exceed the vessel size limits that apply to herring fishing vessels, and stated that those size limits should apply to USAP vessels.

*Response:* NMFS reviewed the Council's justification for setting USAP at zero and concluded it would inappropriately favor one segment of the U.S. processing sector over another, without any justifiable reasons. Landings from Areas 2 and 3 (where USAP is being authorized, as in previous years) have been considerably lower than the allocated TACs for each of the past several years. USAP could provide an additional outlet for U.S. harvesters, particularly those who operate vessels that do not have refrigerated seawater systems (RSW) to maintain catch quality for delivery to onshore processors. Such vessels could offload product to USAP vessels near the fishing areas, increasing the benefits to the U.S. industry. Given the significant gap between the DAH and recent landings in this fishery, the allocation of 20,000 mt for USAP should not restrict either the operation or the expansion of the shoreside processing facilities.

NMFS notes that the FMP specifically allows USAP vessels to exceed the vessel size limits that apply to fishing vessels.

*Comment 11:* Six commenters supported NMFS's intention to use the inseason adjustment provision in the FMP to increase the allocations for TAC in Areas 2 and Area 3 if the landings approach the TACs being set in these specifications. Most of these commenters recommended establishing a trigger point at which the action would be initiated, with many suggesting that the adjustment should be triggered when landings reach 75 percent of the OY.

*Response:* NMFS agrees that it will be important to closely monitor herring landings in 2005 and 2006 so that an in-season adjustment, if necessary, can be implemented quickly. NMFS will utilize all available data sources and landings projection techniques to ensure that it can achieve that goal. NMFS sees no need to establish a pre-established landings trigger for initiating an inseason increase. The provision requires that NMFS consult with the Council and, through the Council process, the industry can provide additional information about activity in

the fishery to help determine the need for an inseason adjustment.

*Comment 12:* One commenter supports the use of the inseason adjustment, if necessary, but would like to broaden it to give the NMFS Regional Administrator the authority to do the following: Adjust OY, DAH, and area TACs downward if scientific information warrants it; implement bycatch control measures, including hard bycatch caps, for species including groundfish and marine mammals; and require mandatory levels of observer coverage on a seasonal and/or area basis if high amounts of bycatch are encountered.

*Response:* The inseason adjustment regulations at § 648.200(e) give the Regional Administrator the authority to adjust the specifications and TACs either upward or downward, assuming that new information warrants such an adjustment. However, the regulations do not allow the Regional Administrator to implement bycatch control measures or to require mandatory levels of observer coverage. Such management measures must be addressed through the framework process or through an amendment to the FMP.

*Comment 13:* One commenter suggested that, because NMFS can close the herring fishery through a notification in the **Federal Register**, it should be able to take the same abbreviated action to increase OY, DAH, DAP, and area TACs, if necessary.

*Response:* NMFS does not have legal authority to adjust the specifications through the mechanism proposed by the commenter. Applicable laws and regulations require that NMFS go through notice and comment rulemaking to increase OY,DAH, DAP and area TACs.

*Comment 14:* Seven commenters opposed setting the specifications for a period of 2 years, with some arguing that because it is a dynamic fishery, the specifications need to be reconsidered and reestablished annually.

*Response:* This action does not automatically establish these specifications for 2 years. The Council intended, however, that the specifications for 2005 will be maintained in 2006, if appropriate. The herring PDT will evaluate updated stock and fishery information during 2005, and will make a recommendation to the Council and NMFS concerning whether or not to maintain these specifications for 2006. If new data require it, the Council will initiate the process to establish new specifications for the 2006 fishing year. NMFS has used this rulemaking to ensure that the public understands the Council's intent.

*Comment 15:* One commenter stated that the system thorough which the specifications were developed was not fair, in large part because it did not adequately reflect the concerns and interests of recreational fishermen.

*Response:* The process used by the Council to develop these specifications was open to the public, and public notice was given well in advance of all meetings of the Council's Herring Advisory Panel and Herring Oversight Committee. In addition, the specifications were debated at Council meetings, during which public comment was solicited. Furthermore, the publication of the proposed rule for the specifications provided an additional opportunity for any interested individuals or groups to submit comments on the measures being considered, as was done by this commenter.

*Comment 16:* One commenter opposed the removal of the regulatory text that specifies the dates by which the proposed and final rules for the annual specifications must be published.

*Response:* This change is being made because it is unnecessary to specify such dates in regulatory text. NMFS believes that the requirement to issue specifications for each fishing year is sufficient to assure that the appropriate regulatory action will be taken. Furthermore, the timing of the Council process, and date of the Council's submission of its recommendations, determines whether NMFS is able to publish the proposed and final rules by a specific date. The dates themselves are not sufficient to control the process.

*Comment 17:* One commenter suggested that all quotas be cut by 50 percent this year, and by 10 percent each succeeding year, but provided no basis for these recommendations.

*Response:* The TACs established by this action are based on the best scientific information available and extensive analyses conducted by the Council and reviewed by NMFS. There is no information to support the reductions suggested by the commenter.

## Classification

This final rule has been determined to be not significant for purposes of Executive Order 12866.

Included in this final rule is the FRFA prepared pursuant to 5 U.S.C. 604(a). The FRFA incorporates the discussion that follows, the comments and responses to the proposed rule, and the initial regulatory flexibility analysis (IRFA) and other analyses completed in support of this action. No comments were received on the IRFA. A copy of the IRFA is available from the Regional Administrator (see **ADDRESSES**).

*Final Regulatory Flexibility Analysis*

Statement of Objective and Need

A description of the reasons why this action is being considered, and the objectives of and legal basis for this action, is contained in the preamble to the proposed rule and is not repeated here.

### Description and Estimate of Number of Small Entities to Which the Rule Will Apply

During the 2003 fishing year, 154 vessels landed herring, 38 of which averaged more than 2,000 lb (907 kg) of herring per trip. There are no large entities, as defined in section 601 of the RFA, participating in this fishery. Therefore, there are no disproportionate economic impacts between large and small entities.

### Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements

This action does not contain any new collection-of-information, reporting, recordkeeping, or other compliance requirements. It does not duplicate, overlap, or conflict with any other Federal rules.

### Minimizing Significant Economic Impacts on Small Entities

The annual setting of the specifications focuses on the allocation of herring to various groups and for various purposes. Impacts were assessed by the Council and NMFS by comparing the proposed measures to the herring landings made in 2003. Alternatives that were considered to lessen the impacts on small entities are summarized below.

The Council analyzed four alternatives for OY and the distribution of TACs. One alternative would have retained the specifications implemented during the 2003 fishing year, which would have maintained the OY at 180,000 mt. This OY is still roughly 80 percent greater than the average historical landings for this fishery, and therefore that level of OY would not pose a constraint on the fishery. This alternative was rejected because it would have set OY at a level that is too high in light of the historic performance of the fishery. An allocation of this level could have resulted in an allocation of TALFF, resulting in negative impacts on the U.S. industry.

The three other alternatives considered by the Council would have set the OY at 150,000 mt. Although the OY of 150,000 mt is lower than that proposed by the Council, it is still

roughly 50 percent greater than the average historical landings for this fishery, and therefore that level of OY is not expected to pose a constraint on the fishery.

The alternatives that would set the OY at 150,000 mt would establish varying levels for the area TACs. One alternative would have established the following TACs: Area 1A, 60,000 mt; Area 1B, 10,000 mt; Area 2, 20,000 mt; and Area 3, 60,000 mt. The only area TAC that would be lower than the 2003 TAC under this option is the Area 2 TAC. The most recent year in which the landings from this area were greater than 20,000 mt (the proposed TAC) was 2000 (27,198 mt). The average landings from 2001 to 2003 were 14,300 mt, with 2003 landings at 16,079 mt. Under current market conditions, the new TAC may become constraining if the fishery in 2005 (and possibly 2006) is similar to that in 2000. If this is the case, then the Area 2 TAC fishery season could end before the end of the year, creating a potential economic constraint on the fishery, especially if vessels were forced to travel farther (increased steaming time) to harvest herring in Area 3. Because of this potential for economic costs, this alternative was rejected.

Another alternative considered would have established the following TACs: Area 1A, 45,000 mt; Area 1B, 10,000 mt; Area 2, 35,000 mt; and Area 3, 60,000 mt. With a 15,000–mt decrease in the combined Area 1 TACs, the economic impact of this alternative could be relatively large on vessels in the fishery that depend on herring in Area 1A, especially if those vessels are not able to move to other areas to obtain fish. Even if vessels could fish in other areas, their operating costs would be increased because of increased steaming time. Because of this potential for economic costs, this alternative was rejected. An Area 2 TAC of 35,000 mt proposed under this alternative would not be constraining given recent landings history.

The final alternative considered would have established the following TACs: Area 1A, 55,000 mt; Area 1B, 5,000 mt; Area 2, 30,000 mt; and Area 3, 60,000 mt. With a 10,000–mt decrease in the combined Area 1 TACs, the impact of this alternative would be very similar to the impact of the prior alternative, although not as severe. Because of this potential for economic costs, this alternative was rejected. An Area 2 TAC of 30,000 mt proposed under this alternative would not be constraining given recent landings history.

**Small Entity Compliance Guide**

Section 212 of the Small Business Regulatory Enforcement Fairness Act of 1996 states that, for each rule, or group of related rules, for which an agency is required to prepare a FRFA, the agency shall publish one or more guides to assist small entities in complying with the rule and shall designate such publications as ''small entity compliance guides.'' The agency shall explain the actions a small entity is required to take to comply with a rule or group of rules. As part of this rulemaking process, a small entity compliance guide will be sent to all holders of permits issued for the herring fishery. In addition, copies of this final rule and guide (i.e., permit holder letter) are available from the Regional Administrator (see **ADDRESSES**) and may be found at the following web site: *http://www.nmfs.gov/ro/doc/nero.html*.

**List of Subjects in 50 CFR Part 648**

Fisheries, Fishing, Reporting and recordkeeping requirements.

Dated: April 21, 2005.

**Rebecca Lent,**

*Deputy Assistant Administrator for Regulatory Programs, National Marine Fisheries Service.*

For the reasons set out above, 50 CFR part 648 is amended as follows:

## PART 648—FISHERIES OF THE NORTHEASTERN UNITED STATES

■ 1. The authority citation for part 648 continues to read as follows:

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

■ 2. In § 648.200, paragraphs (c) and (d) are revised to read as follows:

**§ 648.200 Specifications.**

* * * * *

(c) The Atlantic Herring Oversight Committee shall review the recommendations of the PDT and shall consult with the Commission's Herring Section. Based on these recommendations and any public comment received, the Herring Oversight Committee shall recommend to the Council appropriate specifications. The Council shall review these recommendations and, after considering public comment, shall recommend appropriate specifications to NMFS. NMFS shall review the recommendations, consider any comments received from the Commission, and shall publish notification in the **Federal Register** proposing specifications and providing a 30–day public comment period. If the proposed specifications differ from those recommended by the Council, the reasons for any differences shall be clearly stated and the revised specifications must satisfy the criteria set forth in this section.

(d) NMFS shall make a final determination concerning the specifications for Atlantic herring. Notification of the final specifications and responses to public comments shall be published in the **Federal Register**. If the final specification amounts differ from those recommended by the Council, the reason(s) for the difference(s) must be clearly stated and the revised specifications must be consistent with the criteria set forth in paragraph (b) of this section. The previous year's specifications shall remain effective unless revised through the specification process. NMFS shall issue notification in the **Federal Register** if the previous year's specifications will not be changed.

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[FR Doc. 05–8464 Filed 4–27–05; 8:45 am]

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## DEPARTMENT OF COMMERCE

## National Oceanic and Atmospheric Administration

## 50 CFR Part 648

**[Docket No. 050216041–5105–02; I.D. 020705C]**

**RIN 0648–AS87**

## Fisheries of the Northeastern United States; Recordkeeping and Reporting Requirements; Regulatory Amendment to Modify Seafood Dealer Reporting Requirements

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

**ACTION:** Final rule.

**SUMMARY:** NMFS issues this final rule to amend the electronic reporting and recordkeeping regulations for federally permitted seafood dealers participating in the summer flounder, scup, black sea bass, Atlantic sea scallop, Northeast (NE) multispecies, monkfish, Atlantic mackerel, squid, butterfish, Atlantic surfclam, ocean quahog, Atlantic herring, Atlantic deep-sea red crab, tilefish, Atlantic bluefish, skate, and/or spiny dogfish fisheries in the NE Region. This action reduces the submission schedule for dealer reports from daily to weekly, eliminates duplicate reporting of certain species, and clarifies existing reporting requirements. This action will also

allow vessel operator permits issued by the Southeast Region to satisfy NE vessel operator permitting requirements. The purpose of this action is to reduce the reporting burden on seafood dealers, improve data quality, simplify compliance, and clarify existing requirements.

**DATES:** This final rule is effective May 1, 2005.

**ADDRESSES:** Copies of the Regulatory Amendment, its Regulatory Impact Review (RIR), the Final Regulatory Flexibility Analysis (FRFA), and other supporting materials are available from Patricia A. Kurkul, Regional Administrator, Northeast Region, NMFS, One Blackburn Drive, Gloucester MA 01930. The regulatory amendment/RIR/FRFA are also accessible via the Internet at *http://www.nero.nmfs.gov*.

Written comments regarding the burden hour estimates or other aspects of the collection-of-information requirements contained in this final rule may be submitted to Patricia A. Kurkul at the above address and by e-mail to *David_Rostker@omb.eop.gov*, or by fax to (202) 395–7285.

**FOR FURTHER INFORMATION CONTACT:** Kelley McGrath, Fishery Information Specialist, (978) 281–9307, fax (978) 281–9161 or Erik Braun, Fishery Reporting Specialist, (631) 324–3569, fax (631) 324–3314.

**SUPPLEMENTARY INFORMATION:** This final rule implements measures contained in the Regulatory Amendment to Modify Seafood Dealers Reporting Requirements (Regulatory Amendment) for federally permitted seafood dealers. This action will reduce the reporting frequency for electronic purchase reports from daily to weekly; require only species managed by the NE Region to be reported when purchasing fish from a vessel landing outside the NE Region; and exempt certain inshore species from Federal reporting requirements. Other measures include: eliminating duplicate reporting to NMFS of Atlantic bluefin tuna purchases by federally permitted dealers; removing the option for dealers to submit reports via a phone-line using File Transfer Protocol (FTP); and clarifying several existing dealer reporting requirements. In addition to the dealer reporting changes, this action modifies the requirements for vessel operator permits to allow operator permits issued by the Southeast Region under 50 CFR part 622 to satisfy NE operator permit requirements at 50 CFR 648.5. Details concerning the justification for and development of the regulatory amendment and the implementing regulations were provided in the preamble to the proposed rule (69 FR 10585, March 4, 2005) and are not repeated here. A copy of the proposed rule was mailed to all federally permitted dealers affected by this action, as well as to the state directors for all states within the NE Region.

Regulations implementing the fishery management plans (FMPs) for the summer flounder, scup, black sea bass, Atlantic sea scallop, NE multispecies, monkfish, Atlantic mackerel, squid, butterfish, Atlantic surfclam, ocean quahog, Atlantic herring, Atlantic deep-sea red crab, tilefish, Atlantic bluefish, skate, and spiny dogfish fisheries are found at 50 CFR part 648. These FMPs were prepared under the authority of the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act). All dealers and vessels issued a Federal permit in one or more of the aforementioned fisheries must comply with the reporting requirements outlined at § 648.7. Lobster dealers issued a Federal lobster permit, but not issued any of the permits with mandatory reporting requirements under this part, are not required to comply with these reporting regulations, although other reporting requirements may apply. NMFS is modifying several components of these reporting regulations to reduce the reporting and administrative burden on seafood dealers and vessel operators, improve data quality, simplify compliance and enforceability of the reporting regulations, and eliminate confusion regarding existing reporting requirements.

## Frequency of Reporting

This rule requires all seafood dealers permitted under § 648.6 to submit electronic, trip-level reports of all fish purchases and receipts to NMFS on a weekly basis. Consistent with the existing regulations, weekly reports will be due within 3 days of the end of the reporting week, by midnight of the following Tuesday. If no purchases or receipts are made during the entire reporting week, an electronic report so stating is required. Dealers are allowed to submit negative reports for up to 3 months in advance, if they know that no fish will be purchased during that time. Edits to an existing report will be allowed for up to 3 days following the due date of the original report.

## Out-of-region Dealers

This rule requires dealers making purchases from a vessel landing outside of the NE Region (Maine to North Carolina) to report only their purchases of species managed by the NE Region. Limiting the species that must be reported by dealers making out-of-region purchases will reduce the burden on those dealers, and still allow for effective monitoring of species for which the NE Region is responsible. It will also lessen duplicate reporting to Federal and state agencies, and improve the quality of the data collected by reducing the potential for double counting of landings.

## Inshore Species Reporting

This action exempts several inshore species from dealer reporting requirements. Inshore exempted species include bay scallops; blood arc, razor and soft clams; blood and sand worms; blue, green, hermit, Japanese shore, and spider crabs; blue mussels; oysters; and, quahogs. NMFS will continue to collect landings information from federally permitted seafood dealers for all finfish species, federally managed shellfish, and American lobsters received or purchased by these dealers. In many cases, purchases of the exempt inshore species are being reported to a state management agency as well as to NMFS, resulting in duplicate data. In other cases the state agency supplies NMFS with summary data of these species, thus providing the needed information for analyses. Other states rely on NMFS to collect inshore species landings and provide that state with the data. However, states have responsibility for collection of information for most inshore shellfish fisheries and several states have information collection programs already in place, many of which have more detailed information requirements than the Federal reporting requirements. In addition, NMFS cannot verify the quality and completeness of state data, nor properly monitor and enforce the requirement. As states move toward electronic reporting programs, it is anticipated that one reporting system will meet the data needs of both state and Federal agencies, further reducing the reporting burden on dealers and simplifying compliance with both state and Federal regulations. Until such time, state agencies may require their dealers to report purchases of exempt inshore species through the Federal electronic reporting system, and NMFS will continue to make those data available to the responsible state agency.

## Atlantic Bluefin Tuna

This action eliminates the requirement for dealers to report purchases of Atlantic bluefin tuna. However, to purchase Atlantic bluefin tuna, dealers must comply with Highly Migratory Species (HMS) requirements under 50 CFR part 635, including the

requirement to submit purchase reports to the HMS division of NMFS. This action does not affect HMS requirements.

**File Transfer Protocol (FTP) Option**

To accommodate NOAA policy, outlined in the DOC's ''Unclassified System Remote Access Security Policy and Minimum Implementation Standards'' document, this rule eliminates phone-line FTP as an acceptable system of file transfer due to security concerns. Dealers may submit reports using a web-based data entry system, through a web-based file upload procedure, or via an approved state-implemented data collection program.

**Units of Measure**

This rule clarifies that dealers can report purchases in a variety of units of measure. The revised language will accommodate purchases of species that are landed in units of measure other than pounds or bushels. For instance, scallops may be reported in gallons, and ocean quahogs may be reported in bags. The online data entry system that many dealers use to submit data to NMFS contains these additional units of measure as well.

**Cage Tag Numbers**

This rule clarifies that only surfclam and ocean quahog trips harvested under an Individual Transferrable Quota (ITQ) require cage tag numbers to be reported. Purchases of surfclams and ocean quahogs from non-ITQ trips do not require tags, nor do other species purchased by surfclam and ocean quahog dealers.

**Price, Disposition and Trip Identifier**

This rule requires dealers to submit price and disposition information within 16 days after the end of the reporting week. Prior to the implementation of electronic reporting in 2004, price information was due within 16 days of the end of the reporting week, which gave dealers the time they needed to collect the information and still provided economic data for analyses within a reasonable time frame. As specified in the existing regulations, effective May 1, 2005, trip identifier information will be due within the same time frame as the initial report.

**At-Sea Receivers**

To minimize the potential for duplicate and triplicate reporting of fish transferred at sea, this rule removes the requirement for at-sea receivers to report their at-sea receipts of Atlantic herring, Atlantic mackerel, squid, butterfish, scup, or black sea bass. At-sea purchases of these species must still be reported. This rule also removes summer flounder from the above list of species because summer flounder regulations prohibit that species from being transferred at sea.

**Computer Acquisition Requirement**

This rule clarifies that dealers are not required to purchase or obtain their own personal computer to comply with the reporting requirements. Dealers may use any computer that meets the minimum system requirements to submit data. NMFS has established kiosks in several field offices specifically for dealers to use to meet their reporting requirements.

**Annual Processed Products Report (APPR)**

This rule clarifies that both dealers and processors must complete and submit the APPR each year. The APPR is a census used to collect employment and economic data for the processing segment of the seafood industry. Certain fisheries, such as surfclam, ocean quahog, and Atlantic herring require processors to be issued a processor permit under this part. Most entities issued a processor permit are also issued a dealer permit, however, there may be some processors issued only a processor permit under this part.

**Operator Permits**

To provide a reciprocal agreement with the Southeast Region, this rule allows vessel operator permits issued by the Southeast Region under certain parts to satisfy NE Region vessel operator permitting requirements.

**Comments and Responses**

The deadline for receiving comments on the proposed rule (69 FR 10585, March 4, 2005) was March 21, 2005. Prior to the end of the comment period, NMFS received nine comments on the proposed rule. Six comments were from individuals representing or affiliated with seafood dealers. Two comments were from state fishery management agencies (North Carolina and Delaware). One comment was submitted by a member of the general public who appears to have no particular affiliation. Geographically, four comments were submitted by individuals in Massachusetts, and one comment each was submitted by individuals in Maine, Rhode Island, New Jersey, Delaware, and North Carolina. Three commenters expressed overall support for the proposed rule, particularly with regard to reducing the reporting frequency from daily to weekly. Two commenters were in favor of the proposed rule, but offered specific comments regarding the exempted inshore species. The remaining commenters provided specific comments on one or more of the following issues:

*Comment 1:* One commenter was in favor of reducing the reporting frequency, but suggested that monthly reporting would be more beneficial to dealers.

*Response:* NMFS recognizes that many dealers would prefer to submit reports on a monthly basis, however monthly reporting does not provide fisheries mangers with the necessary landings information within the time frame required for effective quota monitoring. Weekly reporting offers a compromise that is less burdensome to dealers than daily, but that still allows NMFS to monitor quotas and implement management measures within a reasonable time frame.

*Comment 2:* One commenter requested that the exemption for certain inshore species be expanded to exempt all non-federally-managed species from Federal reporting requirements.

*Response:* Having a complete picture of the fisheries, including harvests, landings, and economic data for species not managed by the Federal government is necessary for effective scientific and economic analyses and fisheries management. This enables NMFS to meet its obligations under a number of laws. One option NMFS considered was state-by-state exemptions for reporting of non-federally-managed species, contingent upon the state providing NMFS with trip-level landings and economic data for the exempt species within an acceptable time frame. While some states have been able to provide NMFS with landings information at the level of detail and within the time frame required for analyses, other states have not been able to accommodate these data needs. Therefore, to exclude all non-federally-managed species from reporting requirements at this time would likely have a deleterious effect on fisheries management. However, as more states move toward electronic reporting, it is anticipated that one reporting system will meet the data needs of both state and Federal agencies, further reducing the reporting burden on dealers and simplifying compliance with both state and Federal regulations.

*Comment 3:* One commenter suggested that NMFS continue to collect landings of all species, whether federally managed or not, and continue to make those data available to the responsible state management agency.

*Response:* NMFS will continue to collect landings information from federally permitted seafood dealers for all finfish species, federally managed shellfish, and American lobsters received or purchased by these dealers. However, states have responsibility for collection of information for most inshore shellfish fisheries and many states have information collection programs already in place. Further, NMFS cannot verify the quality and completeness of state data, nor properly monitor and enforce the requirement. As states move toward electronic reporting programs, it is anticipated that one reporting system will meet the data needs of both state and Federal agencies, further reducing the reporting burden on dealers and simplifying compliance with both state and Federal regulations. Until such time, states may require their dealers to report purchases of exempt inshore species through the Federal electronic reporting system, and NMFS will continue to make those data available to the responsible state agency.

*Comment 4:* One commenter stated that NMFS should not make it easier on dealers to report, and should impose even more stringent enforcement measures on dealers, as they are profiting from a public resource.

*Response:* It is not the intention nor the duty of NMFS to impose unnecessary regulatory burdens on entities that participate in the fishing industry, but rather to ensure the long term health of the resource through the implementation of effective management measures. The change in reporting frequency from daily to weekly and the exemption of certain species from reporting requirements will make compliance easier for most dealers. However, the information needed to implement appropriate management strategies will continue to be collected at the same level of detail, and within a time frame that allows for effective management.

*Comment 5:* Two commenters did not feel the proposed changes would reduce the reporting burden on dealers.

*Response:* The change to weekly reporting will make it easier for most dealers to comply with the reporting requirements. The time frame for submissions will be more flexible under weekly reporting, enabling dealers to complete and submit their reports in one session of data entry or file upload at the end of the week, or in several sessions spread over the course of the week. The exemption of certain species from reporting requirements will benefit some dealers more than others, depending on the primary species purchased and the location of their particular business.

*Comment 6:* Two commenters questioned the time frame in which dealer reports are currently processed and collated by NMFS.

*Response:* NMFS currently compiles landings data for quota managed species on a weekly basis. This information is published in the weekly quota reports and is available on the NMFS web site at *http://www.nero.nmfs.gov*.

*Comment 7:* One commenter suggested returning to paper-based reporting and submitting those reports via a facsimile machine.

*Response:* This rule does not consider returning to a paper based reporting system because it is more cumbersome, costly, and time consuming to administer, and cannot provide the information needed in a timely manner. NMFS will continue to look for ways to allow dealers to use new technologies, as they develop, to satisfy Federal reporting requirements through the least burdensome mechanism.

*Comment 8:* Two commenters suggested that the burden of providing a trip identifier should be on the fisherman rather than the dealer, and that vessel operators should be aware of the trip identifier and logbook requirements.

*Response:* This rule makes no changes to the trip identifier requirement. However, any vessel owner issued a permit requiring completion of a vessel logbook has been sent information regarding vessel logbook completion as well as the trip identifier requirement, and should be aware of their reporting responsibilities. It is the responsibility of the dealer to ensure that a trip identifier is available, if required for that trip, prior to purchasing or receiving fish. It is the responsibility of the vessel operator to provide the trip identifier to the dealer upon sale of their fish.

## Changes from the Proposed Rule

There are no changes from the proposed rule.

## Classification

The Assistant Administrator (AA) for Fisheries, NOAA, finds good cause pursuant to 5 U.S.C 553(d)(3) to make this rule effective immediately, thereby waiving the 30-day delayed effective date required by 5 U.S.C. 553. The principal purpose of this action is to reduce the reporting and administrative burden on seafood dealers. This rule will reduce the reporting burden on federally permitted dealers by: reducing the reporting frequency for electronic purchase reports from daily to weekly; requiring only species managed by the Northeast Region to be reported when purchasing fish from a vessel landing outside the Northeast Region; minimizing reporting of certain inshore species not managed by NMFS; eliminating confusion over some existing regulatory requirements; and, eliminating duplicate reporting of Atlantic bluefin tuna purchases by federally permitted dealers. This action will also reduce the administrative burden on vessel operators by allowing operator permits issued by the Southeast Region under 50 CFR part 622 to satisfy Northeast Regional operator permit requirements.

The AA waives the 30-day delay in effectiveness of this rule in order to implement this rule by May 1, 2005, the start of the fishing year. The original electronic dealer reporting rule was effective on May 1, 2004. It represented such a deviation from the historical paper reporting system, that NMFS allowed industry members several months to come into compliance. It also delayed the daily reporting system for small dealers until May 1, 2005. During this transition period to compliance, NMFS encountered a number of unanticipated technical problems in the development and implementation of the computer program for the reporting system. In addition, once NMFS began receiving daily reports from large dealers, it became apparent that the new system was causing much confusion and unforseen problems among dealers due to the transition from using regional species codes to using national species codes. Specifically, the new system was not able to provide the flexibility that dealers, particularly those purchasing illex and loligo squid, needed to accurately report the amounts of species landed. In order to allow effective monitoring of quota managed fisheries, NMFS concluded that a weekly reporting requirement for all dealers would satisfy quota monitoring needs for most species, for most of the year, and that the current level of staffing could manage efficiently the number of data transmissions generated by a weekly reporting requirement.

If the delayed effective period is not waived, a number of small dealers will be forced to hire at least an additional employee to meet the daily electronic reporting requirement. The average cost to hire a temporary employee for six weeks, at a wage rate of $18.88 per hour, is $4,531 per dealer. Assuming half of the 267 small dealers opt to do that, the total cost to industry, including a recruitment fee of $300 each, would be approximately $683,000. Larger dealers may have to modify their office

procedures to ensure that the required reports are submitted daily to NMFS. This will cause a certain level of economic disruption during the period prior to the implementation of the measures in this rule. Dealers who do not comply with the daily reporting requirements may face civil monetary penalties of up to $130,000 for an offense under the Magnuson-Stevens Act. Failure by dealers to report their fisheries transactions will have a negative impact on the quality and completeness of the data upon which fisheries analyses and management decision are based.

Further, May 1st is the start of the fishing year for most species, therefore, implementation of these requirements by that date ensures that consistent reporting requirements are in effect throughout the entire fishing year, resulting in better fisheries data. Some dealers may temporarily drop their dealer permit to avoid daily reporting, resulting in the loss of income during what is typically a very busy period for dealers. Based on 2003 and 2004 ex-vessel revenues reported by small dealers, the loss of revenue resulting from a dealer dropping their permit(s) for six weeks to avoid the daily reporting requirement would average approximately $16,500 per dealer. Assuming that ten percent, or 26, of the small dealers opt to temporarily drop their permits, the total cost to those dealers would be approximately $230,000. These estimates do not include the potential impacts to the vessels that would no longer be allowed to sell their catches to those dealers, nor the long term impacts to a dealer if a vessel is forced to go elsewhere temporarily to sell their product and then does not return to the original dealer once their dealer permit(s) is reissued. The implementation of the daily electronic reporting requirement for such a short period of time (i.e., during the delayed effectiveness period) will cause confusion and a lack of confidence in the stability of the administrative process among many dealers. In addition, the lack of a waiver will cause those fishermen in possession of an operator permit issued by the Southeast Region to have to apply for a NE Regional operator's permit if they intend to fish for species regulated under 50 CFR part 648 before the end of the delayed effectiveness period.

This final rule has been determined to be not significant for the purposes of Executive Order 12866.

Included in this final rule is the Final Regulatory Flexibility Analysis (FRFA) prepared pursuant to 5 U.S.C. 604(a). The FRFA incorporates the IRFA and a summary of the analyses completed in support of this action. There were no public comments on the economic impacts of the proposed rule. A copy of the FRFA is available from the Regional Administrator (see **ADDRESSES**).

**Final Regulatory Flexibility Analysis**

*Statement of Objective and Need*

A description of why this action is being considered, and the objective of and legal basis for this action, is contained in the preamble to the proposed rule and is not repeated here.

*Summary of Significant Issues Raised in Public Comments*

NMFS received 9 comments on the proposed rule (69 FR 10585, March 4, 2005) prior to the close of the comment period. Of these, there were no comments on the economic impacts of the rule. Therefore, no changes were made to this action as a result of the comments received. For a complete description of the comments received on the proposed rule, refer to the above section titled ''Comments and Responses.''

*Description and Estimate of Number of Small Entities to Which the Rule Will Apply*

This action affects seafood dealers and processors issued a Federal permit for one or more of several species. Dealers are firms who purchase or receive fish from vessels for a commercial purpose, other than solely for transport on land, and then sell that product directly to restaurants, other dealers or processors, or consumers without substantially altering the product. Processors are firms that purchase raw product and produce another product form, which is then sold or transferred to markets, restaurant, or consumers. The majority of dealers and processors affected by this action are issued permits for several species.

For the purposes of RFA, all dealers affected by this final rule are considered small businesses; therefore, there are no disproportionate impacts between large and small entities, as defined in the RFA. Based on 2003 data, approximately 576 dealers and processors hold one or more of the permits requiring compliance with this rule.

*Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements*

The projected reporting, recordkeeping, and other compliance requirements to which the final rule applies were identified in the preamble to the proposed rule (69 FR 10585, March 4, 2005) and in the IRFA, and remain the same. A description of the projected reporting, recordkeeping, and other compliance requirements is provided in the IRFA and the IRFA summary contained in the classification section of the proposed rule and is not repeated here. No professional skills are necessary for preparation of the reports or records specified above.

*Overall, Duplicate, or Conflict with other Federal rules*

This rule does not duplicate, overlap, or conflict with any relevant Federal rules.

*Steps Taken to Minimize Economic Impacts on Small Entities*

This final rule modifies the reporting requirements for seafood dealers participating in the summer flounder, scup, black sea bass, Atlantic sea scallop, NE multispecies, monkfish, Atlantic mackerel, squid, butterfish, Atlantic surfclam, ocean quahog, Atlantic herring, Atlantic deep-sea red crab, tilefish, Atlantic bluefish, skate, and/or spiny dogfish fisheries, and also makes a minor change to vessel operator permit requirements. These changes are designed to reduce the administrative burden on dealers and vessel operators, and to clarify existing regulations, thus it is anticipated that any economic impacts resulting from this action will be beneficial. The potential economic impacts of these measures are described in detail in the IRFA and the IRFA summary contained in the Classification section of the proposed rule (69 FR 10585, March 4, 2005).

In addition to the action being taken in this final rule and a No Action alternative, NMFS considered additional options for each of the three major facets of this rule: Reporting frequency, out-of-region purchases, and inshore species reporting. For reporting frequency, NMFS considered two additional options. The first option redefined the dealer categories based on purchases of quota managed species only, rather than total purchases as is currently the case. Under this option Small Dealers would continue to report weekly and Large Dealers would continue to report daily. The second option considered for reporting frequency required weekly reporting for all dealers, with an option for NMFS to implement daily reporting if landings of a species reached levels requiring daily reporting for effective quota monitoring. Both of these options would reduce the reporting frequency, and thus the cost of compliance, for most dealers. While the

dealers still required to report daily under the first option would not see a cost savings, the cost would not increase for any dealers under that option compared to the No Action alternative. Under the second option, all dealers would see a cost benefit unless and until daily reporting was implemented, at which time the cost of compliance may temporarily increase for some dealers, to the same level as under the current regulations. The selected alternative is the most beneficial to dealers in that it will reduce the cost of compliance for all dealers throughout the year, while still allowing NMFS to effectively monitor quotas.

For out-of-region dealer reporting, NMFS considered two other options for determining what constitutes an out-of-region dealer or trip. In the first option, the primary business address of the dealer determined whether the dealer was out-of-region or not. In the second option, the determination was based on the point of purchase for the trip. In addition, NMFS considered two other options for relieving dealers of inshore species reporting requirements. One option considered employing dealer-by-dealer reporting exemptions for any non-federally-managed species, if requested by the state agency for that dealer. The second option allowed for a state agency to request that NMFS relieve all dealers in their state from reporting species to NMFS that are also reported to the state agency, regardless of the management agency. For both out-of-region purchases and inshore species reporting, the differences in cost savings among the various options and the selected action are negligible because it is likely that the number of dealers affected under each option is very similar. However, both the options and the selected actions would result in a time and cost savings compared to the current regulations, due to the reduction in reporting requirements. Given the similar decrease in compliance costs to industry, NMFS selected the options that are the most practical for the agency to manage and enforce.

For all other changes included in this final rule, only the action being taken and the No Action alternative were considered. Of these changes, only the elimination of Atlantic bluefin tuna reporting under 50 CFR part 648, removing the option for dealer to submit reports via FTP, and alleviating at-sea receivers from reporting requirements may have an economic effect on dealers. The elimination of Atlantic bluefin tuna reporting requirements for dealers issued a permit under 50 CFR part 648 will result in a slight time saving for dealers issued an Atlantic bluefin tuna permit since they will no longer have to report their Atlantic bluefin tuna purchases under two sets of regulations. Removing the option to submit reports via a phone line FTP will require all dealers to have Internet access that could, theoretically, result in a small cost increase to certain dealers. However, since no dealers are currently using the FTP option, no dealers will actually be affected by this change. Eliminating the requirement for at-sea receivers to submit purchase reports may save a very small number of entities from reporting under 50 CFR part 648.

The remaining changes are primarily clarifications or administrative changes that will not result in any economic impacts on the affected entities. These changes include allowing various units of measure to be reported; requiring the trip identifier and disposition to be reported within 16 days of the end of the reporting week; clarifying which trips require cage tag numbers to be reported; clarifying that dealers do not have to purchase their own computer to comply with these reporting requirements; and allowing operator permits issued by the Southeast Region to satisfy operator permit requirements under 50 CFR part 648. Detailed descriptions of each of the changes are provided in the associated RIR/IRFA document (see **ADDRESSES**).

*Small Entity Compliance Guide*

Section 212 of the Small Business Regulatory Enforcement Fairness Act of 1996 states that, for each rule or group of related rules for which an agency is required to prepare an FRFA, the agency shall publish one or more guides to assist small entities in complying with the rule and shall designate such publications as ''small entity compliance guides.'' The agency shall explain the actions a small entity is required to take to comply with a rule or group of related rules. As part of the rulemaking process, a small entity compliance guide will be sent to all holders of NE Federal dealer permits. In addition, copies of this final rule and guide (i.e., permit holder letter) are available from NMFS (see **ADDRESSES**) and at the following web site: *http://www.nmfs.gov/ro/doc/nero.html*.

**Collection-of-Information Requirements**

This final rule contains a collection-of-information requirement subject to the Paperwork Reduction Act (PRA) and which has been approved by OMB under OMB Control Number 0648–0229. Public reporting burden for electronic dealer purchase reports is estimated to average 4 minutes per response, including the time required for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection-of-information. Send comments regarding these burden estimates or any other aspects of this data collection, including suggestion for reducing the burden, to NMFS (see **ADDRESSES**) and to OMB by e-mail *David_Rostker@omb.eop.gov*, or by fax 202–395–7285.

Notwithstanding any other provision of law, no person is required to respond to, and no person shall be subject to a penalty for failure to comply with, a collection of information subject to the requirements of the PRA, unless that collection-of-information displays a currently valid OMB control number.

**List of Subjects in 50 CFR Part 648**

Fisheries, Fishing, Reporting and recordkeeping requirements.

Dated: April 22, 2005.

**Rebecca Lent,**

*Deputy Assistant Administrator for Regulatory Programs, National Marine Fisheries Service.*

■ For the reasons set out in the preamble, 50 CFR part 648 is amended as follows:

## PART 648—FISHERIES OF THE NORTHEASTERN UNITED STATES

1. The authority citation for part 648 continues to read as follows:

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

■ 2. In § 648.2, the definitions for ''Dealer-large'' and ''Dealer-small'' are removed, and a new definition for ''Inshore exempted species'' is added in alphabetical order as follows:

**§ 648.2 Definitions.**

* * * * *

*Inshore exempted species* means the following species:

Bay scallop - *Aequipecten irradians*.
Blood arc clam - *Anadara ovalis*.
Blood worm - *Glycera dibranchiata*.
Blue crab - *Callinectes similis* and *Callinectes sapidus*.
Blue mussel - *Mytilus edulis*.
Green crab - *Carcinus maenas*.
Hermit crab - *Clibanarius vittatus*, *Pagurus pollicaris* and *Pagurus longicarpus*.
Japanese shore crab - *Hemigrapsus sanguineus*.
Oyster - *Crassostrea virginica* and *Ostrea edulis*.
Quahog - *Mercenaria mercenaria*.
Razor clam - *Ensis directus*.
Sand worm - *Neresis virens*.
Soft clam - *Mya arenaria*.
Spider crab - *Libinia emarginata*.

* * * * *

■ 3. In § 648.5, paragraph (a) is revised to read as follows:

**§ 648.5 Operator permits.**

(a) *General.* Any operator of a vessel fishing for or possessing: Atlantic sea scallops in excess of 40 lb (18.1 kg); NE multispecies, spiny dogfish, monkfish, Atlantic herring, Atlantic surfclam, ocean quahog, Atlantic mackerel, squid, butterfish, scup, black sea bass, or Atlantic bluefish, harvested in or from the EEZ; tilefish harvested in or from the EEZ portion of the Tilefish Management Unit; skates harvested in or from the EEZ portion of the Skate Management Unit; or Atlantic deep-sea red crab harvested in or from the EEZ portion of the Red Crab Management Unit, issued a permit, including carrier and processing permits, for these species under this part, must have been issued under this section, and carry on board, a valid operator permit. An operator's permit issued pursuant to part 622 or part 697 of this chapter satisfies the permitting requirement of this section. This requirement does not apply to operators of recreational vessels.

* * * * *

■ 4. In § 648.7, paragraph (f)(1)(ii) is removed and reserved, paragraphs (a)(1)(i), (a)(2), (a)(3) introductory text, (a)(3)(i), (f)(1)(i), (f)(1)(iv), (f)(1)(v), and (f)(3) are revised, and paragraph (a)(1)(ii) is added to read as follows:

**§ 648.7 Recordkeeping and reporting requirements.**

(a) * * *

(1) * * *

(i) *Required information.* All dealers issued a dealer permit under this part must provide: Dealer name; dealer permit number; name and permit number or name and hull number (USCG documentation number or state registration number, whichever is applicable) of vessel(s) from which fish are purchased or received; trip identifier for each trip from which fish are purchased or received from a commercial fishing vessel permitted under this part; date(s) of purchases and receipts; units of measure and amount by species (by market category, if applicable); price per unit by species (by market category, if applicable) or total value by species (by market category, if applicable); port landed; cage tag numbers for surfclams and ocean quahogs, if applicable; disposition of the seafood product; and any other information deemed necessary by the Regional Administrator. If no fish are purchased or received during a reporting week, a report so stating must be submitted.

(ii) *Exceptions.* The following exceptions apply to reporting requirements for dealers permitted under this part:

(A) Inshore Exempted Species, as defined in § 648.2, are not required to be reported under this part;

(B) When purchasing or receiving fish from a vessel landing in a port located outside of the Northeast Region (Maine, New Hampshire, Massachusetts, Connecticut, Rhode Island, New York, New Jersey, Pennsylvania, Maryland, Delaware, Virginia and North Carolina), only purchases or receipts of species managed by the Northeast Region under this part, and American lobster, managed under part 697 of this chapter, must be reported. Other reporting requirements may apply to those species not managed by the Northeast Region, which are not affected by this provision; and

(C) Dealers issued a permit for Atlantic bluefin tuna under part 635 of this chapter are not required to report their purchases or receipts of Atlantic bluefin tuna under this part. Other reporting requirements, as specified in § 635.5 of this chapter, apply to the receipt of Atlantic bluefin tuna.

(iii) * * *

(2) *System requirements.* All persons required to submit reports under paragraph (a)(1) of this section are required to have the capability to transmit data via the Internet. To ensure compatibility with the reporting system and database, dealers are required to utilize a personal computer, in working condition, that meets the minimum specifications identified by NMFS. The affected public will be notified of the minimum specifications via a letter to all Federal dealer permit holders.

(3) *Annual report.* All persons issued a permit under this part are required to submit the following information on an annual basis, on forms supplied by the Regional Administrator:

(i) All dealers and processors issued a permit under this part must complete all sections of the Annual Processed Products Report for all species that were processed during the previous year. Reports must be submitted to the address supplied by the Regional Administrator.

* * * * *

(f) *Submitting reports*—(1) *Dealer or processor reports.* (i) Detailed reports required by paragraph (a)(1)(i) of this section must be received by midnight of the first Tuesday following the end of the reporting week. If no fish are purchased or received during a reporting week, the report so stating required under paragraph (a)(1)(i) of this section must be received by midnight of the first Tuesday following the end of the reporting week.

(ii) [Reserved]

(iii) * * *

(iv) Through April 30, 2005, to accommodate the potential lag in availability of some required data, the trip identifier, price and disposition information required under paragraph (a)(1) may be submitted after the detailed weekly report, but must be received within 16 days of the end of the reporting week or the end of the calendar month, whichever is later. Dealers will be able to access and update previously submitted trip identifier, price, and disposition data.

(v) Effective May 1, 2005, the trip identifier required under paragraph (a)(1) of this section must be submitted with the detailed report, as required under paragraphs (f)(1)(i) of this section. Price and disposition information may be submitted after the initial detailed report, but must be received within 16 days of the end of the reporting week.

(vi) * * *

(2) * * *

(3) *At-sea purchasers and processors.* With the exception of the owner or operator of an Atlantic herring carrier vessel, the owner or operator of an at-sea purchaser or processor that purchases or processes any Atlantic herring, Atlantic mackerel, squid, butterfish, scup, or black sea bass at sea for landing at any port of the United States must submit information identical to that required by paragraph (a)(1) of this section and provide those reports to the Regional Administrator or designee by the same mechanism and on the same frequency basis.

* * * * *

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# Proposed Rules

Federal Register
Vol. 70, No. 81
Thursday, April 28, 2005

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 HOMELAND SECURITY

### 8 CFR Part 214

**[CIS No. 2295–03 and DHS–2004–0009]**

**RIN 1615–AB17**

## Petitioning Requirements for the O and P Nonimmigrant Classifications

**AGENCY:** U.S. Citizenship and Immigration Services, Department of Homeland Security.

**ACTION:** Proposed rule.

**SUMMARY:** This rule proposes to amend the Department of Homeland Security (DHS), U.S. Citizenship and Immigration Services (USCIS) regulations to enable petitioners to file O and P nonimmigrant petitions up to one year prior to the petitioners' need for the alien's services. By extending the filing time requirement for O and P petitions, USCIS will be able to adjudicate petitions in a timely fashion and ensure that, if approvable, such petitions will be approved prior to the date of the need for the alien's services, which is often dictated by a scheduled event, competition or performance.

**DATES:** Written comments must be submitted on or before June 27, 2005.

**ADDRESSES:** You may submit comments, identified by CIS No. 2295–03 or DHS 2004–0009, by one of the following methods:

- EPA Federal Partner EDOCKET Web Site: *http://www.epa.gov/feddocket*. Follow instructions for submitting comments on the Web site.
- Federal eRulemaking Portal: *http://www.regulations.gov*. Follow the instructions for submitting comments.
- E-mail: *rfs.regs@dhs.gov*. When submitting comments electronically, please include CIS No. 2295–03 in the subject line of the message.
- Mail: The Director, Regulatory Management Division, U.S. Citizenship and Immigration Services, Department of Homeland Security, 111 Massachusetts Avenue, NW., 2nd Floor, Washington, DC 20529. To ensure proper handling, please reference CIS No. 2295–03 on your correspondence. This mailing address may also be used for paper, disk, or CD–ROM submissions.
- Hand Delivery/Courier: U.S. Citizenship and Immigration Services, Department of Homeland Security, 111 Massachusetts Avenue, NW., 2nd Floor, Washington, DC 20529. Contact telephone number (202) 272–8377.

*Instructions:* All submissions received must include the agency name and docket number (if available) or Regulatory Information Number (RIN) for this rulemaking. All comments received will be posted without change to *http://www.epa.gov/feddocket,* including any personal information provided. For detailed instructions on submitting comments and additional information on the rulemaking process, see the ''Public Participation'' 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://www.epa.gov/feddocket*. You may also access the Federal eRulemaking Portal at *http://www.regulations.gov*. Submitted comments may also be inspected at the office of the Director, Regulatory Management Division, U.S. Citizenship and Immigration Services, Department of Homeland Security, 111 Massachusetts Avenue, NW., 2nd Floor, Washington, DC 20529. To ensure proper handling, please reference CIS No. 2295–03 on your correspondence.

**FOR FURTHER INFORMATION CONTACT:** Kevin J. Cummings, Adjudications Officer, Business and Trade Services Branch/Program and Regulation Development, U.S. Citizenship and Immigration Services, Department of Homeland Security, 111 Massachusetts Avenue, NW., 2nd Floor, Washington, DC 20529, telephone (202) 305–3175.

**SUPPLEMENTARY INFORMATION:**

### Public Participation

Interested persons are invited to participate in this rulemaking by submitting written data, views, or arguments on all aspects of the proposed rule. USCIS also invites comments that relate to the economic, environmental, or federalism affects that might result from this proposed rule. Comments that will provide the most assistance to USCIS in developing these procedures will reference a specific portion of the proposed rule, explain the reason for any recommended change, and include data, information, or authority that support such recommended change. See **ADDRESSES** above for information on how to submit comments.

### What Is an O and P Nonimmigrant Petition?

The O and P nonimmigrant classifications include individual aliens with extraordinary ability in the arts, sciences, education, business or athletics (including those in the motion picture and television industry), as well as internationally recognized athletic team members, entertainment groups, artists and other entertainers. Petitions for O and P nonimmigrant classifications are filed on Form I–129, Petition for Nonimmigrant Worker.

### What Are the Current Timeframes for Filing O and P Nonimmigrant Petitions?

8 CFR 214.2(o)(2)(i) currently states that an O nonimmigrant petition may not be filed more than 6 months before the actual need for the alien's services. A P nonimmigrant petition may not be filed more than 6 months before the actual need for the alien's services under 8 CFR 214.2(p)(2)(i).

### What Will Be the New Timeframes for Filing O and P Nonimmigrant Petitions?

USCIS is amending its regulations to allow an O or P petitioner to file a Form I–129 up to one year, but not earlier than 6 months, before the date of the petitioner's need for the alien's services. The rule also provides that USCIS may grant exceptions to the filing timeframes in emergency situations at the discretion of the USCIS Service Center Director, and in special filing situations as determined by USCIS Headquarters.

### Why Is USCIS Extending the Filing Times for O and P Nonimmigrant Petitions?

Current filing times combined with processing times often result in an O or P petition being adjudicated at the same time or later than the date of the petitioner's stated need for the alien. This situation creates a hardship for petitioners who are seeking to employ the alien based on a scheduled performance, competition, or event and who may have booked a venue and sold advance tickets. If the petition is not

approved by the time of the petitioner's stated need, the petitioner may be required to cancel a scheduled event or performance, may lose funds advanced for booking a venue, and may be liable for the costs associated with ticket refunds and various associated costs. By extending the filing time requirement for O and P petitions, USCIS will be able to adjudicate petitions for O and P nonimmigrants in a timely fashion and ensure that, if approvable, such petitions will be approved in advance of the date of the scheduled event, competition or performance. Moreover, a large percentage of O and P petitioners seeking alien performers or athletes often schedule and must plan for competitions, events, or performances more than one year in advance, further supporting the amendment to the regulations that this rule makes.

**Why Is USCIS Requiring That O and P Nonimmigrant Petitions Be Filed No Earlier Than 6 Months of the Petitioner's Need for the Alien's Services?**

USCIS has determined that a large percentage of O and P petitioners seeking alien performers or athletes often schedule and plan for events more than a year in advance. Thus, filing the Form I–129 within 6 months of the petitioner's stated need should not be a hardship on those U.S. employers seeking O and P nonimmigrants. In addition, filing within a 6 month timeframe will ensure that USCIS is able to timely adjudicate and, if eligible, approve Form I–129 petitions prior to the scheduled event or performance. USCIS recognizes that there may be certain instances, and even emergency circumstances, where the U.S. employer is unable to file the Form I–129 six months in advance of his or her actual need or of the scheduled event or performance. In those instances, USCIS will review the specifics of the U.S. employer's case and may, in its discretion, permit the U.S. employer to file the O or P petition within a shorter timeframe. USCIS intends to use its discretion liberally in this regard. USCIS also reminds U.S. employers seeking O and P nonimmigrants that premium processing is available for these categories. See 8 CFR 103.2(f).

**Will USCIS Extend the Filing Timeframes for Other Nonimmigrant Classifications Associated With the Form I–129?**

No. At this time, USCIS is satisfied that the petitions for the other Form I–129 classifications are processed by the date of the petitioner's stated need. Moreover, a large percentage of cases filed under these other categories are for ongoing, long-term employment rather than one-time performances or specific entertainment events or series of events that are usually planned, booked, and funded well in advance. In addition, the O and P nonimmigrant classifications do not require a current test of the U.S. labor market or a certification from the Department of Labor indicating that the hiring of a foreign laborer will not result adversely affect the domestic U.S. workforce. Further, USCIS is concerned that expanding the filing times for all Form I–129 petitioners would lead to an increase in cases where the need for the alien has not fully materialized and may lead to an increase in adjudications of petitions regarding speculative employment.

USCIS, however, specifically invites comments on whether it should extend the filing timeframes for all Form I–129 petitioners. USCIS also requests comments on whether such an extension may increase the potential for fraud or abuse of the O and P classifications (as well as other nonimmigrant categories covered by the Form I–129 petition) and suggestions for addressing such fraud or abuse should it occur.

**Regulatory Flexibility Act**

DHS has reviewed this regulation in accordance with the Regulatory Flexibility Act (5 U.S.C. 605(b)), and, by approving it, certifies that this rule will not have a significant economic impact on a substantial number of small entities. As stated under the certification required by Executive Order 12866, section 1(b)(6), DHS has determined that there are no new costs to either the government or the public associated with this rule. This rule does not alter any of the substantive petitioning requirements related to the Form I–129 or the evidentiary standards for establishing eligibility for the O and P nonimmigrant classification. This rule will ensure that certain O and P nonimmigrant petitions are adjudicated well in advance of the date of the employers' stated need and thus prevent employers from having to cancel an event, competition or performance either because the petition was denied at the last minute, or because the petition was not adjudicated in advance of the need. Employers will be less likely to lose booking costs or have to issue refunds if they receive a decision on the petition well in advance of the event, competition, or performance.

**Unfunded Mandates Reform Act of 1995**

This rule will not result in the expenditure by state, local and tribal governments, in the aggregate, or by the private sector, of $100 million or more in any one year, and it will not significantly or uniquely affect small governments. Therefore, no actions were deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995.

**Small Business Regulatory Enforcement Fairness Act of 1996**

This rule is not a major rule as defined by section 804 of the Small Business Regulatory Enforcement Fairness Act of 1996. This rule will not result in an annual effect on the economy of $100 million or more; a major increase in costs or prices; or significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based companies to compete with foreign-based companies in domestic and export markets.

**Executive Order 12866**

This rule is considered by the Department of Homeland Security to be a ''significant regulatory action'' under Executive Order 12866, section 3(f), Regulatory Planning and Review. Accordingly, this regulation has been submitted to the Office of Management and Budget (OMB) for review.

DHS has assessed both the costs and benefits of this rule as required by Executive Order 12866, section 1(b)(6) and has determined that there are no new costs to either the government or the public associated with this rule. The rule does not alter any of the substantive petitioning requirements related to the Form I–129 or the evidentiary standards for establishing eligibility for the O or P nonimmigrant classification. Further, DHS has determined that the benefits of this rule justify any *de minimus* costs that may be incurred by the government or public associated with the change in filing time frames. The rule will ensure that certain O and P nonimmigrant petitions are adjudicated well in advance of the date of the employers' stated need and thus prevent employers from having to cancel an event, competition or performance either because the petition was denied at the last minute, or because the petition was not adjudicated in advance of the need. Employers will not lose booking costs or have to issue refunds if they receive a decision on the petition well in advance of the event, competition, performance,

etc. Finally, this rule will ensure that employers have sufficient time to seek a new beneficiary or beneficiaries in the event a petition is denied.

**Executive Order 13132**

This rule 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. Therefore, in accordance with section 6 of Executive Order 13132, it is determined that this rule does not have sufficient federalism implications to warrant the preparation of a federalism summary impact statement.

**Executive Order 12988 Civil Justice Reform**

This rule meets the applicable standards set forth in sections 3(a) and 3(b)(2) of Executive Order 12988.

**Paperwork Reduction Act**

Under the Paperwork Reduction Act of 1995, Public Law 104–13, all Departments are required to submit to the Office of Management and Budget (OMB), for review and approval, any reporting requirements inherent in a rule. This rule does not impose any new reporting or recordkeeping requirements under the Paperwork Reduction Act.

**List of Subjects in 8 CFR Part 214**

Administrative practice and procedures, Aliens, Employment, Foreign officials, Health professions, Reporting and recordkeeping requirements, Students.

Accordingly, part 214 of chapter I of title 8 of the Code of Federal Regulations is proposed to be amended as follows:

## PART 214—NONIMMIGRANT CLASSES

1. The authority citation for part 214 continues to read as follows:

**Authority:** 8 U.S.C. 1101, 1102, 1103, 1182, 1184, 1186a, 1187, 1221, 1281, 1282, 1301–1305 and 1372; sec. 643, Pub. L. 104–208, 110 Stat. 3009–708; Section 141 of the Compacts of Free Association with the Federated States of Micronesia and the Republic of the Marshall Islands, and with the Government of Palau, 48 U.S.C. 1901 note, and 1931 note, respectively, 8 CFR part 2.

2. Section 214.2 is amended by:

a. Revising the second sentence in paragraph (o)(2)(i) and adding a new sentence immediately thereafter; and by

b. Revising the tenth sentence in paragraph (p)(2)(i) and adding a new sentence immediately after.

The revisions read as follows:

**§ 214.2 Special requirements for admission, extension, and maintenance of status.**

* * * * *

(o) * * *

(2) * * *

(i) *General.* * * * The petition may be filed up to one year, but not earlier than 6 months, before the actual need for the alien's services. Exceptions may be granted in emergency situations at the discretion of the USCIS Service Center Director, and in special filing situations as determined by USCIS Headquarters. * * *

* * * * *

(p) * * *

(2) * * *

(i) *General.* * * * The petition may be filed up to one year, but not earlier than 6 months before the actual need for the alien's services. Exceptions may be granted in emergency situations at the discretion of the USCIS Service Center Director, and in special filing situations as determined by USCIS Headquarters. * * *

* * * * *

Dated: April 22, 2005.

**Michael Chertoff,**

*Secretary.*

[FR Doc. 05–8471 Filed 4–27–05; 8:45 am]

BILLING CODE 4410–10–P

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## DEPARTMENT OF AGRICULTURE

## Animal and Plant Health Inspection Service

## 9 CFR Part 114

**[Docket No. 04–064–1]**

## Viruses, Serums, Toxins, and Analogous Products; Expiration Date Required for Serials and Subserials and Determination of Expiration Date of Product

**AGENCY:** Animal and Plant Health Inspection Service, USDA.

**ACTION:** Proposed rule.

**SUMMARY:** We are proposing to amend the Virus-Serum-Toxin Act regulations to require licensees and permittees to confirm the proposed expiration dating period of products by potency testing serials on multiple occasions throughout the proposed dating period, rather than only at release and at the approximate expiration date as is currently required. We would require that those stability test data be submitted to the Animal and Plant Health Inspection Service for review and filing, and that the approval date be specified in a filed Outline of Production. In addition, after a product is licensed and its dating period confirmed, the licensee or permittee would have to submit a plan to monitor the stability of the product and the suitability of its dating period; that plan would have to include regular testing of serials for potency during and at the end of dating. The proposed changes would help clarify the distinction between specifying an expiration date for an individual serial of a product and establishing the appropriate expiration dating period for the product. The effect of these proposed changes would be to establish a single uniform standard for determining expiration dates for veterinary biological products.

**DATES:** We will consider all comments that we receive on or before June 27, 2005.

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

- EDOCKET: Go to *http://www.epa.gov/feddocket* 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 you have entered EDOCKET, click on the ''View Open APHIS Dockets'' link to locate this document.
- Postal Mail/Commercial Delivery: Please send four copies of your comment (an original and three copies) to Docket No. 04–064–1, Regulatory Analysis and Development, PPD, APHIS, Station 3C71, 4700 River Road Unit 118, Riverdale, MD 20737–1238. Please state that your comment refers to Docket No. 04–064–1.
- Federal eRulemaking Portal: Go to *http://www.regulations.gov* and follow the instructions for locating this docket and submitting comments.

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

*Other Information:* You may view APHIS documents published in the **Federal Register** and related information on the Internet at *http://www.aphis.usda.gov/ppd/rad/webrepor.html.*

**FOR FURTHER INFORMATION CONTACT:** Dr. Albert P. Morgan, Chief of Operational Support, Center for Veterinary Biologics, Licensing and Policy

Development, VS, APHIS, 4700 River Road Unit 148, Riverdale, MD 20737–1231; (301) 734–8245.

**SUPPLEMENTARY INFORMATION:**

## Background

The Virus-Serum-Toxin Act regulations in 9 CFR part 114, ''Production Requirements for Biological Products'' (referred to below as the regulations), include requirements applicable to designating the expiration date of a serial or subserial of veterinary biologics and determining the expiration dating period (stability) for veterinary biologics. Currently, § 114.12 of the regulations requires each serial or subserial of veterinary biological product prepared in a licensed establishment to be given an expiration date determined in accordance with the requirements prescribed in § 114.13 of the regulations. The regulations in § 114.13 require the expiration date described under § 114.12 to be computed from the date of the initiation of the potency test.

The expiration date of a product designates the end of the period during which a biological product, when properly stored and handled, can be expected, with reasonable certainty, to be efficacious. Thus, the most precise determination of the expiration date occurs when the product is tested at the end of its predicted shelf life. However, the typical product may be released for distribution and sale before its dating period is confirmed, which necessitates a mechanism for predicting the product's shelf life. Prior to licensure, the stability of each fraction of a product must be determined by methods acceptable to Animal and Plant Health Inspection Service (APHIS). Typically, such methods involve subjecting the product to extreme temperatures and measuring its relative strength by conducting a potency test. Products that pass the potency test are licensed with the provision that such expiration dates must be confirmed by real-time testing as follows: For products consisting of viable organisms each (prelicensing) serial shall be tested for potency at release and at the approximate expiration date until a statistically valid stability record has been established; for nonviable biological products, each (prelicensing) serial presented in support of licensure shall be tested for potency at release and at or after the dating requested.

We are proposing to amend the title of § 114.12 to read: ''Expiration date required for a serial.'' In addition, we propose to amend this section by adding the wording ''computed from the date of the initiation of the potency test'' and remove it from § 114.13 where it is currently found. This change is intended to clarify the fact that the expiration date of a serial, and not the dating period of a product, is computed from the date of the initiation of the potency test.

We are proposing to amend the title of § 114.13 to read: ''Determination of the expiration dating period of a product.'' This change will show that it deals with a product's dating period rather than the expiration date of a serial. The proposed revision of this section would define a single uniform standard for determining the dating period for all veterinary biologics; require the expiration dating periods of a product to be confirmed by testing serials or subserials on multiple occasions throughout their dating period in place of the current requirement which only requires testing at the beginning and end of the dating period in order to confirm stability; require a report of the expiration dating period testing to be submitted to APHIS for review and filing and the date of approval to be specified in section VI of the filed Outline of Production; and after the dating period has been approved, require that the stability of the product and the suitability of the dating period be monitored by regularly testing serials during and after their dating period.

APHIS is proposing these amendments because it has been shown that the potency of most veterinary biologics degrades in a nonlinear fashion, which could result in their potency reaching its lowest point during the middle of the dating period rather than at the end. Testing on only two occasions would be reasonable only if potency loss has a strictly linear pattern, and this is usually not the case. Thus, APHIS is proposing to evaluate a product's stability as a function of time by requiring serials to be tested on multiple occasions when confirming the dating period, and thereafter by monitoring stability on a regular basis.

The proposed amendment would update and standardize testing to establish/confirm the stability of veterinary biologics and improve the reliability of expiration dating periods currently specified on the labeling of veterinary biologics, thereby providing greater assurance that the product, when properly stored and handled, will be efficacious. We are therefore proposing to amend §§ 114.12 and 114.13 as set forth below.

*Executive Order 12866 and Regulatory Flexibility Act*

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

This proposed rule would amend the Virus-Serum-Toxin Act regulations in §§ 114.12 and 114.13 concerning expiration dates and the determination of the stability of veterinary biologics to: Change the title of the sections; require veterinary biologics licensees and permittees to evaluate the stability of veterinary biologics as a function of time by testing serials for potency throughout and after their proposed dating period beginning at the date of final formulation; require that the expiration dating period be determined by testing serials for potency on multiple occasions throughout and after the proposed dating period; require that a report of the results of the testing to confirm expiration dating be submitted to APHIS for review and filing and that the date of approval be specified in the filed Outline of Production; and require monitoring of the stability of the product and the suitability of the dating period. The overall effect of these proposed amendments would be to establish a single uniform standard for confirming the expiration dating period of veterinary biologics.

This proposed rule would affect all licensed manufacturers of veterinary biologics. Currently, there are approximately 152 veterinary biologics manufacturers, including permittees. According to the standards of the Small Business Administration, most veterinary biologics establishments are small entities. We believe that this proposed rule would not have a significant effect on small entities because all veterinary biologics manufacturers are currently required to confirm the expiration dating of the products that they produce and to submit a report to APHIS for review and filing. In addition, the proposed requirements to test serials on multiple occasions when confirming expiration dating and to require post-licensing stability monitoring are not expected to have a significant effect, as most veterinary biologics manufacturers routinely test and monitor the stability of products throughout their dating period.

Under these circumstances, the Administrator of the Animal and Plant Health Inspection Service has determined that this action would not

have a significant economic impact on a substantial number of small entities.

*Executive Order 12372*

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

*Executive Order 12988*

This proposed rule has been reviewed under Executive Order 12988, Civil Justice Reform. It is not intended to have retroactive effect. This rule would not preempt any State or local laws, regulations, or policies unless they present an irreconcilable conflict with this rule. The Virus-Serum-Toxin Act does not provide administrative procedures which must be exhausted prior to a judicial challenge to the provisions of this rule.

*Paperwork Reduction Act*

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

**List of Subjects in 9 CFR Part 114**

Animal biologics, Reporting and recordkeeping requirements.

Accordingly, we propose to amend 9 CFR part 114 as follows:

## PART 114—PRODUCTION REQUIREMENTS FOR BIOLOGICAL PRODUCTS

1. The authority citation for part 114 would continue to read as follows:

**Authority:** 21 U.S.C. 151–159; 7 CFR 2.22, 2.80, and 371.4.

2. Section 114.12 would be revised to read as follows:

**§ 114.12 Expiration date required for a serial.**

Unless otherwise provided for in a Standard Requirement or filed Outline of Production, each serial or subserial of biological product prepared in a licensed establishment must be given an expiration date computed from the date of the initiation of the first potency test. A licensed biological product shall be considered worthless under the Virus-Serum-Toxin Act subsequent to the expiration date appearing on the label.

3. Section 114.13 would be revised to read as follows:

**§ 114.13 Determination of the expiration dating period of a product.**

(a) An expiration dating period shall be assigned to each product. When tested at any time during the dating period, the potency of the product must not be less than the minimum specified in the filed Outline of Production.

(b) Prior to licensure, a proposed expiration dating period for the product should be determined by assessing the stability of each of its fractions by methods acceptable to Animal and Plant Health Inspection Service. The proposed dating period must be confirmed by testing the serials for potency on multiple occasions throughout the proposed dating period beginning at the date of final formulation specified in the filed Outline of Production. A report of the study should be submitted to Animal and Plant Health Inspection Service for review and filing and the date of approval should be specified in section VI of the filed Outline of Production.

(c) After the product is licensed and its dating period confirmed, the licensee or permittee must submit a plan to monitor the stability of the product and the suitability of its dating period that includes regularly testing serials for potency during and at the end of dating.

(d) Subsequent changes in the dating period for a product may be granted, based on the submission of a study to support a revision of the Outline of Production.

Done in Washington, DC, this 22nd day of April 2005.

**W. Ron DeHaven,**

*Administrator, Animal and Plant Health Inspection Service.*

[FR Doc. 05–8516 Filed 4–27–05; 8:45 am]

BILLING CODE 3410–34–P

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## DEPARTMENT OF THE INTERIOR

## Fish and Wildlife Service

## 50 CFR Part 17

**RIN 1018–AT84**

## Endangered and Threatened Wildlife and Plants; Extension of the Comment Period for Proposed Designation of Critical Habitat for the Arkansas River Basin Population of the Arkansas River Shiner

**AGENCY:** Fish and Wildlife Service, Interior.

**ACTION:** Proposed rule; extension of public comment period.

**SUMMARY:** We, the U.S. Fish and Wildlife Service (Service), announce the extension of the public comment period for the proposal to designate critical habitat for the Arkansas River Basin population of the Arkansas River Shiner (*Notropis girardi*) (October 6, 2004; 69 FR 59859). This action will allow all interested parties an opportunity to comment on the proposed critical habitat designation under the Endangered Species Act of 1973, as amended.

**DATES:** Comments must be submitted directly to the Service (*see* **ADDRESSES** section) on or before June 17, 2005. Any comments received after the closing date may not be considered in the final determination on the proposal.

**ADDRESSES:** If you wish to comment, you may submit your comments and materials concerning this proposal by any one of several methods:

1. You may submit written comments and information to the Field Supervisor, Oklahoma Ecological Services Office, U.S. Fish and Wildlife Service, 222 South Houston, Tulsa, Oklahoma 74127–8909.

2. You may hand-deliver written comments and information to our Oklahoma Office, at the above address, or fax your comments to 918–581–7467.

3. You may send your comments by electronic mail (e-mail) to *r2arshinerch@fws.gov*. For directions on how to submit electronic filing of comments, see the ''Public Comments Solicited'' section.

All comments and materials received, as well as supporting documentation used in preparation of this proposed rule, will be available for public inspection, by appointment, during normal business hours at the above address.

**FOR FURTHER INFORMATION CONTACT:** Jerry Brabander, Field Supervisor, Oklahoma Office (telephone 918–581–7458; facsimile 918–581–7467).

**SUPPLEMENTARY INFORMATION:**

### Background

On October 6, 2004 (69 FR 59859), we proposed to designate as critical habitat a total of approximately 2,002 kilometers (1,244 miles) of linear distance of rivers, including 91.4 meters (300 feet) of adjacent riparian areas measured laterally from each bank. This distance includes areas that we are proposing to exclude that are discussed below. The areas that we have determined to be essential to the conservation of the Arkansas River Shiner include portions of the Canadian River (often referred to as the South Canadian River) in New Mexico, Texas, and Oklahoma, the Beaver/North Canadian River of Oklahoma, the Cimarron River in Kansas and Oklahoma, and the Arkansas River in Arkansas, Kansas, and Oklahoma.

In developing this proposal, we evaluated those lands determined to be essential to the conservation of the Arkansas River Shiner to ascertain if any specific areas would be appropriate for exclusion from the final critical habitat designation pursuant to section 4(b)(2) of the Act. On the basis of our preliminary evaluation, we believe that the benefits of excluding the Beaver/North Canadian River of Oklahoma and the Arkansas River in Arkansas, Kansas, and Oklahoma, from the final critical habitat for the Arkansas River Shiner outweigh the benefits of their inclusion. The public comment period for the proposed rule was originally scheduled to close on April 30, 2005.

On September 30, 2003, in a complaint brought by the New Mexico Cattle Growers Association and 16 other plaintiffs, the U.S. District Court of New Mexico instructed us to propose critical habitat by September 30, 2004, and publish a final rule by September 30, 2005. The proposed rule was signed on September 30, 2004, and published in the **Federal Register** on October 6, 2004 (69 FR 59859). Additional background information is available in the October 6, 2004, proposed rule.

Critical habitat is defined in section 3 of the Act as the specific areas within the geographic 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 essential to the conservation of the species and that may require special management considerations or protection; and specific areas outside the geographic area occupied by a species at the time it is listed, upon a determination that such areas are essential for the conservation of the species. If the proposed rule is made final, section 7 of the Act will prohibit destruction or adverse modification of critical habitat by any activity funded, authorized, or carried out by any Federal agency. Federal agencies proposing actions affecting areas designated as critical habitat must consult with us on the effects of their proposed actions, pursuant to section 7(a)(2) of the Act.

Section 4 of the Act requires that we consider economic and other relevant impacts prior to making a final decision on what areas to designate as critical habitat. We are currently developing a draft economic analysis and draft environmental assessment for the proposal to designate certain areas as critical habitat for the Arkansas River Shiner and will announce their availability at a later date. We may revise the proposal, or its supporting documents, to incorporate or address new information received during the comment period. In particular, we may exclude an area from critical habitat if we determine that the benefits of excluding the area outweigh the benefits of including the area as critical habitat, provided such exclusion will not result in the extinction of the species.

Pursuant to 50 CFR 424.16(c)(2), we may extend or reopen a comment period upon finding that there is good cause to do so. We are currently developing a draft economic analysis and draft environmental assessment for the proposal and will announce the availability of those documents and solicit data and comments from the public on these draft documents at a later date. We will also announce hearing dates concurrently with the availability of the draft documents. However, it is our intention to leave the public comment period open and uninterrupted until those documents are available for public consideration and comment. We believe that allowing the comment period to close before the full set of supporting draft analytical documents is available could result in hurried and incomplete comments on our proposed rule and could also unnecessarily frustrate respondents. We deem these considerations as sufficient cause to extend the comment period.

We are required by court order to complete the final designation of critical habitat for the Arkansas River Shiner by September 30, 2005. To meet this date, all comments on or proposed revisions to the proposed rule need to be submitted to us during the comment period, as extended by this document (*see* **DATES**).

Our practice is to make comments, including names and home addresses of respondents, available for public review during regular business hours. Individual respondents may request that we withhold their home address, which we will honor to the extent allowable by law. If you wish us to withhold your name or address, you must state this request prominently at the beginning of your comments. However, we will not consider anonymous comments. To the extent consistent with applicable law, we will make all submissions from organizations or businesses, and from individuals identifying themselves as representatives or officials of organizations or businesses, available for public inspection in their entirety.

Comments and materials received, as well as supporting documentation used in preparation of the proposal to designate critical habitat, will be available for public inspection, by appointment, during normal business hours at the Tulsa Ecological Services Office (*see* **ADDRESSES** section).

**Authority:** The authority for this action is the Endangered Species Act of 1973 (16 U.S.C. 1531 *et seq.*).

Dated: April 21, 2005.

**Craig Manson,**

*Assistant Secretary for Fish and Wildlife and Parks.*

[FR Doc. 05–8489 Filed 4–27–05; 8:45 am]

**BILLING CODE 4310–55–P**

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## DEPARTMENT OF THE INTERIOR

## Fish and Wildlife Service

## 50 CFR Part 17

**RIN 1018—AT88**

## Endangered and Threatened Wildlife and Plants; Proposed Designation of Critical Habitat for the Southwestern Willow Flycatcher

**AGENCY:** Fish and Wildlife Service, Interior.

**ACTION:** Proposed rule; notice of availability of draft economic analysis and draft environmental assessment, and notice of public hearings.

**SUMMARY:** We, the U.S. Fish and Wildlife Service (Service), announce the availability of the draft economic analysis and draft environmental assessment for the proposal to designate critical habitat for southwestern willow flycatcher (*Empidonax traillii extimus*) under the Endangered Species Act of 1973 (Act), as amended. The draft economic analysis considers the potential economic effects of efforts to protect the southwestern willow flycatcher and its habitat, collectively referred to as ''flycatcher conservation activities.'' In the case of habitat conservation, these costs would reflect the costs associated with the commitment of resources to comply with habitat protection measures. The analysis also addresses how potential economic impacts are likely to be distributed and looks retrospectively at costs that have been incurred since the date the species was listed. The draft economic analysis finds that over a 10-year time period costs associated with southwestern willow flycatcher conservation activities are forecast to range from $29.2 to $39.5 million per year. Comments previously submitted on the October 12, 2004, proposed rule (69 FR 60706) and the extensions of comment period published December 13, 2004 (69 FR 72161), or March 31, 2005 (70 FR 16474) need not be resubmitted as they have been

incorporated into the public record and will be fully considered in preparation of the final rule. We will hold eight public informational sessions and hearings (*see* **DATES** and **ADDRESSES** sections).

**DATES:** Comments must be submitted directly to the Service (*see* **ADDRESSES** section) on or before May 31, 2005, or at the public hearings.

We will hold public informational sessions from 3:30 p.m. to 5 p.m., followed by a public hearing from 7 p.m. to 9 p.m., on the following dates:

1. May 2, 2005: Escondido, CA.
2. May 3, 2005: City of Chino, CA.
3. May 9, 2005: Las Vegas, NV.
4. May 10, 2005: Lake Isabella, CA.
5. May 16, 2005: Mesa, AZ.
6. May 17, 2005: Silver City, NM.
7. May 18, 2005: Albuquerque, NM.
8. May 19, 2005: Alamosa, CO.

**ADDRESSES:**

**Meetings**

The public informational sessions and hearings will be held at the following locations:

1. Escondido, CA: California Center for the Arts, 340 N. Escondido Blvd., Escondido, CA 92025.
2. City of Chino, CA: El Prado Golf Course, 6555 Pine Ave., Chino, CA 91710.
3. Las Vegas, NV: Cashman Center, 850 N. Las Vegas Blvd., Las Vegas, NV 89101.
4. Lake Isabella, CA: Lake Isabella Senior Center, Room 1, 6405 Lake Isabella Blvd., Lake Isabella, CA 93240.
5. Mesa, AZ: Mesa Community and Conference Center, 263 N. Center St., Mesa, AZ 85211.
6. Silver City, NM: Western New Mexico University, Global Resource Room, 1000 W. College, 12th and E St., Silver City, NM 88061.
7. Albuquerque, NM: Indian Pueblo Cultural Center, Special Events Center, 2401 12th St. NW., Albuquerque, NM 87104.
8. Alamosa, CO: Adams State University, Student Union Bldg., Rooms 308 & 309, First and Stadium Dr., Alamosa, CO 81102.

Persons needing reasonable accommodations in order to attend and participate in the public hearing should contact Steve Spangle, Field Supervisor, Arizona Ecological Services Field Office at the phone number and address below as soon as possible. In order to allow sufficient time to process requests, please call no later than 1 week before the hearing. Information regarding this proposal is available in alternative formats upon requests.

If you wish to comment on the proposed rule, draft economic analysis, or draft environmental assessment, you may submit your comments and materials by any one of several methods:

1. You may submit written comments and information by mail or hand-delivery to the Steve Spangle, Field Supervisor, Arizona Ecological Services Field Office, 2321 W. Royal Palm Road, Suite 103, Phoenix, Arizona 85021.
2. Written comments may be sent by facsimile to (602) 242–2513.
3. You may send your comments by electronic mail (e-mail) to *WIFLcomments@fws.gov.* For directions on how to submit electronic filing of comments, see the ''Public Comments Solicited'' section below.

You may obtain copies of the draft economic analysis and draft environmental assessment by mail or by visiting our Web site at *http://arizonaes.fws.gov/SWWF_PCH_Oct.htm.* You may review comments and materials received, and review supporting documentation used in preparation of this proposed rule by appointment, during normal business hours, at the above address.

**FOR FURTHER INFORMATION CONTACT:** Steve Spangle, Field Supervisor, Arizona Ecological Services Field Office (telephone 602–242–0210, facsimile 602–242–2513) or by electronic mail at *steve_spangle@fws.gov.*

**SUPPLEMENTARY INFORMATION:**

**Public Comments Solicited**

We intend that any final action resulting from this proposal will be as accurate and as effective as possible. Therefore, we solicit comments or suggestions from the public, other concerned governmental agencies, the scientific community, industry, or any other interested party concerning the proposed rule, the draft economic analysis, and the draft environmental assessment. On the basis of public comment, during the development of our final determination, we may find that areas proposed are not essential, are appropriate for exclusion under section 4(b)(2) of the Act, or not appropriate for exclusion. We particularly seek comments concerning:

(1) The reasons why any habitat should or should not be determined to be critical habitat as provided by section 4 of the Act, including whether the benefits of designation will outweigh any threats to the species resulting from designation;

(2) Specific information on the distribution of the southwestern willow flycatcher, the amount and distribution of the species' habitat, and which habitat is essential to the conservation of the species, and why;

(3) Land-use designations and current or planned activities in the subject area and their possible impacts on the species or proposed critical habitat;

(4) Whether our approach to listing or critical habitat designation could be improved or modified in any way to provide for greater public participation and understanding, or to assist us in accommodating public concerns and comments;

(5) Any foreseeable economic, environmental, or other impacts resulting from the proposed designation of critical habitat or coextensively from the proposed listing, and in particular, any impacts on small entities or families;

(6) Whether the economic analysis identifies all State and local costs. If not, what other costs should be included;

(7) Whether the economic analysis makes appropriate assumptions regarding current practices and likely regulatory changes imposed as a result of the listing of the species or the designation of critical habitat;

(8) Whether the economic analysis correctly assesses the effect on regional costs associated with land- and water-use controls that derive from the designation;

(9) Whether the designation will result in disproportionate economic impacts to specific areas that should be evaluated for possible exclusion from the final designation; and

(10) Whether the economic analysis appropriately identifies all costs that could result from the designation or coextensively from the listing.

Our practice is to make comments, including names and home addresses of respondents, available for public review during regular business hours. Individual respondents may request that we withhold their home addresses from the rulemaking record, which we will honor to the extent allowable by law. There also may be circumstances in which we would withhold from the rulemaking record a respondent's identity, as allowable by law. If you wish us to withhold your name and/or address, you must state this prominently at the beginning of your comment. However, we will not consider anonymous comments. We will make all submissions from organizations or businesses, and from individuals identifying themselves as representatives or officials of organizations or businesses, available for public inspection in their entirety. Comments and materials received will be available for public inspection, by appointment, during normal business hours at the above address.

If you wish to comment, you may submit your comments and materials concerning this proposal by any one of several methods (*see* **ADDRESSES** section). Please submit electronic comments in ASCII file format and avoid the use of special characters or any form of encryption. Please also include your name and return address in the body of your message. If you do not receive a confirmation from the system that we have received your Internet message, contact us directly by calling our Arizona Ecological Services Field Office at (602) 242–0210.

## Background

We proposed to designate for the southwestern willow flycatcher 376,095 acres (ac) (152,124 hectares (ha)) [including approximately 1,556 stream miles (2,508 stream kilometers)] of critical habitat, which includes various stream segments and their associated riparian areas, not exceeding the 100-year floodplain or flood prone area, on Federal, State, Tribal, and private lands in southern California, southern Nevada, southwestern Utah, south-central Colorado, Arizona, and New Mexico. The proposed rule was published in the **Federal Register** (69 FR 60706) on October 12, 2004, pursuant to a court order.

On September 30, 2003, in response to a complaint brought by the Center for Biological Diversity, the U.S. District Court of New Mexico ordered us to propose critical habitat on or by September 30, 2004, and complete a final designation by September 30, 2005. Additional background information is available in the October 12, 2004, proposal to designate critical habitat.

Critical habitat identifies specific areas that are essential to the conservation of a listed species and that may require special management considerations or protection. If the proposed rule is made final, section 7 of the Act will prohibit adverse modification of critical habitat by any activity funded, authorized, or carried out by any Federal agency. Federal agencies proposing actions affecting areas designated as critical habitat must consult with us on the effects of their proposed actions, pursuant to section 7(a)(2) of the Act.

Section 4 of the Act requires that we consider economic and other relevant impacts prior to making a final decision on what areas to designate as critical habitat. We are announcing the availability of a draft economic analysis and draft environmental assessment for the proposal to designate certain areas as critical habitat for the southwestern willow flycatcher. We may revise the proposal, or its supporting documents, to incorporate or address new information received during the comment period. In particular, we may exclude an area from critical habitat if we determine that the benefits of excluding the area outweigh the benefits of including the area as critical habitat, provided such exclusion will not result in the extinction of the species.

## Mapping Corrections for Proposed Units of Critical Habitat in Southern California and for the West Fork of the Little Colorado River

Following the publication of the proposed rule on October 12, 2004, we discovered that the coordinates for river reaches in Riverside, Orange, and San Diego Counties, California, were not correctly projected, causing a shift in the proposed critical habitat polygons of approximately 262 feet (ft) (80 meters (m)) to the west. We have since corrected the data projections to accurately reflect what we are considering for designation or exclusion from proposed critical habitat, and we provide the corrected start- and end-point coordinates below. Corrected Geographic Information System layers will be available at *http://crithab.fws.gov.* The figures provided for the total amount of critical habitat being proposed [376,095 acres (ac) (152,124 hectares (ha)) [including approximately 1,556 stream miles (mi) (2,508 stream kilometers (km)] remain accurate.

| River | Start latitude | Start longitude | End latitude | End longitude |
|---|---|---|---|---|
| (5) Santa Ynez Management Unit: | | | | |
| Santa Ynez River | 34.5972867 | –120.1744120 | 34.6596711 | –120.4394929 |
| (6) Santa Ana Management Unit: | | | | |
| Bear Creak | 34.1609651 | –117.0151013 | 34.2422080 | –116.9772861 |
| Mill Creek | 34.0766521 | –116.8443877 | 34.0911038 | –117.1189177 |
| Oak Glen Creek | 34.0386250 | –117.0646375 | 34.0483423 | –116.9394664 |
| San Timoteo Wash | 34.0044045 | –117.1657189 | 34.0696468 | –117.4534886 |
| Santa Ana River | 34.1513001 | –116.7350693 | 33.9673435 | –117.4534886 |
| Waterman Creek | 34.2169729 | –117.2909403 | 34.1863475 | –117.2721230 |
| Wilson Creek | 34.0102690 | –117.1074706 | 34.0386049 | –117.0646183 |
| Yucaipa Creek | 34.0102933 | –117.1075071 | 34.0044047 | –117.1656724 |
| (7) San Diego Management Unit: | | | | |
| Christianitos Creek | 33.4202297 | –117.5711573 | 33.4702954 | –117.5643999 |
| San Mateo Creek | 33.4193065 | –117.5369622 | 33.3859065 | –117.5935937 |
| San Onofre Creek | 33.3947622 | –117.5253484 | 33.3810809 | –117.5783356 |
| (8) San Diego Management Unit: | | | | |
| Deluz Creek | 33.3631634 | –117.3233833 | 33.4283909 | –117.3215173 |
| Las Flores Creek | 33.3386714 | –117.4116194 | 33.2917863 | –117.4657736 |
| Las Pulgas Creek | 33.3612114 | –117.3905836 | 33.3386355 | –117.4115600 |
| Pilgrim Creek | 33.2412419 | –117.3359159 | 33.3115680 | –117.2982166 |
| San Luis Rey River | 33.2026115 | –117.3901467 | 33.2408111 | –116.7646876 |
| Santa Margarita River | 33.4331091 | –117.1976515 | 33.2326142 | –117.4168773 |
| Temecula Creek | 33.4982324 | –116.9773975 | 33.3637228 | –116.7592014 |
| (9) San Diego/Salton Management Units: | | | | |
| Agua Hedionda Creek | 33.1568123 | –117.2241974 | 33.1394463 | –117.3150591 |
| Agua Hedionda Lagoon | 33.1396776 | –117.3150857 | 33.1426464 | –117.3411351 |
| Cuyamaca Reservoir | 32.9897875 | –116.5871030 | 32.9922459 | –116.5626160 |
| San Dieguito River | 32.9771651 | –117.2515713 | 33.0907715 | –116.9646098 |
| San Felipe Creek | 33.1455161 | –116.5448283 | 33.1848207 | –116.6238274 |
| Santa Ysabel River | 33.1184844 | –116.7865468 | 33.0909411 | –116.9646660 |
| Temescal Creek | 33.2308371 | –116.8251816 | 33.1203200 | –116.8528263 |
| (10) San Diego Management Unit: | | | | |

| River | Start latitude | Start longitude | End latitude | End longitude |
|---|---|---|---|---|
| San Diego River | 32.8847273 | –116.8112102 | 32.8281759 | –117.0527358 |
| (11) Owens Management Unit: | | | | |
| Owens River | 37.5877424 | –118.6992268 | 37.1354380 | –118.2419417 |
| (12) Kern Management Unit: | | | | |
| Kern River—South Fork | 35.7176912 | –118.1808882 | 35.6629518 | –118.3705422 |
| (13) Mohave Management Unit: | | | | |
| Deep Creek | 34.2871220 | –117.1269778 | 34.3404079 | –117.2457049 |
| Holcomb Creek | 34.2870519 | –117.1270054 | 34.3049219 | –116.9646522 |
| Mojave River | 34.4701947 | –117.2546695 | 34.5838662 | –117.3374023 |

In our proposed rule we inaccurately mapped the extent of essential habitat on the West Fork of the Little Colorado River in Arizona. We are correcting that error by adding a Service Road 113 (longitude −109.507567, latitude 33.959677) to a new endpoint approximately 170 ft (51.8 m) east of the Mt. Baldy Wilderness boundary (longitude −109.516209, latitude 33.958302).

**Authority:** The authority for this action is the Endangered Species Act of 1973 (16 U.S.C. 1531 *et seq.*).

Dated: April 20, 2005.

**David P. Smith,**

*Acting Assistant Secretary for Fish and Wildlife and Parks.*

[FR Doc. 05–8488 Filed 4–25–05; 1:06 pm]

BILLING CODE 4310–55–P

# Notices

Federal Register

Vol. 70, No. 81

Thursday, April 28, 2005

This section of the FEDERAL REGISTER contains documents other than rules or proposed rules that are applicable to the public. Notices of hearings and investigations, committee meetings, agency decisions and rulings, delegations of authority, filing of petitions and applications and agency statements of organization and functions are examples of documents appearing in this section.

## DEPARTMENT OF AGRICULTURE

### Foreign Agricultural Service

### Reestablishment of the Edward R. Madigan United States Agricultural Export Excellence Award Board of Evaluators

**AGENCY:** Foreign Agricultural Service, USDA.

**ACTION:** Notice to reestablish board of evaluators.

**SUMMARY:** Notice is hereby given that the Secretary of Agriculture intends to reestablish the Edward R. Madigan United States Agricultural Export Excellence Award Board of Evaluators. The Secretary of Agriculture has determined that the Board is necessary and in the public interest.

**FOR FURTHER INFORMATION CONTACT:** Marketing Operations Staff, Foreign Agricultural Service, USDA, Room 4932, 1400 Independence Ave., SW., Washington, DC 20250–10442, telephone: (202) 720–4327, fax: (202) 720–9361, E-mail: *mosdamin@fas.usda.gov.*

**SUPPLEMENTARY INFORMATION:** The purpose of the Edward R. Madigan United States Agricultural Export Excellence Award Board of Evaluators is to advise the Secretary of Agriculture on the selection of recipients for the Edward R. Madigan United States Agricultural Export Excellence Award.

Dated: April 15, 2005.

**A. Ellen Terpstra,**

*Administrator, Foreign Agricultural Service.*

[FR Doc. 05–8480 Filed 4–27–05; 8:45 am]

**BILLING CODE 3410–10–P**

## DEPARTMENT OF AGRICULTURE

### Forest Service

### Main Boulder Fuels Reduction Project, Big Timber Ranger District, Gallatin National Forest, Park and Sweet Grass Counties, MT

**AGENCY:** Forest Service, USDA.

**ACTION:** Notice of intent to prepare a Supplemental Environmental Impact Statement.

**SUMMARY:** The USDA, Forest Service is releasing a Supplemental Environmental Impact Statement (SEIS) to further address the environmental effects that the Main Boulder Fuels Reduction Project would have on the northern goshawk. This is a hazardous fuels reduction project consisting of approximately 2500 acres of overstory and understory canopy thinning, prescribed burning, and aspen stimulation.

**DATES:** The Supplemental Draft Environmental Impact Statement is expected May of 2005 and the Supplemental Final Environmental Impact Statement and Record of Decision are expected August of 2005.

**ADDRESSES:** Written correspondence should be sent to Bill Avey, District Ranger, Big Timber Ranger District, P.O. Box 1130, Big Timber, MT 59011–1130. Copies of the Main Boulder Fuels Reduction SEIS will be available at the Big Timber Ranger District Office, 225 Big Timber Loop Road, Big Timber, MT and the Bozeman Ranger District Office, 3710 Fallon Street, Bozeman, MT. Electronic copies will also available on the Internet at *http://www.fs.fed.us/r1/gallatin* in the Projects and Plans area.

**FOR FURTHER INFORMATION CONTACT:** Bill Avey, District Ranger or Brent Foster, ID Team Leader, Big Timber Ranger District at (406) 932–5155 or Barbara Ping, Co-ID Team Leader, Bozeman Ranger District at (406) 522–2558 (*see* **ADDRESSES** above).

**SUPPLEMENTARY INFORMATION:**

#### Purpose and Need for Action

The purpose and need of the project is to provide for public and firefighter safety by minimizing the probability and effects of future fire starts in the wildland/urban interface of the Main Boulder River Corridor, to extend the potential time available for evacuation in the event of a wildfire by reducing the fire hazard along the Main Boulder Road, and to reduce fuel loadings by breaking up the vertical and horizontal fuel composition in the corridor, wherever possible.

#### Proposed Action

Stand density reduction, utilizing ground based harvest equipment, would occur on approximately 1060 acres on slopes up to 35%. Approximately 1040 acres on slopes >35% would be treated with other specialized methods or hand-treatments. A minimum of 15 to 20% of each unit would be left untreated to provide diversity across the landscape. In addition to reducing surface fuel loading by commercial thinning and salvage, small diameter fuel reduction, understory and/or pile burning would occur. Conifers would be slashed and prescribed burning would occur on approximately 400 acres of meadow-type habitats. Aspen clones would have conifers removed within a 100 foot radius to encourage aspen regeneration. A maximum of 7.4 miles of temporary road may be constructed to access the areas proposed for mechanical fuels treatment. No permanent roads would be constructed.

#### Alternatives

Alternatives that were considered in detailed study include the No Action Alternative and the Proposed Action Alternative. Seven other alternatives were considered, but did not merit detailed analysis or further consideration in the process.

#### Responsible Official

Rebecca Heath, Forest Supervisor, Gallatin National Forest, P.O. Box 130, 10 East Babcock, Bozeman, MT 59011.

#### Nature of Decision To Be Made

The scope of actions in the decision are limited to stand density reduction and the reduction of downed fuel loadings on National Forest Land including the thinning of large diameter conifers, removal of insect or disease damaged/killed conifers, cutting of small diameter conifers, slashing of conifers encroaching into meadow or aspen stands, prescribed burning of meadow areas, underburning of some treated stands, piling and removal or burning of downed woody materials resulting from treatment actions.

**Scoping Process**

Collaboration with the public has been an important part of the project. The proposal was developed with input from adjacent private landowners,the local watershed association, and numerous state, county, and local officals and groups. More than 20 meetings have been held providing information and updates pertaining to the project. Numerous field trips to the project area have been conducted involving various individuals, agencies and organizations. In December 2002, a formal scoping letter was sent to interested parties. The DEIS was released for public comment in July of 2004 followed by a 45 day review and comment period. In January of 2005 the FEIS and ROD were released and a 45 day appeal filing period began. Three appeals were received and subsequently the decision was reversed to update and clarify the analysis to better address the impacts to northern goshawk.

**Preliminary Issues**

Key issues that were identified include the possible negative environmental effects to water quality, fisheries, scenery, wildlife, recreation, and air quality. Key issues also included the threat of fuel accumulation and the potential for increasing the risk of noxious weed spread.

**Comment Requested**

The Draft Supplemental EIS is expected to be filed with the Environmental Protection Agency (EPA) and available for public review in May 2005. At that time EPA will publish a Notice of Availability (NOA) of the Draft Supplemental EIS in the **Federal Register**. The comment period on the Draft Supplemental EIS will be 45 days from the publication date of the NOA. A Supplemental Final Environmental Impact Statement and new Record of Decision will then be prepared.

**Early Notice of the Importance of Public Participation in Subsequent Environmental Review**

A Supplemental Draft Environmental Impact Statement will be prepared for comment. The comment period on the Supplemental 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 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. *City of Angoon* v. *Hodel,* 803 F.2d 1016, 1022 (9th Cir. 1986) and *Wisconsin Heritages, Inc.* v. *Harris,* 490 F. Supp. 1334, 1338 (E.D. Wis. 1980). Because of 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 Supplemental 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 Supplemental 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.

Comments received, including the names and addresses of those who comment, will be considered part of the public record on this proposal and will be available for public inspection.

Dated: April 21, 2005.

**Rebecca Heath,**

*Forest Supervisor.*

[FR Doc. 05–8483 Filed 4–27–05; 8:45 am]

BILLING CODE 3410–11–P

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## DEPARTMENT OF AGRICULTURE

### Forest Service

### Los Padres National Forest; California; Oil and Gas Leasing Analysis

**AGENCY:** Forest Service, USDA.

**ACTION:** Revised notice of intent to prepare an environmental impact statement.

**SUMMARY:** The USDA, Forest Service, Los Padres National Forest, published a Notice of Intent to conduct an analysis and prepare an Environmental Impact Statement (EIS) for oil and gas leasing in the **Federal Register** on September 15, 1995 (Volume 60, Number 179, pages 47929–47930). A revised notice of Intent is being issued because of the delay in filing the Final EIS. The original Notice of Intent of September 15, 1995 stated that the Final EIS was scheduled to be completed by April of 1997. The estimated date for completing the Final EIS is now June of 2005.

**DATES:** Scoping was conducted as described in the September 15, 1995 Notice of Intent. Scoping comments submitted during scoping for the proposed action are part of the project record and were considered in the Draft EIS. The Draft EIS was distributed in December of 2001. Agency, organization, and public comment to the Draft EIS was accepted until April 19, 2002. These comments are being considered during the completion of the Final EIS. The final environmental impact statement is expected in June of 2005.

**FOR FURTHER INFORMATION CONTACT:** Al Hess, Oil and Gas Resource Specialist, Los Padres National Forest, 1190 E. Ojai Ave., Ojai, CA 93023, (805) 646–4348, ext. 311. E-mail: *ahess@fs.fed.us*

**SUPPLEMENTARY INFORMATION:**

**Purpose and Need for Action**

There is a need for identification of Los Padres National Forest lands were oil and gas exploration, development, and production would be appropriate. There is a need to respond to the Bureau of Land Management on outstanding requests (applications) for leasing. There is a need for information concerning the potential environmental impacts of existing leases.

**Proposed Action**

The Forest Supervisor proposes to make additional areas of Los Padres National Forest lands available for oil and gas exploration, development, and production by selecting among alternative leasing scenarios. These scenarios vary in the amount of area available for leasing as well as the conditions (stipulations) under which the lands would be leased. The Forest Supervisor will also determine what specific lands will be offered for leasing. The various leasing scenarios are described in detail in Section 2.4.2 of the Draft EIS. The proposal will amend the Los Padres National Forest Land and Resource Management Plan in accordance with regulations for oil and

gas leasing found at 36 CFR 228, Subpart E—Oil and Gas Resources. Subsequently, the Regional Forester will authorize the Bureau of Land Management to offer specific National Forest System lands for lease.

**Possible Alternatives**

Seven alternative leasing scenarios were analyzed and compared in the draft EIS. These alternatives are:

Alternative 1—No Action, No New Leasing;
Alternative 2—Emphasize Oil & Gas Development;
Alternative 3—Meet Forest Plan Direction;
Alternative 4—Emphasize Surface Resources;
Alternative 4a—Alternative 4 With Roadless Conservation Area Emphasis;
Alternative 5—Combination of Alternatives 3 and 4;
Alternative 5a—Alternative 5 With Roadless Conservation Area Emphasis.

Alternative 5 and 5a were identified as ''Preferred Alternatives'' in the draft EIS. One or the other would be selected depending upon the outcome of the Roadless Rule.

**Responsible Official**

Gloria Brown, Forest Supervisor, Los Padres National Forest, Goleta, California, is the responsible official.

**Nature of Decision To Be Made**

In order to implement the proposed action the Forest Supervisor will amend the Los Padres Land and Resources Management Plan to incorporate the following leasing decisions:

1. Decide within Los Padres National Forest which, if any, National Forest System lands not already withdrawn from mineral entry, are available for oil and gas leasing and under what conditions (lease stipulations). (Reference: 36 CFR 228.102(d)).

2. Decide what specific National Forest System lands the Bureau of Land Management will be authorized to offer for lease, subject to Forest Service stipulations to be attached to leases issued by the Bureau of Land Management. (Reference: 36 CFR 228.102(e)).

3. If requested, recommend leasing options to the Bureau of Land Management for the non-federal lands with federal mineral ownership that are within the administrative boundary of Los Padres National Forest.

Subsequently, the BLM will decide whether or not to offer leases on the specific lands authorized by the Forest Service.

Dated: April 6, 2005.

**Gloria D. Brown,**

*Forest Supervisor.*

[FR Doc. 05–8504 Filed 4–27–05; 8:45 am]

**BILLING CODE 3410–11–M**

## DEPARTMENT OF AGRICULTURE

### Forest Service

### Off-Highway Vehicle (OHV) Study, Mark Twain National Forest, Madison, WA, and Wayne Counties, MO

**AGENCY:** Forest Service, USDA.

**ACTION:** Revised notice: intent to prepare an environmental impact statement

**SUMMARY:** The Forest Service will prepare an environmental impact statement (EIS) to analyze and disclose the environmental effects of proposed activities within the three OHV Study project areas. The three OHV Study project areas are located on National Forest System lands administered by the Potosi/Fredericktown and Poplar Bluff Ranger Districts is southeast Missouri. The legal descriptions of the three study areas are as follows:

*Palmer Study Area*—This study area would be located on the Potosi Unit of the Potosi/Fredericktown Ranger District in Washington County, approximately 12 miles southwest of Potosi, Missouri. This trail system would be managed for a variety of motorized vehicles, including jeeps and dune buggies. Trailheads and parking areas would also be constructed at some locations.

*Cherokee Pass Study Area*—This study area would be located on the Fredericktown Unit of the Potosi/Fredericktown Ranger District in Madison County, approximately seven miles south of Fredericktown, Missouri. This trail system would be managed for ATV and equestrian use. Other motorized vehicles such as motorcycles, jeeps, and dune buggies, would not be allowed. Trailheads and parking areas would also be constructed at some locations.

*Blackwell Ridge Study Area*—This study area would be located on the Poplar Bluff Ranger District in Wayne County, approximately 1½ mile north of Williamsville, Missouri. This trail system would be managed for ATV and motorcycles. Other motorized four-wheel drive vehicles, jeeps, and dune buggies, would not be allowed. Trailheads and parking areas would also be constructed at some locations.

The primary purpose of this project is to study OHV use and users to guide future management options on OHV trail opportunities and use. This study will also evaluate equipment impacts to natural resources. Social impacts, such as customer satisfaction, demographics of trail users, and compatibility between trail users, would also be studied.

The Mark Twain National Forest needs to determine if designating more motorized trails can be done in a manner that not only provides for this recreational use, but also addresses environmental concerns. It is hoped that by providing additional designated OHV trails, OHV users would avoid undesignated roads and trails and, thereby, the overall environmental damage from unauthorized use can be reduced. Observations by OHV managers locally and from other states indicate that when OHV riders have designated areas to ride, they are more likely to stay on designated routes.

Therefore, the OHV customer, the resource manager, and the environment should all benefit from this study. Resource managers would be able to direct OHV customers to a designated trail system where impacts are confined, minimized, evaluated, monitored, and mitigated. With this study, OHV customers would know they are in an area where they can legally ride in a setting they enjoy. The Forest Service can promote responsible OHV use, better communicate with this forest user group, promote local partnerships for conservation education and OHV trail maintenance, and evaluate resource and social impacts.

The focus of this study is to evaluate OHV use in three separate study locations and publish an evaluation of what is learned. The results of this study would be used to guide future management decisions on OHV trail management here and elsewhere in the National Forest System. At the end of the study period, unless the study is modified or terminated early, a separate decision, following the National Environmental Policy Act process, would be made as to whether or not to designate all, part, or none of the three areas as permanent OHV trails. The data collected from this study and other ongoing national studies would be used to corroborate and assist in making that decision.

**DATES:** An original Notice of Intent was published in the **Federal Register** on May 6, 2004. Comments concerning the proposal should have been received during the original comment period. The Forest Service expects to file a Draft EIS with the Environmental Protection Agency and make it available for public comment by December 2005.

**ADDRESSES:** Comments concerning this revision should be received in writing within 30 days of this Notice's publication. Send comments to: Potosi/Fredericktown Ranger District, P.O. Box 188, Potosi, MO 63664. Electronic comments must be sent via the Internet to: comments-eastern-mark-*twain-potosi@fs.fed.us.*

**FOR FURTHER INFORMATION CONTACT:** Tom McGuire, Project Leader/Integrated Resource Analyst, Potosi/Fredericktown Ranger District, P.O. Box 188, Potosi Missouri 63664, phone (573) 438–5427.

**SUPPLEMENTARY INFORMATION:** Further information about the proposal can be found in the original notice of intent originally published in the **Federal Register**, Vol. 69, No. 88, pp.25365–25367, on May 6, 2004. The scope of the project has not changed; therefore, this revised notice of intent does not initiate a new scoping period for this proposal. The notice of intent is being revised because the publication of the Draft EIS has been delayed for more than six months. The original release date was expected to be September 2004; the new expected release date is December 2005, and the Final EIS is expected to be released in March 2006.

### Estimated Dates for Filing

The draft EIS is expected to be filed with the Environmental Protection Agency and available for public review in December 2005. A 45-day comment period will follow publication of a Notice of Availability of the draft EIS in the **Federal Register**. Comments received on the draft EIS will be analyzed and considered in preparation of a final EIS, expected in March 2006. A Record of Decision (ROD) will also be issued at that time along with the publication of a Notice of Availability of the final EIS and ROD in the **Federal Register**.

### Reviewers Obligation To Comment

The Forest Service believes it is important at this early stage to give reviewers notice of several court rulings related to public participation in the environmental review process. First, reviewers of the draft EIS must structure their participation in the environmental review of the proposal in such a way 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, 513 (1978). Also, environmental objections that could be raised at the draft EIS stage but that are not raised until after completion of the final EIS may be waived or dismissed by the courts. *City of Angoon* v. *Hodel*, 803 F.2d 1016, 1022 (9th Cir, 1986), and *Wisconsin Heritages Inc.* v. *Harris*, 490 F.Supp. 1334, 1338 (E.D. Wis., 1980). Because of these court rulings, it is very important that those interested in this proposed action participate by the close of the 45-day comment period of the draft EIS in order that substantive comments and objections are available to the Forest Service at a time when it can meaningfully consider them and respond to them in the final EIS. To assist the Forest Service in identifying and considering issues and concerns on the proposed action, comments should be as specific as possible. 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.

### Responsible Official

The responsible official for this environmental impact statement is Ronnie Raum, Forest Supervisor, Mark Twain National Forest, 401 Fairgrounds Rd, Rolla, MO 65401 (573) 364–4621.

Dated: April 19, 2005.

**Michael J. Weber,**

*District Ranger, Potosi/Fredericktown Ranger District, P.O. Box 188, Potosi, Missouri 63664.*

[FR Doc. 05–8482 Filed 4–27–05; 8:45 am]

BILLING CODE 3410–11–P

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## DEPARTMENT OF AGRICULTURE

## Forest Service

## Notice of Resource Advisory Committee Meeting

**AGENCY:** Lassen Resource Advisory Committee, Susanville, California, USDA Forest Service.

**ACTION:** Notice of meetings.

**SUMMARY:** Pursuant to the authorities in the Federal Advisory Committees Act (Pub. L. 92–463) and under the Secure Rural Schools and Community Self-Determination Act of 2000 (Pub. L. 106–393) the Lassen National Forest's Lassen County Resource Advisory Committee will meet Thursday, May 12, 2005, at the Lassen National Forest Supervisor's Office, 2550 Riverside Drive, Susanville, California for a business meeting. The meeting is open to the public.

**SUPPLEMENTARY INFORMATION:** The business meeting on May 12th will begin at 9 a.m., at the Lassen National Forest Supervisor's Office. There will be an update on the Coordinated Resource Management Plan (CRMP), as well as HR2389 and the project-monitoring letter. Time will also be set aside for public comments at the beginning of the meeting.

**FOR FURTHER INFORMATION CONTACT:** Robert Andrews, District Ranger, Designated Federal Officer, at (530) 257–4188; or Public Affairs Officer Heidi Perry at (530) 252–6604.

**Laurie Tippin,**

*Forest Supervisor.*

[FR Doc. 05–8502 Filed 4–27–05; 8:45 am]

BILLING CODE 3410–11–M

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## DEPARTMENT OF AGRICULTURE

## Rogue/Umpqua Resource Advisory Committee (RAC)

**AGENCY:** Forest Service, USDA.

**ACTION:** Action of meeting.

**SUMMARY:** The Rogue/Umpqua Resource Advisory Committee (RAC) will meet on Thursday and Friday, May 19 and 20, 2005. The purpose of the meeting is monitor RAC projects through fieldtrips. The fieldtrip is scheduled to begin at 9 a.m. and conclude at approximately 4 p.m. on May 19 and begin at 9 a.m. and conclude at approximately 4 p.m. on May 20. The May 19 fiedltrip will be held on the Cottage Grove Ranger District, 78405 Cedar Park Road, Cottage Grove, OR. On May 20, the fieldtrip will be held on the Tiller Ranger District, 27812 Tiller Trail Highway, Tiller, OR. The agenda on both days includes a short business meeting from 9 to 9:30 a.m. to discuss RAC projects and funding, followed by monitoring RAC projects on the district. Public comments are welcome between 9 to 9:30 a.m. Written public comments may be submitted prior to the May fieldtrip by sending them to Designated Federal Official Jim Caplan at the address given below.

**FOR FURTHER INFORMATION CONTACT:** For more information regarding this meeting, contact Designated Federal Official Jim Caplan; Umpqua National Forest; 2900 NW., Stewart Parkway, Roseburg, Oregon 97470; (541) 580–0839.

Dated: April 20, 2005.

**James A. Caplan,**

*Forest Supervisor, Umpqua National Forest.*

[FR Doc. 05–8505 Filed 4–27–05; 8:45 am]

BILLING CODE 3410–11–M

## DEPARTMENT OF COMMERCE

### International Trade Administration

**[A–570–899]**

### Initiation of Antidumping Duty Investigation: Certain Artist Canvas From the People's Republic of China

**AGENCY:** Import Administration, International Trade Administration, Department of Commerce.

**EFFECTIVE DATE:** April 28, 2005.

**FOR FURTHER INFORMATION CONTACT:** Jon Freed or Michael Holton, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Washington, DC 20230; telephone: (202) 482–3818 and (202) 482–1324, respectively.

**Initiation of Investigation**

*The Petition*

On March 31, 2005, the Department of Commerce (''Department'') received a Petition on imports of certain artist canvas from the People's Republic of China (''PRC'') (''Petition'') filed in proper form by Tara Materials Inc. (''Tara'' or ''Petitioner'') on behalf of the domestic industry and workers producing certain artist canvas. On April 7, 2005, the Department clarified that the official filing date for the Petition was April 1, 2005, and that the proper period of investigation (''POI'') is July 1, 2004, through December 31, 2004. *See Memorandum from Edward Yang to Barbara Tillman: Decision Memo Concerning Petition Filing Date and Period of Investigation,* April 7, 2005. On April 7, 2005, and April 14, 2005, the Department requested clarification of certain areas of the Petition and received responses to those requests on April 12, 2005, April 15, 2005, and April 18, 2005.

In accordance with section 732(b) of the Tariff Act of 1930, as amended (''the Act''), Petitioner alleged that imports of certain artist canvas from the PRC are being, or are likely to be, sold in the United States at less than fair value within the meaning of section 731 of the Act, and that such imports are materially injuring and threaten to injure an industry in the United States.

*Scope of Investigation*

The products covered by this investigation are artist canvases regardless of dimension and/or size, whether assembled or unassembled (*i.e.,* kits that include artist canvas and other items, such as a wood frame), that have been primed/coated, whether or not made from cotton, whether or not archival, whether bleached or unbleached, and whether or not containing an ink receptive top coat. Priming/coating includes the application of a solution, designed to promote the adherence of artist materials, such as paint or ink, to the fabric. Artist canvases (*i.e.,* pre-stretched canvases, canvas panels, canvas pads, canvas rolls (including bulk rolls that have been primed), printable canvases, floor cloths, and placemats) are tightly woven prepared painting and/or printing surfaces.

Artist canvases subject to this investigation are currently classifiable under subheadings 5901.90.20.00 and 5901.90.40.00 of the Harmonized Tariff Schedule of the United States (HTSUS). Specifically excluded from the scope of this investigation are tracing cloths and stretcher strips, whether or not made from wood, so long as they are not incorporated into artist canvases or sold as part of an artist canvas kit. While HTSUS subheadings are provided for convenience and customs purposes, our written description of the scope of this proceeding is dispositive.

*Comments on Scope of Investigation*

During our review of the Petition, we discussed the scope with Petitioner to ensure that it accurately reflects the product for which the domestic industry is seeking relief. Moreover, as discussed in the preamble to the Department's regulations, we are setting aside a period for interested parties to raise issues regarding product coverage. *See Antidumping Duties; Countervailing Duties; Final Rule,* 62 FR 27295, 27323 (1997). The Department encourages all interested parties to submit such comments within 20 calendar days of publication of this initiation notice.

Comments should be addressed to Import Administration's Central Records Unit in Room 1870, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Washington, DC 20230—Attn: Michael Holton. The period of scope consultations is intended to provide the Department with ample opportunity to consider all comments and consult with interested parties prior to the issuance of the preliminary determination.

*Determination of Industry Support for the Petition*

Section 732(b)(1) of the Act requires that a Petition be filed on behalf of the domestic industry. Section 732(c)(4)(A) of the Act provides that the Department's industry support determination, which is to be made before the initiation of the investigation, be based on whether a minimum percentage of the relevant industry supports the Petition. A Petition meets this requirement if the domestic producers or workers who support the Petition account for: (i) At least 25 percent of the total production of the domestic like product; and (ii) more than 50 percent of the production of the domestic like product produced by that portion of the industry expressing support for, or opposition to, the Petition. Moreover, section 732(c)(4)(D) of the Act provides that, if the Petition does not establish support of domestic producers or workers accounting for more than 50 percent of the total production of the domestic like product, the Department shall: (i) Poll the industry or rely on other information in order to determine if there is support for the Petition, as required by subparagraph (A), or (ii) determine industry support using a statistically valid sampling method.

Section 771(4)(A) of the Act defines the ''industry'' as the producers of a domestic like product. Thus, to determine whether a Petition has the requisite industry support, the statute directs the Department to look to producers and workers who produce the domestic like product. The International Trade Commission (''ITC''), which is responsible for determining whether ''the domestic industry'' has been injured, must also determine what constitutes a domestic like product in order to define the industry. While both the Department and the ITC must apply the same statutory definition regarding the domestic like product (section 771(10) of the Act), they do so for different purposes and pursuant to a separate and distinct authority. In addition, the Department's determination is subject to limitations of time and information. Although this may result in different definitions of the like product, such differences do not render the decision of either agency contrary to law. *See USEC, Inc.* v. *United States,* 132 F. Supp. 2d 1, 8 (Ct. Int'l Trade 2001), citing *Algoma Steel Corp. Ltd.* v. *United States,* 688 F. Supp. 639, 642–44 (Ct. Int'l Trade 1988).

Section 771(10) of the Act defines the domestic like product as ''a product which is like, or in the absence of like, most similar in characteristics and uses with, the article subject to an investigation under this title.'' Thus, the reference point from which the domestic like product analysis begins is ''the article subject to an investigation,'' *i.e.,* the class or kind of merchandise to be investigated, which normally will be the scope as defined in the Petition.

With regard to the domestic like product, Petitioner does not offer a

definition of domestic like product distinct from the scope of the investigation. Based on our analysis of the information submitted in the Petition, we have determined there is a single domestic like product, certain artist canvas, which is defined further in the ''Scope of the Investigation'' section above, and we have analyzed industry support in terms of that domestic like product.

Our review of the data provided in the petition and other information readily available to the Department indicates that Petitioner has established industry support representing at least 25 percent of the total production of the domestic like product; and more than 50 percent of the production of the domestic like product produced by that portion of the industry, requiring no further action by the Department pursuant to section 732(c)(4)(D) of the Act. In addition, the Department received no opposition to the petition from domestic producers of the like product. Therefore, the domestic producers (or workers) who support the petition account for at least 25 percent of the total production of the domestic like product, and the requirements of section 732(c)(4)(A)(i) of the Act are met. Furthermore, the domestic producers who support the petition account for more than 50 percent of the production of the domestic like product produced by that portion of the industry expressing support for or opposition to the petition. Thus, the requirements of section 732(c)(4)(A)(ii) of the Act also are met. Accordingly, the Department determines that the petition was filed on behalf of the domestic industry within the meaning of section 732(b)(1) of the Act. *See Import Administration: Antidumping Duty Investigation Initiation Checklist of Certain Artist Canvas from the PRC* (''*Initiation Checklist*''), dated April 21, 2005, at Attachment II (Industry Support).

The Department finds that Petitioner filed this petition on behalf of the domestic industry because it is an interested party as defined in section 771(9)(G) of the Act and it has demonstrated sufficient industry support with respect to the antidumping investigation that it is requesting the Department initiate. *See Initiation Checklist* at Attachment II (Industry Support).

*Export Price and Normal Value*

The following is a description of the allegation of sales at less than fair value upon which the Department based its decision to initiate this investigation. The sources of data for the deductions and adjustments relating to the U.S. price and the factors of production are also discussed in the *Initiation Checklist.* Petitioner submits that the particular export prices and normal values chosen represent equivalent forms of artist canvas. Petitioner identified the proper products for comparison by matching the dimensions of the artist canvas, the type and depth of stretcher strip, the weight of the cotton canvas, the number of coating applications, and the number and locations of staples in the artist canvas. *See* Petition Exhibit 34, April 12, 2005, Supplement to the Petition at pages 19–20, and April 15, 2005, Supplement to Petition at Exhibit 4. Should the need arise to use any of this information as facts available under section 776 of the Act in our preliminary or final determination, we may reexamine the information and revise the margin calculations, if appropriate.

*Export Price*

Petitioner based export price on a price list for artist canvas offered for sale by a producer and exporter of artist canvas located in the PRC. *See* Petition at page 26 and Exhibit 34. Petitioner also submitted promotional materials. Petitioner made no adjustments or deductions to the export price. Because, for the reasons discussed in the *Initiation Checklist,* this resulted in a conservative estimate of the export price, we relied on the data in the Petition.

Using the product codes contained in the price list provided to the U.S. buyer, Petitioner chose four of the most common types of artist canvas sold in the U.S. to be used for the dumping margin calculation. *See* Petition Exhibit 34, April 12, 2005, Supplement to the Petition at pages 19–20, and April 15, 2005, Supplement to Petition at Exhibit 4.

*Normal Value*

Petitioner asserted that the PRC is a non-market economy country (''NME'') and no determination to the contrary has yet been made by the Department. In previous investigations, the Department has determined that the PRC is an NME. *See Notice of Final Determination of Sales at Less Than Fair Value: Magnesium Metal from the People's Republic of China,* 70 FR 9037 (February 24, 2005), *Notice of Final Determination of Sales at Less Than Fair Value: Certain Tissue Paper Products From the People's Republic of China,* 70 FR 7475 (February 14, 2005), and *Notice of Final Determination of Sales at Less Than Fair Value: Certain Frozen and Canned Warmwater Shrimp From the People's Republic of China,* 69 FR 70997 (December 8, 2004). In accordance with section 771(18)(C)(i) of the Act, the presumption of NME status remains in effect until revoked by the Department. The presumption of NME status for the PRC has not been revoked by the Department and remains in effect for purposes of the initiation of this investigation. Accordingly, the normal value of the product is appropriately based on factors of production valued in a surrogate market economy country in accordance with section 773(c) of the Act. In the course of this investigation, all parties will have the opportunity to provide relevant information related to the issues of the PRC's NME status and the granting of separate rates to individual exporters.

Petitioner selected India as the surrogate country. *See* Petition at pages 14–16. Petitioner explained that India was selected as the appropriate surrogate for purposes of this Petition because India is economically comparable to the PRC and is a significant producer of comparable merchandise. *See* Petition at page 14. Petitioner identified three Indian companies that produce artist canvas. *See* Petition at page 15, April 12, 2005, Supplement to the Petition at page 13, and April 15, 2005, Supplement to the Petition at page 2 and Exhibit 1. In addition, Petitioner submitted import statistics indicating that India exported about 555,000 square meters of artist canvas to the United States in 2004. *See* Petition at page 15.

Petitioner provided a dumping margin calculation using the Department's NME methodology as required by 19 CFR 351.202(b)(7)(i)(C). *See* Petition Exhibits 12–15, *see also,* April 15, 2005, Supplement to the Petition, at Exhibits 6A–7D. To determine the quantities of inputs used by the PRC producers to produce each of the selected artist canvases, Petitioner relied on the production experience and actual consumption rates of Tara during 2004. Petitioner stated that the products selected were chosen because they are representative of the U.S. production of artist canvas and the artist canvas imported from the PRC. *See* Petition at page 17. For each product selected for comparison to export price, Petitioner provided two sets of normal value calculations. One set of normal value calculations reported consumption based on total material inventory withdrawals and did not account for scrap materials that were recovered and used for other production purposes. *See* April 15, 2005, Supplement to the Petition at Exhibits 6A–6D and Exhibits 7A–7D, respectively. Petitioner contends that the consumption rates

that are based on actual inventory withdrawals are the more appropriate basis for calculating normal value because the scrap is a ''dead loss'' with no further application in the manufacturing process. Notwithstanding this argument, an employee of Petitioner provided an affidavit that indicates that Tara's re-use of scrap material reduces its manufacturing costs. *See* April 15, 2005, Supplement to the Petition at Exhibit 2. However, Petitioner did not incorporate an offset for recovered scrap in its normal value calculations. As a result, Petitioner's calculation of normal value could be overstated because it did not account for scrap materials that are recovered and used for other production purposes. Therefore, for the purposes of initiation, the Department has conservatively determined to analyze the normal value calculations submitted by Petitioner that accounted for materials consumed (net of scrap). *See* April 15, 2005, Supplement to the Petition at Exhibits 6A–6D.

For the normal value calculation, Petitioner valued the factors of production for artist canvas using surrogate values derived from official Indian government import statistics. *See* Petition at Exhibits 16–31, *see also* April 15, 2005, Supplement to the Petition at Exhibit 3. Petitioner explained that, when surrogate values were not contemporaneous, it calculated the surrogate values using the best data available and relied on wholesale price indices in India as published in the International Financial Statistics of the International Monetary Fund to determine the appropriate adjustments for inflation. *See* Petition at Exhibit 32 and the April 12, 2005, Supplement to the Petition at Exhibit 32. Using the foreign currency exchange rates posted on the Department's Web site, Petitioner converted the surrogate values from rupees to U.S. dollars based on the average exchange rate for the POI. *See* April 12, 2005, Supplement to the Petition at Exhibit K. Additionally, in calculating the surrogate values, Petitioner excluded those values reflecting imports from countries previously determined by the Department to be NME countries and imports into India from Indonesia, Korea and Thailand, because the Department has previously excluded prices from these countries because they maintain broadly-available, non-industry specific export subsidies. *See Automotive Replacement Glass Windshields From the People's Republic of China: Final Results of Administrative Review,* 69 FR 61790 (October 21, 2004), and accompanying Issues and Decision Memorandum at Comment 5.

For each of the inputs detailed in the normal value calculations, Petitioner provided surrogate values based on Indian Import Statistics. *See* April 15, 2005, Supplement to the Petition at Exhibit 3. The surrogate values submitted for the material and packing inputs consist of information reasonably available, and are therefore acceptable for purposes of initiation. However, the Department has recalculated the surrogate value for raw canvas and expressed it in U.S. dollars per square yard to be consistent with the unit of measure in which the consumption of raw canvas is reported. *See Initiation Checklist* at Attachment V.

The Department calculates and publishes the surrogate values for labor to be used in NME cases. Therefore, to value labor, Petitioner used a labor rate of $0.93 per hour, in accordance with the Department's regulations. *See* 19 CFR 351.408(c)(3) and Petition at Exhibits 6A–6D.

Petitioner did not include amounts for energy consumption as a separate factor of production in its calculation of normal value. Since Petitioner did not directly value energy consumption in its normal value calculation and because the Department does not normally include energy costs in the numerator of its factory overhead ratio, the Department has not included an amount for energy in its recalculation of Petitioner's normal values. *See Initiation Checklist* at pages 7–8.

Factory overhead, selling, general and administrative expenses, interest, and profit were derived from the 2003–2004 financial statements of Arvind Mills Limited, an Indian fabric producer. *See* Petition at pages 15–16, and Exhibit 33. Petitioner stated it was unable to obtain financial data from any Indian producers that specifically produce artist canvas. *See* Petition at page 15. The Department agrees with Petitioner's contention that, in the absence of surrogate financial data for the specific subject merchandise, the Department may consider financial data for surrogate companies with similar characteristics and production processes. See Petition at page 16, *see also, Notice of Initiation of Antidumping Duty Investigations: 4,4′-Diamino-2,2′-Stilbenedisulfonic Acid (DAS) and Stilbenic Fluorescent Whitening Agents (SFWA) from Germany, India, and the People's Republic of China,* 68 FR 34579, 34581 (June 10, 2003). In this case, the Department has accepted the financial information for the Indian fabric producer for the purposes of initiation, because these data appear to be the best information on such expenses currently available to Petitioner. Petitioner submitted calculations of the surrogate financial ratios in Exhibit 33 of the Petition and revised calculations in Exhibit 8 of the April 15, 2005, Supplement to the Petition. However, the Department has recalculated the surrogate financial ratios to be consistent with its normal practice with regard to the treatment of energy, purchase of traded goods, taxes, duties, and movement expenses. *See Initiation Checklist* at Attachment VII.

In addition to the changes discussed above, the Department has adjusted Petitioner's normal value calculations with regard to how amounts for packing materials are incorporated into the normal value calculation. Petitioner stated that it had excluded the packing material amounts from the components of the normal value calculation to which the surrogate financial ratios were applied in the normal value calculations. However, Petitioner's calculation of normal value for the 16x20 stretched canvas and the 18x24 stretched canvas applied the surrogate financial ratios to the packing materials as well as to the material and labor amounts, which Petitioner valued directly. As a result, Petitioner's calculation overstated normal value to a certain extent for those two products. In light of this, the Department has recalculated the normal values for the 16x20 stretched canvas and the 18x24 stretched canvas so that packing costs are added to normal value after application of the surrogate financial ratios to the cost of manufacturing. *See Initiation Checklist* at Attachment VI.

*Fair Value Comparisons*

Based on the data provided by Petitioner, there is reason to believe that imports of certain artist canvas from the PRC are being, or are likely to be, sold in the United States at less than fair value. Based upon comparisons of export price to the normal value, calculated in accordance with section 773(c) of the Act, the estimated recalculated dumping margins for certain artist canvas range from 242.09 percent to 264.09 percent.

*Allegations and Evidence of Material Injury and Causation*

The Petition alleges that the U.S. industry producing the domestic like product is being materially injured and is threatened with material injury, by reason of the imports of the subject merchandise sold at less than normal value. The petitioner contends that the

industry's injured condition is evident in: (1) Declining market share; (2) declining domestic prices and lost sales; (3) declining production and sales; (4) reductions in employment levels; and (5) declining profitability. *See Initiation Checklist* at Attachment IV (Injury).

The Department has assessed the allegations and supporting evidence (*e.g.,* import statistics, etc) regarding material injury and causation and determined that these allegations are supported by accurate and adequate evidence and meet the statutory requirements for initiation.

*Separate Rates and Quantity and Value Questionnaire*

The Department recently modified the process by which exporters and producers may obtain separate-rate status in NME investigations. This change is described in *Policy Bulletin 05.1: Separate-Rates Practice and Application of Combination Rates in Antidumping Investigations involving Non-Market Economy Countries,* (April 5, 2005), (''*Policy Bulletin 05.1*'') available at *http://ia.ita.doc.gov/.* Although the process has changed, now requiring submission of a separate-rate status application, the standard for eligibility for a separate rate (which is whether a firm can demonstrate an absence of both *de jure* and *de facto* governmental control over its export activities) has not changed.

The specific requirements for submitting a separate-rates application are outlined in detail in the application itself, and in Policy Bulletin 05.1, which is also available on the Department's Web site at *http://ia.ita.doc.gov/policy/bull05-1.pdf.* Regarding deadlines, Policy Bulletin 05.1 explains that ''[a]ll applications are due sixty calendar days after publication of the initiation notice. This deadline applies equally to NME-owned and wholly foreign-owned firms for completing the applicable provisions of the application and for submitting the required supporting documentation.'' *See Policy Bulletin 05.1* at page 5.

The deadline for submitting a separate-rates application applies equally to NME-owned firms, wholly foreign-owned firms, and foreign sellers who purchase the subject merchandise and export it to the United States. Therefore, this notice constitutes public notification to all firms eligible to seek separate-rate status in the investigation of artist canvas from the PRC that they must submit a separate-rates application within 60 calendar days of the date of publication of this initiation notice in the **Federal Register**. All potential respondents should also bear in mind that firms to which the Department issues a Quantity and Value (''Q&V'') questionnaire must respond both to this questionnaire and to the separate-rates application by the respective deadlines in order to receive consideration for a separate-rate status. In other words, the Department will not give consideration to any separate rate-status application made by parties that were issued a Q&V questionnaire by the Department but failed to respond to that questionnaire within the established deadline. The particular separate-rate status application for this investigation is available on the Department's Web site *http://ia.ita.doc.gov/ia-highlights-and-news.html.*

*Combination Rates*

The Department will calculate combination rates for certain respondents that are eligible for a separate rate in this investigation. *The Separate Rates and Combination Rates Bulletin,* states:

> [w]hile continuing the practice of assigning separate rates only to exporters, all separate rates that the Department will now assign in its NME investigations will be specific to those producers that supplied the exporter during the period of investigation. Note, however, that one rate is calculated for the exporter and all of the producers which supplied subject merchandise to it during the period of investigation. This practice applies both to mandatory respondents receiving an individually calculated separate rate as well as the pool of non-investigated firms receiving the weighted-average of the individually calculated rates. This practice is referred to as the application of ''combination rates'' because such rates apply to specific combinations of exporters and one or more producers. The cash-deposit rate assigned to an exporter will apply only to merchandise both exported by the firm in question and produced by a firm that supplied the exporter during the period of investigation.

*Separate Rates and Combination Rates Bulletin,* at page 6.

*Initiation of Antidumping Investigation*

Based upon our examination of the Petition on certain artist canvas from the PRC, we find that the Petition meets the requirements of section 732 of the Act. Therefore, we are initiating an antidumping duty investigation to determine whether imports of certain artist canvas from the PRC are being, or are likely to be, sold in the United States at less than fair value. Unless it is postponed, we will make our preliminary determination no later than 140 days after the date of this initiation.

*Distribution of Copies of the Petition*

In accordance with section 732(b)(3)(A) of the Act, a copy of the public version of the Petition has been provided to the Government of the PRC.

*ITC Notification*

We have notified the ITC of our initiation, as required by section 732(d) of the Act.

*Preliminary Determination By the ITC*

The ITC will preliminarily determine, no later than May 16, 2005, whether there is a reasonable indication that imports of certain artist canvas from the PRC are causing material injury, or are threatening to cause material injury, to a U.S. industry. A negative ITC determination will result in this investigation being terminated; otherwise, this investigation will proceed according to statutory and regulatory time limits.

This notice is issued and published pursuant to section 777(i) of the Act.

Dated: April 21, 2005.

**Joseph A. Spetrini,**

*Acting Assistant Secretary for Import Administration.*

[FR Doc. E5–2047 Filed 4–27–05; 8:45 am]

BILLING CODE 3510–DS–P

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## DEPARTMENT OF COMMERCE

### International Trade Administration

**[A–201–831]**

### Notice of Rescission of Antidumping Duty Administrative Review: Prestressed Concrete Steel Wire Strand From Mexico

**AGENCY:** Import Administration, International Trade Administration, Department of Commerce.

**SUMMARY:** On February 24, 2005, the Department of Commerce (the Department) published in the **Federal Register** a notice announcing the initiation of an administrative review of the antidumping duty order on prestressed concrete steel wire strand from Mexico, covering the period July 17, 2003, to December 31, 2004. *See Notice of Initiation of Antidumping and Countervailing Duty Administrative Reviews, Mexico: Prestressed Concrete Steel Wire Strand,* 70 FR 9035 (February 24, 2005). The review covers Cablesa S.A. de C.V. (Cablesa). We are now rescinding this review as a result of Cablesa's timely withdrawal of its request for an administrative review .

**DATES:** *Effective Date:* April 28, 2005.

**FOR FURTHER INFORMATION CONTACT:** Constance Handley or Saliha Loucif, at (202) 482–0631 or (202) 482–1779, respectively, AD/CVD Enforcement, Office 1, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th

Street & Constitution Avenue, NW., Washington, DC 20230.

**SUPPLEMENTARY INFORMATION:**

### Background

In accordance with 19 CFR 351.214(c), on January 31, 2005, Cablesa requested an administrative review of the antidumping duty order on prestressed concrete steel wire strand from Mexico. On February 24, 2005, in accordance with section 751(a)(2)(B)(ii) of the Tariff Act of 1930, as amended (the Act), and 19 CFR 351.214(d)(1), we initiated the administrative review of this order for the period July 17, 2003 to December 31, 2004 (70 FR 9035). Cablesa withdrew its request for a first administrative review on March 29, 2005.

### Rescission of First Administrative Review

The Department's regulations at 19 CFR 351.213(d)(1) provide that the Department will rescind an administrative review if a party that requested a review withdraws the request within 90 days of the date of publication of the notice of initiation of the requested review. Cablesa, the only interested party to request a review, withdrew its request for an administrative review within the 90-day period. Therefore, the Department is required to grant the request to rescind this administrative review.

This notice also serves as the only reminder to parties subject to administrative protective order (APO) of their responsibility concerning the disposition of proprietary information disclosed under APO in accordance with 19 CFR 351.305(a)(3). Timely written notification of the return/destruction of APO material or conversion to judicial protective order is hereby requested. Failure to comply with the regulations and terms of an APO is a violation which is subject to sanctions.

This notice is issued and published in accordance with sections 751(a)(2)(B)(iv) and 777(I) of the Act and 19 CFR 351.214(f)(3).

Dated: April 22, 2005.

**Barbara E. Tillman,**

*Acting Deputy Assistant Secretary for Import Administration.*

[FR Doc. E5–2046 Filed 4–27–05; 8:45 am]

**BILLING CODE 3510–DS–P**

## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

**[I.D. 042505A]**

### Pacific 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 Pacific Fishery Management Council's (Council) Coastal Pelagic Species Management Team (CPSMT) will hold a work session, which is open to the public. The CPSMT will meet Wednesday, May 18, 2005 from 8 a.m. until business for the day is completed.

**DATES:** The CPSMT will meet Wednesday, May 18, 2005 from 8 a.m. until business for the day is completed.

**DATES:** The CPSMT work session will be held at National Marine Fisheries Service, Southwest Fisheries Science Center, Small Conference Room (D–203), 8604 La Jolla Shores Drive, La Jolla, California 92037, (858) 546–7000.

*Council address:* Pacific Fishery Management Council, 7700 NE Ambassador Place, Suite 200, Portland, OR 97220–1384.

**FOR FURTHER INFORMATION CONTACT:** Mr. Mike Burner, Pacific Fishery Management Council, (503) 820–2280.

**SUPPLEMENTARY INFORMATION:** The CPSMT will review the current Pacific mackerel stock assessment and develop harvest guideline and seasonal structure recommendations for the 2005–2006 fishery. The CPSMT will also review the 2005 CPS stock assessment and fishery evaluation (SAFE) document and analyses pertaining to a long-term allocation framework to apportion the annual Pacific sardine harvest guideline. Additionally, the CPSMT will develop recommendations for Council consideration at its June meeting in Foster City, CA review progress on development of management measures to regulate directed fisheries for krill, receive an update on Vessel Monitoring System issues, and address other assignments relating to coastal pelagic species management. No management actions will be decided by the CPSMT.

Although nonemergency issues not contained in the meeting agenda may come before the CPSMT for discussion, those issues may not be the subject of formal CPSMT action during this meeting. CPSMT action will be restricted to those issues specifically listed in this notice and any issues arising after publication of this notice that require emergency action under Section 305(c) of the Magnuson-Stevens Fishery Conservation and Management Act, provided the public has been notified of the CPSMT'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 Ms. Carolyn Porter at 503–820–2280 at least 5 days prior to the meeting date.

Dated: April 25, 2005.

**Peter H. Fricke,**

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

[FR Doc. 05–8524 Filed 4–27–05; 8:45 am]

**BILLING CODE 3510–22–S**

## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

**[I.D. 042505B]**

### Western Pacific 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 89th meeting of the Western Pacific Fishery Council's Scientific and Statistical Committee (SSC) will convene in May 2005. Agenda topics are provided under the **SUPPLEMENTARY INFORMATION** section of this notice.

**DATES:** The meeting will be held from 8:30 a.m. to 5 p.m. each day on May 17–19, 2005.

**ADDRESSES:** The 89th SSC meeting will be held at the Council office conference room, 1164 Bishop St., Suite 1400, Honolulu, HI; telephone: 808–522–8220.

**FOR FURTHER INFORMATION CONTACT:** Kitty M. Simonds, Executive Director; telephone 808–522–8220.

**SUPPLEMENTARY INFORMATION:** The SSC will discuss and may make recommendations to the Council on the agenda items below. The order in which agenda items will be addressed can change.

### Agenda

*Tuesday, May 17, 2005*

1. Introductions
2. Approval of Draft Agenda and Assignment of Rapporteurs

3. Approval of the Minutes of the 88th SSC Meeting
4. Insular Fisheries
A. Bottomfish Management
1. Report on Northwestern Hawaiian Islands Bottomfish Habitat Study
2. Main Hawaiian Islands Bottomfish Overfishing Plan (Action Item)
B. Black Coral Management
1. State of Hawaii Research
2. Black Coral Management Options (Action Item)
C. Bottomfish Plan Team Recommendations
D. Precious Coral Plan Team Recommendations
E. Public Comment
F. Discussion and Recommendations
5. Ecosystem and Habitat
A. Marine Protected Area Objectives and Criteria DRAFT (Action Item)
B. Ecosystem-Based Fishery Management Workshop
C. Report on Marianas Fisheries Ecosystem Plan Pilot Project
D. Coral Reef Plan Team Recommendations
E. Public Comment
F. Discussion and Recommendations

*Wednesday, May 18, 2005*

6. Pelagics Fisheries
A. Bigeye Overfishing Plan (Action Item)
1. International
2. Domestic Federal Permits and Reporting
B. American Samoa & Hawaii Longline Fisheries Quarterly Reports
C. International Issues
D. Plan Team Recommendations
E. Public Comment
F. Discussion and Recommendations
7. Protected Species
A. Sea Turtles
1. Technical Assistance Workshop
2. Ridleys Sea Turtle Biological Opinion
3. Report on the Turtle Advisory Committee
B. Marine Mammals
1. Report on Marine Mammal Advisory Committee
C. Public Comment
D. Discussion and Recommendations

*Thursday, May 19, 2005*

8. Other Business
A. 90th SSC meeting
9. Summary of SSC Recommendations to the Council Paul Callaghan

**Special Accommodations**

This meeting is physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to Kitty M. Simonds, 808–522–8220 (voice) or 808–522–8226 (fax), at least 5 days prior to meeting date.

Dated: April 25, 2005.

**Peter H. Fricke**

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

[FR Doc. 05–8525 Filed 4–27–05; 8:45 am]

BILLING CODE 3510–22–S

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## DEPARTMENT OF COMMERCE

## National Oceanic and Atmospheric Administration

**[I.D. 042005A]**

## Endangered and Threatened Species; Take of Anadromous Fish

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

**ACTION:** Applications for two scientific research permits (1531, 1532) and requests to modify two permits (1119, 1338).

**SUMMARY:** Notice is hereby given that NMFS has received two scientific research permit applications and two modification requests relating to Pacific salmon. The proposed research is intended to increase knowledge of species listed under the Endangered Species Act (ESA) and to help guide management and conservation efforts.

**DATES:** Comments or requests for a public hearing on the applications must be received at the appropriate address or fax number (see ADDRESSES) no later than 5 p.m. Pacific daylight-saving time on May 31, 2005.

**ADDRESSES:** Written comments on the application should be sent to Protected Resources Division, NMFS, 1201 NE Lloyd Blvd., Suite 1100, Portland, OR 97232–1274. Comments may also be sent via fax to 503–230–5441 or by e-mail to *resapps.nwr@NOAA.gov*.

**FOR FURTHER INFORMATION CONTACT:** Garth Griffin, Portland, OR (ph.: 503–231–2005, Fax: 503–230–5441, e-mail: *Garth.Griffin@noaa.gov*). Permit application instructions are available at *http://www.nwr.noaa.gov*.

**SUPPLEMENTARY INFORMATION:**

**Species Covered in This Notice**

The following listed species and evolutionarily significant units (ESUs) are covered in this notice:

Chinook salmon (*Oncorhynchus tshawytscha*): endangered natural and artificially propagated upper Columbia River (UCR); threatened natural and artificially propagated Snake River (SR) spring/summer (spr/sum); threatened SR fall; threatened lower Columbia River (LCR).

Chum salmon (*O. keta*): threatened Columbia River (CR).

Steelhead (*O. mykiss*): threatened middle Columbia River (MCR); endangered UCR.

Coho salmon (*O. kisutch*): threatened Southern Oregon/Northern California Coast (SONCC).

**Authority**

Scientific research permits are issued in accordance with section 10(a)(1)(A) of the ESA (16 U.S.C. 1531 et. seq) and regulations governing listed fish and wildlife permits (50 CFR 222–226). NMFS issues permits based on findings that such permits: (1) are applied for in good faith; (2) if granted and exercised, would not operate to the disadvantage of the listed species that are the subject of the permit; and (3) are consistent with the purposes and policy of section 2 of the ESA. The authority to take listed species is subject to conditions set forth in the permits.

Anyone 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, NMFS.

**Applications Received**

*Permit 1119 - Modification 2*

The U.S. Fish and Wildlife Service (FWS) is seeking to modify its 5–year permit covering six studies that, among them, would annually take adult and juvenile endangered UCR spring chinook salmon (natural and artificially propagated) and UCR steelhead (natural and artificially propagated) at various points in the Wenatchee, Entiat, Methow, Okanogan, and Yakima River watersheds and other points in eastern Washington State. The ongoing research projects are: Study 1–Recovery of ESA-listed Entiat River Salmonids through Improved Management Actions; Study 2–Peshastin Creek Salmonid Production and Life History Investigations; Study 3–Entiat Basin Spawning Ground Surveys; Study 4–Snorkel Surveys in the Wenatchee, Entiat, Methow, Okanogan, and Yakima Watersheds and Other Waterways of Eastern Washington; Study 5–Fish Salvage Activities in the Wenatchee, Entiat, Methow, Okanogan, and Yakima Watersheds and other Waterways of Eastern Washington; Study 6–Icicle

Creek Salmonid Production and Life History Investigations. The FWS is only asking to change the first two studies. Under the ongoing research, listed adult and juvenile salmon and steelhead would be variously (a) captured (using nets, traps, and electrofishing equipment) and anesthetized; (b) sampled for biological information and tissue samples; (c) tagged with PIT tags or other identifiers; (d) marked and recaptured to determine trap efficiency, and (e) released.

The research has many purposes and would benefit listed salmon and steelhead in different ways. In general, the purposes of the research are to (a) gain current information on the status and productivity of various fish populations (to be used in determining the effectiveness of restoration programs); (b) collect data on the how well artificial propagation programs are helping salmon recovery efforts (looking at hatchery and wild fish interactions); (c) support the aquatic species restoration goals found in several regional plans; and (d) fulfill ESA requirements for several fish hatcheries. The fish would benefit through improved recovery actions, better designs for hatchery supplementation programs, and by being rescued outright when they are stranded by low flows in Eastern Washington streams. The FWS does not intend to kill any of the fish being captured, but a small percentage may die as an unintentional result of the research activities.

*Permit 1338 - Modification 1*

The FWS is asking to modify its 5–year permit to continue studying salmonids in tributaries of the Lower Columbia River. The FWS is requesting to increase its annual take of juvenile LCR chinook salmon and CR chum salmon because the abundance of juvenile salmon has increased in the study area.

The research is designed to provide a better understanding of life history requirements and factors affecting chum salmon in Hardy Creek and in Hamilton Springs and ultimately to improve the conservation of salmonids in the lower Columbia River. The study will benefit listed chum salmon by providing information on their freshwater life history that can be used in Columbia River water management and recover planning. The FWS is requesting authorization to capture (using fyke nets, weirs, or screw traps), handle, mark, and release additional juvenile fish. The USFWS does not intend to kill any fish being captured but some additional fish may die as an unintentional result of the research activities.

*Permit 1531*

Aaron Maxwell of the Southern Oregon University (SOU) is asking for a 3–year research permit to identify existing salmonid strongholds and detail threats to salmonid survival and recovery. The research will take place in Bear Creek, a tributary to the Rogue River in southern Oregon. The SOU is requesting to take juvenile SONCC coho salmon.

The research is designed to assess species abundance and to further document the location of habitats occupied by native and non-native fish species in the Bear Creek Watershed. Detailed species abundance data will be used to identify productive habitats and to prioritize sites of feasible restoration potential. The study will benefit listed coho salmon by providing information on habitat that could be used for the long-term protection of intact ecosystems in the Klamath-Siskiyou Bioregion. The SOU proposes to capture, using minnow traps, handle, and release listed salmonids. The SOU does not intend to kill any fish being captured but some may die as an unintentional result of the research activities.

*Permit 1532*

The Columbia River Inter-Tribal Fish Commission (CRITFC) is seeking a 5–year permit to take juvenile MCR steelhead during the course of research designed to determine their freshwater movements and how those movements are affected by the area's substantially altered hydrograph. The research will take place in Satus, Ahtanum, and Toppenish Creeks, Washington.

The fish will be captured using screw traps, anesthetized, and some will be tissue-sampled and some will receive passive integrated transponder (PIT) tags. The information gathered will be used to determine the fishes' movements, abundance, and the ongoing status of the various MCR steelhead populations in the Yakima River subbasin. The research will benefit the fish by helping managers determine the effectiveness of current recovery measures and design new ones where needed. The CRITFC does not plan to kill any of the fish being captured, but a few may die as an unintentional result of the research.

This notice is provided pursuant to section 10(c) of the ESA. NMFS will evaluate the applications, associated documents, and comments submitted to determine whether the applications meet the requirements of section 10(a) of the ESA and Federal regulations. The final permit decisions will not be made until after the end of the 30–day comment period. NMFS will publish notice of its final action in the **Federal Register**.

Dated: April 21, 2005.

**Phil Williams,**

*Chief, Endangered Species Division, Office of Protected Resources, National Marine Fisheries Service.*

[FR Doc. 05–8463 Filed 4–27–05; 8:45 am]

BILLING CODE 3510–22–S

## CORPORATION FOR NATIONAL AND COMMUNITY SERVICE

### Information Collection; Submission for OMB Review, Comment Request

**AGENCY:** Corporation for National and Community Service.

**ACTION:** Notice.

**SUMMARY:** The Corporation for National and Community Service (hereinafter the ''Corporation''), has submitted a public information collection request (ICR) entitled AmeriCorps Member Satisfaction Surveys 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). Copies of this ICR, with applicable supporting documentation, may be obtained by calling the Corporation for National and Community Service, LaMonica Shelton at (202) 606–5000, ext. 464. Individuals who use a telecommunications device for the deaf (TTY–TDD) may call (202) 565–2799 between 8:30 a.m. and 5 p.m. eastern time, Monday through Friday.

**DATES:** Comments must be received on or before May 31, 2005.

**ADDRESSES:** Comments may be submitted, identified by the title of the information collection activity, to the Office of Information and Regulatory Affairs, Attn: Ms. Katherine Astrich, OMB Desk Officer for the Corporation for National and Community Service, by any of the following two methods:

(1) By fax to: (202) 395–6974, Attention: Ms. Katherine Astrich, OMB Desk Officer for the Corporation for National and Community Service; and

(2) Electronically by e-mail to: *Katherine_T._Astrich@omb.eop.gov.*

**SUPPLEMENTARY INFORMATION:** 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 Corporation, 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;

• Propose ways to enhance the quality, utility, and clarity of the information to be collected; and

• Propose ways to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submissions of responses.

**Comments**

A 60-day public comment Notice was published in the **Federal Register** on November 18, 2004. This comment period ended January 18, 2005. No public comments were received from this notice.

*Description:* The Corporation is seeking approval of the document entitled AmeriCorps Member Satisfaction Surveys. The Corporation for National and Community Service, through its national service programs and projects: (1) Provides opportunities for all Americans to serve; (2) affords members with meaningful, valuable, and enriching experiences (such as through leadership training, technical assistance, and citizenship training development); and (3) supports a continued ethic of volunteer service. The service opportunities available to members cover a wide range of activities over varying periods of time. The Corporation plans to administer a member satisfaction that will allow members to provide information about their satisfaction with their AmeriCorps program or project, and with their overall AmeriCorps service experience.

*Type of Review:* New.

*Agency:* Corporation for National and Community Service.

*Title:* AmeriCorps Member Satisfaction Surveys.

*OMB Number:* None.

*Agency Number:* None.

*Affected Public:* Individuals who are serving in AmeriCorps sponsored programs and projects; state government and non-profit organizations that sponsor members.

*Total Respondents:* 71,570.

*Frequency:* Semi-annual.

*Average Time per Response:* 10 minutes.

*Estimated Total Burden Hours:* 23,262 hours.

*Total Burden Cost (capital/startup):* None.

*Total Burden Cost (operating/maintenance):* None.

Dated: April 21, 2005.

**Robert T. Grimm,**

*Director of Research and Policy Development.*

[FR Doc. 05–8517 Filed 4–27–05; 8:45 am]

BILLING CODE 6050–$$–P

## DEPARTMENT OF EDUCATION

### Office of Special Education and Rehabilitative Services; Overview Information; Rehabilitation Training—National Clearinghouse of Rehabilitation Training Materials; Notice inviting applications for new awards for fiscal year (FY) 2005

*Catalog of Federal Domestic Assistance (CFDA) Number:* 84.275A

*Dates:*

*Applications Available:* April 28, 2005.

*Deadline for Transmittal of Applications:* June 13, 2005.

*Deadline for Intergovernmental Review:* August 11, 2005.

*Eligible Applicants:* States and public or nonprofit agencies and organizations, including Indian tribes and institutions of higher education.

*Estimated Available Funds:* $300,000.

*Estimated Number of Awards:* 1.

**Note:** The Department is not bound by any estimates in this notice.

Project Period: Up to 60 months.

**Full Text of Announcement**

**I. Funding Opportunity Description**

*Purpose of Program:* The Rehabilitation Training program supports projects to ensure skilled personnel are available to provide rehabilitation services to individuals with disabilities through vocational, medical, social, and psychological rehabilitation programs, through supported employment programs, through independent living services programs, and through client assistance programs. The program supports projects to maintain and upgrade basic skills and knowledge of personnel employed to provide state-of-the-art service delivery systems and rehabilitation technology services.

*Priority:* This priority is from the notice of final priorities for this program, published in the **Federal Register** on December 5, 1994 (59 FR 62502).

*Absolute Priority:* For FY 2005, this priority is an absolute priority. Under 34.105(c)(3), we consider only applications that meet this priority.

This priority is:

*National Clearinghouse of Rehabilitation Training Materials*

The project must—

• Demonstrate experience and capacity to provide for a national clearinghouse of rehabilitation training materials;

• Identify and gather rehabilitation information and training materials for use in preparing pre-service and in-service education and training for rehabilitation personnel;

• Disseminate, in a cost-effective manner, rehabilitation information and state-of-the-art training materials and methods to rehabilitation personnel to assist them in achieving improved outcomes in vocational rehabilitation, supported employment, and independent living; and

• Provide linkages and policies for the exchange of information and referral of inquiries with other existing clearinghouses and information centers supported by the U.S. Department of Education, including the Educational Resources Information Center and the National Rehabilitation Information Center.

*Program Authority:* 29 U.S.C. 772.

*Applicable Regulations:* (a) The Education Department General Administrative Regulations (EDGAR) in 34 CFR parts 74, 75, 77, 79, 80, 81, 82, 84, 85, and 86. (b) The regulations for this program in 34 CFR part 385, except § 385.31.

**Note:** The regulations in 34 CFR part 79 apply to all applicants except federally recognized Indian tribes.

**Note:** The regulations in 34 CFR part 86 apply to institutions of higher education only.

**II. Award Information**

*Type of Award:* Discretionary grants.

*Estimated Available Funds:* $300,000.

*Estimated Number of Awards:* 1.

**Note:** The Department is not bound by any estimates in this notice.

*Project Period:* Up to 60 months.

**III. Eligibility Information**

1. *Eligible Applicants:* States and public or nonprofit agencies and organizations, including Indian tribes and institutions of higher education.

2. *Cost Sharing or Matching:* A grantee must provide a match of at least 10 percent of the total cost of the project under the Rehabilitation Training—National Clearinghouse of Rehabilitation Training Materials program (Section 302(a)(1) of the Rehabilitation Act of 1973, as amended).

**Note:** Under 34 CFR 75.562(c), an indirect cost reimbursement on a training grant is

limited to the recipient's actual indirect costs, as determined by its negotiated indirect cost rate agreement, or eight percent of a modified total direct cost base, whichever amount is less. Indirect costs in excess of the eight percent limit may not be charged directly, used to satisfy matching or cost-sharing requirements, or charged to another Federal award.

## IV. Application and Submission Information

1. *Address to Request Application Package:* Education Publications Center (ED Pubs), P.O. 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: *http://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 84.275A.

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, U.S. Department of Education, 400 Maryland Avenue, SW., room 5075, Potomac Center Plaza, Washington, DC 20202–2550. Telephone: (202) 245–7363. If you use a telecommunications device for the deaf (TDD), you may call the Federal Relay Service (FRS) at 1–800–877–8339.

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:* Part III of the application, the application narrative, 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 50 pages, using the following standards:

- A ''page'' is 8.5″ × 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, 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: April 28, 2005.

*Deadline for Transmittal of Applications:* June 13, 2005.

Applications for grants under this competition must be submitted 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 electronically or by mail or hand delivery if you qualify for an exception to the electronic submission requirement, please refer to section IV. 6. *Other Submission Requirements* in this notice.

We do not consider an application that does not comply with the deadline requirements.

Deadline for Intergovernmental Review: August 11, 2005.

4. *Intergovernmental Review:* This program is subject to Executive Order 12372 and the regulations in 34 CFR part 79. Information about Intergovernmental Review of Federal Programs under Executive Order 12372 is in the application package for this competition.

5. *Funding Restrictions:* We reference regulations outlining funding restrictions in the *Applicable Regulations* section of this notice.

6. *Other Submission Requirements:* Applications for grants under this competition must be submitted electronically, unless you qualify for an exception to this requirement in accordance with the instructions in this section.

We will reject your application if you submit it in paper format unless, as described elsewhere in this section, you qualify for one of the exceptions to the electronic submission requirement and submit, no later than two weeks before the application deadline date, a written statement to the Department that you qualify for one of these exceptions. Further information regarding calculation of the date that is two weeks before the application deadline date is provided later in this section under *Exception to Electronic Submission Requirement.*

a. *Electronic Submission of Applications.*

Applications for grants under Rehabilitation Training—National Clearinghouse of Rehabilitation Training Materials—CFDA Number 84.275A must be submitted electronically using e-Application available through the Department's e-Grants system, accessible through the e-Grants portal page at: *http://e-grants.ed.gov*

While completing your electronic application, you will be entering data online that will be saved into a database. You may not e-mail an electronic copy of a grant application to us.

Please note the following:

- You must complete the electronic submission of your grant application by 4:30 p.m., Washington, DC time, on the application deadline date. The e-Application system will not accept an application for this competition after 4:30 p.m., Washington, DC time, on the application deadline date. Therefore, we strongly recommend that you do not wait until the application deadline date to begin the application process.
- 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 between 7 p.m. on Wednesdays and 6 a.m. on Thursdays, Washington, DC time, for maintenance. Any modifications to these hours are posted on the e-Grants Web site.
- You will not receive additional point value because you submit your application in electronic format, nor will we penalize you if you qualify for an exception to the electronic submission requirement, as described elsewhere in this section, and 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.
- Any narrative sections of your application should be attached as files in a .DOC (document), .RTF (rich text), or .PDF (Portable Document) format.
- Your electronic application must comply with any page limit requirements described in this notice.
- Prior to submitting your electronic application, you may wish to print a copy of it for your records.
- After you electronically submit your application, you will receive an automatic acknowledgment that 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 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 provide us original signatures on other forms at a later date.

*Application Deadline Date Extension in Case of e-Application System Unavailability:* If you are prevented from electronically 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 electronic 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 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 acknowledgment 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. If the system is down and therefore the application deadline is extended, an e-mail will be sent to all registered users who have initiated an e-Application. Extensions referred to in this section apply only to the unavailability of the Department's e-Application system.

*Exception to Electronic Submission Requirement:* You qualify for an exception to the electronic submission requirement, and may submit your application in paper format, if you are unable to submit an application through the e-Application system because—

• You do not have access to the Internet; or

• You do not have the capacity to upload large documents to the Department's e-Application system; and

• No later than two weeks before the application deadline date (14 calendar days or, if the fourteenth calendar day before the application deadline date falls on a Federal holiday, the next business day following the Federal holiday), you mail or fax a written statement to the Department, explaining which of the two grounds for an exception prevent you from using the Internet to submit your application. If you mail your written statement to the Department, it must be postmarked no later than two weeks before the application deadline date. If you fax your written statement to the Department, we must receive the faxed statement no later than two weeks before the application deadline date.

Address and mail or fax your statement to: Edward Smith, U.S. Department of Education, 400 Maryland Avenue, SW., room 5027, Potomac Center Plaza, Washington, DC 20202–2800. Fax: (202) 245–7591.

Your paper application must be submitted in accordance with the mail or hand delivery instructions described in this notice.

b. *Submission of Paper Applications by Mail.*

If you qualify for any exception to the electronic submission requirement, you may mail (through the U.S. Postal Service or a commercial carrier) your application to the Department. You must mail the original and two copies of your application, on or before the application deadline date, to the Department at the applicable following address:

*By mail through the U.S. Postal Service:* U.S. Department of Education, Application Control Center, Attention: (CFDA Number 84.275A), 400 Maryland Avenue, SW., Washington, DC 20202–4260.

or

*By mail through a commercial carrier:* U.S. Department of Education, Application Control Center—Stop 4260, Attention: (CFDA Number 84.275A), 7100 Old Landover Road, Landover, MD 20785–1506.

Regardless of which address you use, 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 Secretary of the U.S. Department 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 postmarked after the application deadline date, we will not consider your application.

**Note:** 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 qualify for an exception to the electronic submission requirement, you (or a courier service) may deliver your paper application to the Department by hand. You must deliver the original and two copies of your application, by hand, on or before the application deadline date, to the Department at the following address: U.S. Department of Education, Application Control Center, Attention: (CFDA Number 84.275A), 550 12th Street, SW., Room 7041, Potomac Center Plaza, Washington, DC 20202–4260. The Application Control Center accepts hand deliveries daily between 8 a.m. and 4:30 p.m., Washington, DC time, except Saturdays, Sundays, and Federal holidays.

*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 ED 424 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 grant application receipt acknowledgment within 15 business days from the application deadline date, you should call the U.S. Department of Education Application Control Center at (202) 245–6288.

## V. Application Review Information

1. *Selection Criteria:* The selection criteria for this competition are from 34 CFR 75.210 and are in the application package.

2. *Review and Selection Process:* Additional factors we consider in selecting an application for an award are the geographical distribution of projects

in each Rehabilitation Training Program category in the country (34 CFR 385.33(a)) and the past performance of the applicant in carrying out similar training activities under previously awarded grants, as indicated by factors such as compliance with grant conditions, soundness of programmatic and financial management practices, and attainment of established project objectives (34 CFR 385.33(b)).

**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:* The Government Performance and Results Act (GPRA) of 1993 directs Federal departments and agencies to improve the effectiveness of their programs by engaging in strategic planning, setting outcome-related goals for programs, and measuring program results against those goals. The goals of this project are to—

- Identify and gather rehabilitation information and training materials for use in preparing pre-service and in-service education and training for rehabilitation personnel;
- Disseminate, in a cost-effective manner, rehabilitation information and state-of-the-art training materials and methods to rehabilitation personnel to assist them in achieving improved outcomes in vocational rehabilitation, supported employment, and independent living; and
- Provide linkages and policies for the exchange of information and referral of inquiries with other existing clearinghouses and information centers supported by the U.S. Department of Education, including the Education Resources Information Center and the National Rehabilitation Information Center.

The grantee must, in their annual progress report, present the results of analysis of their performance in achieving the goals and objectives it sets forth in its application. The report must include, at a minimum, the number of requests received and filled; average time to respond to a request; and an analysis any customer satisfaction survey findings, including findings from questions about the product quality, relevance, and utility.

**VII. Agency Contact**

*For Further Information Contact:* Edward Smith, U.S. Department of Education, 400 Maryland Avenue, SW., room 5027, Potomac Center Plaza, Washington, DC 20202–2800. Telephone: (202) 245–7602.

If you use a telecommunications device for the deaf (TDD), you may call the Federal Relay Service (FRS) 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 to the program contact person listed in this section.

**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: April 22, 2005.

**John H. Hager,**

*Assistant Secretary for Special Education and Rehabilitative Services.*

[FR Doc. 05–8511 Filed 4–27–05; 8:45 am]

**BILLING CODE 4000–01–P**

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## DEPARTMENT OF EDUCATION

## Office of Special Education and Rehabilitative Services, Overview Information; State Vocational Rehabilitation Unit In-Service Training Notice Inviting Applications for New Awards for Fiscal Year (FY) 2005

*Catalog of Federal Domestic Assistance (CFDA) Number:* 84.265A.

*Dates:*

*Applications Available:* April 28, 2005.

*Deadline for Transmittal of Applications:* June 13, 2005.

*Deadline for Intergovernmental Review:* August 11, 2005.

*Eligible Applicants:* State agencies designated under a State plan for vocational rehabilitation services under section 101(a) of the Rehabilitation Act of 1973, as amended.

*Estimated Available Funds:* $5,823,883.

*Basic Awards:* $4,659,106.

*Quality Awards:* $1,164,777.

Please see the chart elsewhere in this notice (*see* section II. Award Information) for further information concerning the estimated funds available to individual State agencies for Basic Awards.

*Estimated Range of Awards:*
Basic Awards: $19,413–$325,590.
Quality Awards: $20,000–$60,000.

*Estimated Average Size of Awards:*
Basic Awards: $63,234.
Quality Awards: $40,000.

*Estimated Number of Awards:*
Basic Awards: 80.
Quality Awards: 30.

**Note:** The Department is not bound by any estimates in this notice.

*Project Period:* Up to 60 months.

**Full Text of Announcement**

**I. Funding Opportunity Description**

*Purpose of Program:* This program is designed to support projects for training State vocational rehabilitation (VR) unit personnel in program areas essential to the effective management of the unit's program of VR services or in skill areas that will enable staff personnel to improve their ability to provide VR services leading to employment outcomes for individuals with disabilities.

*Priorities for Quality Awards:* In accordance with 34 CFR 75.105(b)(2)(ii),

these priorities are from the regulations for this program (34 CFR 388.22). The Secretary reserves a portion of the funds for this program to support some or all of the proposals that have been awarded a rating of 80 points or more under the criteria described in 34 CFR 388.20. In making a final selection of proposals to support under this program, the Secretary considers the extent to which proposals have exceeded a rating of 80 points and gives an absolute preference to applications that meet one or more of the following priorities.

*Absolute Priorities:* For FY 2005 these priorities are absolute priorities. Under 34 CFR 75.105(c)(3) we consider for Quality Awards only applications that meet one or more of these priorities.

**Note:** In order to be considered for a Quality Award, applicants must submit a separate Application for Federal Assistance (ED 424).

These priorities are:

*Absolute Priority 1—Development and Dissemination of Model In-Service Training Materials and Practices*

The proposed project demonstrates an effective plan to develop and disseminate information on its State VR In-Service Training program, including the identification of training approaches and successful practices, in order to permit the replication of these programs by other State VR units.

*Absolute Priority 2—Distance Education*

The proposed project demonstrates innovative strategies for training State VR unit personnel through distance education methods, such as interactive audio, video, computer technologies, or existing telecommunications networks.

*Absolute Priority 3—Enhanced Employment Outcomes for Specific Populations*

The proposed project supports specialized training in the provision of VR or related services to individuals with disabilities to increase the rehabilitation rate into competitive employment for all individuals or specified target groups.

*Program Authority:* 29 U.S.C. 721 and 772.

*Applicable Regulations:* (a) The Education Department General Administrative Regulations (EDGAR) in 34 CFR parts 74, 75, 77, 79, 80, 81, 82, 84, 85, 86, and 99. (b) The regulations for this program in 34 CFR parts 385 and 388.

**Note:** The regulations in 34 CFR part 79 apply to all applicants except federally recognized Indian tribes.

**Note:** The regulations in 34 CFR part 86 apply to institutions of higher education only.

## II. Award Information

*Type of Award:* Discretionary grants.

*Estimated Available Funds:* $5,823,883.

*Basic Awards:* $4,659,106.

*Quality Awards:* $1,164,777.

Basic awards are calculated annually and distributed according to staffing levels of the State agencies obtained from data on the Annual Vocational Rehabilitation Program/Cost Report (RSA–2). The minimum level of a basic award is one-third of one percent of the funds available. For FY 2005 that amount is $19,413 (34 CFR 388.21(a)(3)).

The following chart lists, by State agency, the Estimated Available Funds for Basic Awards.

| State | Basic awards estimated available funds |
|---|---|
| Alabama | 103,768 |
| Alaska | 19,413 |
| Arizona | 66,170 |
| Arkansas (General) | 76,349 |
| Arkansas (Blind) | 19,413 |
| California | 325,590 |
| Colorado | 36,450 |
| Connecticut (General) | 24,300 |
| Connecticut (Blind) | 19,413 |
| Delaware (General) | 19,413 |
| Delaware (Blind) | 19,413 |
| Florida (General) | 153,354 |
| Florida (Blind) | 50,242 |
| Georgia | 151,712 |
| Hawaii | 19,413 |
| Idaho (General) | 21,673 |
| Idaho (Blind) | 19,413 |
| Illinois | 138,084 |
| Indiana | 57,138 |
| Iowa (General) | 43,347 |
| Iowa (Blind) | 19,413 |
| Kansas | 41,704 |
| Kentucky (General) | 76,841 |
| Kentucky (Blind) | 19,413 |
| Louisiana | 65,019 |
| Maine (General) | 20,031 |
| Maine (Blind) | 19,413 |
| Maryland | 83,081 |
| Massachusetts (General) | 81,110 |
| Massachusetts (Blind) | 19,413 |
| Michigan (General) | 89,155 |
| Michigan (Blind) | 19,413 |
| Minnesota (General) | 60,586 |
| Minnesota (Blind) | 19,413 |
| Mississippi | 87,185 |
| Missouri (General) | 58,452 |
| Missouri (Blind) | 19,413 |
| Montana | 19,413 |
| Nebraska (General) | 28,569 |
| Nebraska (Blind) | 19,413 |
| Nevada | 19,413 |
| New Hampshire | 19,413 |
| New Jersey (General) | 46,303 |
| New Jersey (Blind) | 19,413 |
| New Mexico (General) | 28,405 |
| New Mexico (Blind) | 19,413 |
| New York (General) | 138,248 |
| New York (Blind) | 31,360 |
| North Carolina (General) | 141,861 |
| North Carolina (Blind) | 61,243 |
| North Dakota | 19,413 |
| Ohio | 126,098 |
| Oklahoma | 67,646 |
| Oregon (General) | 40,062 |
| Oregon (Blind) | 19,413 |
| Pennsylvania | 164,356 |
| Rhode Island | 19,413 |
| South Carolina (General) | 192,924 |
| South Carolina (Blind) | 19,413 |
| South Dakota (General) | 19,413 |
| South Dakota (Blind) | 19,413 |
| Tennessee | 93,754 |
| Texas (General) | 243,987 |
| Texas (Blind) | 87,185 |
| Utah | 38,256 |
| Vermont (General) | 19,413 |
| Vermont (Blind) | 19,413 |
| Virginia (General) | 81,767 |
| Virginia (Blind) | 19,413 |
| Washington (General) | 58,288 |
| Washington (Blind) | 19,413 |
| West Virginia | 88,991 |
| Wisconsin | 57,959 |
| Wyoming | 19,413 |
| District of Columbia | 24,465 |
| Puerto Rico | 226,583 |
| American Samoa | 19,413 |
| Northern Marianna | 19,413 |
| Guam | 19,413 |
| Virgin Islands | 19,413 |
| Total | $4,659,106 |

*Estimated Range of Awards:*

*Basic Awards:* $19,413–$325,590.

*Quality Awards:* $20,000–$60,000.

*Estimated Average Size of Awards:*

Basic Awards: $63,234.

Quality Awards: $40,000.

*Estimated Number of Awards:*

Basic Awards: 80.

Quality Awards: 30.

**Note:** The Department is not bound by any estimates in this notice.

*Project Period:* Up to 60 months.

## III. Eligibility Information

1. *Eligible Applicants:* State agencies designated under a State plan for vocational rehabilitation services under section 101(a) of the Rehabilitation Act of 1973, as amended.

2. *Cost Sharing or Matching:* Grantees under the State Vocational Rehabilitation Unit In-Service Training program must provide at least 10 percent of the total cost of the project (34 CFR 388.30(a)), except that under 34 CFR 388.30(b), grantees designated to receive a minimum share of one third of one percent of the sums made available for the fiscal year are required to provide at least four percent of the total costs of the project.

**Note:** Under 34 CFR 75.562(c), an indirect cost reimbursement on a training grant is limited to the recipient's actual indirect costs, as determined by its negotiated indirect cost rate agreement, or eight percent of a modified total direct cost base, whichever amount is less. Indirect costs in excess of the eight percent limit may not be charged directly, used to satisfy matching or cost-sharing requirements, or charged to another Federal award.

## IV. Application and Submission Information

1. *Address to Request Application Package:* Education Publications Center (ED Pubs), P.O. 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: *http://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 84.265A.

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, U.S. Department of Education, 400 Maryland Avenue, SW., room 5075, Potomac Center Plaza, Washington, DC 20202–2550. Telephone: (202) 245–7363. If you use a telecommunications device for the deaf (TDD), you may call the Federal Relay Service (FRS) at 1–800–877–8339.

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:* Part III of the application, the application narrative, 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 35 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, 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: April 28, 2005.

Deadline for Transmittal of Applications: June 13, 2005.

Applications for grants under this competition must be submitted 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 electronically or by mail or hand delivery if you qualify for an exception to the electronic submission requirement, please refer to section IV. 6. *Other Submission Requirements* in this notice.

We do not consider an application that does not comply with the deadline requirements.

*Deadline for Intergovernmental Review:* August 11, 2005.

4. *Intergovernmental Review:* This program is subject to Executive Order 12372 and the regulations in 34 CFR part 79. Information about Intergovernmental Review of Federal Programs under Executive Order 12372 is in the application package for this competition.

5. *Funding Restrictions:* We reference regulations outlining funding restrictions in the *Applicable Regulations* section of this notice.

6. *Other Submission Requirements:* Applications for grants under this program must be submitted electronically, unless you qualify for an exception to this requirement in accordance with the instructions in this section.

We will reject your application if you submit it in paper format unless, as described elsewhere in this section, you qualify for one of the exceptions to the electronic submission requirement *and* submit, no later than two weeks before the application deadline date, a written statement to the Department that you qualify for one of these exceptions. Further information regarding calculation of the date that is two weeks before the application deadline date is provided later in this section under *Exception to Electronic Submission Requirement.*

a. *Electronic Submission of Applications.*

Applications for grants under State Vocational Rehabilitation Unit In-Service Training—CFDA Number 84.265A must be submitted electronically using e-Application available through the Department's e-Grants system, accessible through the e-Grants portal page at: *http://e-grants.ed.gov.*

While completing your electronic application, you will be entering data online that will be saved into a database. You may not e-mail an electronic copy of a grant application to us.

Please note the following:

- You must complete the electronic submission of your grant application by 4:30 p.m., Washington, DC time, on the application deadline date. The e-Application system will not accept an application for this program after 4:30 p.m., Washington, DC time, on the application deadline date. Therefore, we strongly recommend that you do not wait until the application deadline date to begin the application process.
- 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 between 7 p.m. on Wednesdays and 6 a.m. on Thursdays, Washington, DC time, for maintenance. Any modifications to these hours are posted on the e-Grants Web site.
- You will not receive additional point value because you submit your application in electronic format, nor will we penalize you if you qualify for an exception to the electronic submission requirement, as described elsewhere in this section, and 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.
- Any narrative sections of your application should be attached as files in a .DOC (document), .RTF (rich text), or .PDF (Portable Document) format.
- Your electronic application must comply with any page limit requirements described in this notice.
- Prior to submitting your electronic application, you may wish to print a copy of it for your records.

• After you electronically submit your application, you will receive an automatic acknowledgment that 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 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 provide us original signatures on other forms at a later date.

*Application Deadline Date Extension in Case of e-Application System Unavailability:* If you are prevented from electronically 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 electronic 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 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 acknowledgment 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. If the system is down and therefore the application deadline is extended, an e-mail will be sent to all registered users who have initiated an e-Application. Extensions referred to in this section apply only to the unavailability of the Department's e-Application system.

*Exception to Electronic Submission Requirement:* You qualify for an exception to the electronic submission requirement, and may submit your application in paper format, if you are unable to submit an application through the e-Application system because—

• You do not have access to the Internet; or

• You do not have the capacity to upload large documents to the Department's e-Application system; *and*

• No later than two weeks before the application deadline date (14 calendar days or, if the fourteenth calendar day before the application deadline date falls on a Federal holiday, the next business day following the Federal holiday), you mail or fax a written statement to the Department, explaining which of the two grounds for an exception prevent you from using the Internet to submit your application. If you mail your written statement to the Department, it must be postmarked no later than two weeks before the application deadline date. If you fax your written statement to the Department, we must receive the faxed statement no later than two weeks before the application deadline date.

Address and mail or fax your statement to: Marilyn P. Fountain, U.S. Department of Education, 400 Maryland Avenue, SW., room 5028, Potomac Center Plaza, Washington, DC 20202–2800. Fax: (202) 245–7591.

Your paper application must be submitted in accordance with the mail or hand delivery instructions described in this notice.

b. *Submission of Paper Applications by Mail.*

If you qualify for any exception to the electronic submission requirement, you may mail (through the U.S. Postal Service or a commercial carrier) your application to the Department. You must mail the original and two copies of your application, on or before the application deadline date, to the Department at the applicable following address:

*By mail through the U.S. Postal Service:* U.S. Department of Education, Application Control Center, Attention: (CFDA Number 84.265A), 400 Maryland Avenue, SW., Washington, DC 20202–4260.

or

*By mail through a commercial carrier:* U.S. Department of Education, Application Control Center—Stop 4260, Attention: (CFDA Number 84.265A), 7100 Old Landover Road, Landover, MD 20785–1506.

Regardless of which address you use, 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 Secretary of the U.S. Department 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 postmarked after the application deadline date, we will not consider your application.

**Note:** 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 qualify for an exception to the electronic submission requirement, you (or a courier service) may deliver your paper application to the Department by hand. You must deliver the original and two copies of your application, by hand, on or before the application deadline date, to the Department at the following address: U.S. Department of Education, Application Control Center, Attention: (CFDA Number 84.265A), 550 12th Street, SW., Room 7041, Potomac Center Plaza, Washington, DC 20202–4260.

The Application Control Center accepts hand deliveries daily between 8 a.m. and 4:30 p.m., Washington, DC time, except Saturdays, Sundays, and Federal holidays.

*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 ED 424 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 grant application receipt acknowledgment within 15 business days from the application deadline date, you should call the U.S. Department of Education Application Control Center at (202) 245–6288.

## V. Application Review Information

1. *Selection Criteria:* The selection criteria for this competition are from 34 CFR 75.210 and 34 CFR 388.20. The selection criteria for this competition are in the application package.

2. *Review and Selection Process:* The procedures used for reviewing and selecting an application for an award are in 34 CFR 75.210 and 34 CFR 388.20. An additional factor we consider in selecting an application for an award is the past performance of the applicant in carrying out similar training activities under previously awarded grants, as indicated by factors such as compliance with grant conditions, soundness of programmatic and financial management practices, and attainment of established project objectives (34 CFR 385.33(b)).

## 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, 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:* The Government Performance and Results Act (GPRA) of 1993 directs Federal departments and agencies to improve the effectiveness of their programs by engaging in strategic planning, setting outcome-related goals for programs, and measuring program results against those goals. The primary objective of the State VR Unit In-Service Training program is to maintain and upgrade the knowledge and skills of personnel currently employed in the public VR system. Grantees must provide training that responds to the needs identified in the Comprehensive System for Personnel Development (CSPD) required in section 101(a)(7) of the Rehabilitation Act of 1973, as amended.

In order to measure the success of the State VR Unit In-Service Training program grantees in meeting this objective, State VR agencies are required to submit performance data through the in-service annual performance report and their State plans. At a minimum, the annual performance report must include data on the percentage of currently employed VR State agency counselors who meet their States' CSPD standards.

## VII. Agency Contact

*For Further Information Contact:* Marilyn Fountain, U.S. Department of Education, 400 Maryland Avenue, SW., room 5028, Potomac Center Plaza, Washington, DC 20202–2550. Telephone: (202) 245–7346 or by e-mail: *Marilyn.Fountain@ed.gov.*

If you use a telecommunications device for the deaf (TDD), you may call the Federal Relay Service (FRS) 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 to the program contact person listed in this section.

## 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: April 22, 2005.

**John H. Hager,**

*Assistant Secretary for Special Education and Rehabilitative Services.*

[FR Doc. 05–8512 Filed 4–27–05; 8:45 am]

**BILLING CODE 4000–01–P**

## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

**[Docket No. RP00–70–012]**

### Algonquin Gas Transmission, LLC; Notice of Negotiated Rate

April 20, 2005.

Take notice that on April 14, 2005, Algonquin Gas Transmission, LLC (Algonquin) tendered for filing as a part of its FERC Gas Tariff, Fifth Revised Volume No. 1, the tariff sheets on Appendix A to the filing, to become effective April 1, 2005.

Algonquin states that the purpose of this filing is to implement the negotiated rate transactions for transportation service to be rendered to Consolidated Edison Company of New York, Inc. and Orange and Rockland Utilities, Inc.

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 in accordance with the provisions of Section 154.210 of the Commission's regulations (18 CFR 154.210). Anyone filing an intervention or protest must serve a copy of that document on the Applicant. Anyone filing an intervention or protest on or before the intervention or protest date need not 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. E5–2015 Filed 4–27–05; 8:45 am]

BILLING CODE 6717–01–P

## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

**[Docket No. EL05–83–000]**

### Aquila, Inc., Aquila Long Term, Inc., Aquila Merchant Services, Inc., Aquila Piatt County L.L.C., MEP Clarksdale Power, LLC, MEP Flora Power, LLC., MEP Investments, LLC, MEP Pleasant Hill Operating, LLC, and Pleasant Hill Marketing, LLC; Notice of Institution of Proceeding and Refund Effective Date

April 19, 2005.

On April 14, 2005, the Commission issued an order initiating a proceeding in Docket No. EL05–83–000 under section 206 of the Federal Power Act concerning the justness and reasonableness of the market-based rates of Aquila, Inc., and its affiliates, specified in the caption above, in the Missouri and Kansas control areas. *Aquila, Inc.,* 111 FERC ¶ 61,030 (2005).

The refund effective date in Docket No. EL05–83–000, established pursuant to section 206 of the Federal Power Act, will be 60 days following publication of this notice in the **Federal Register**.

**Magalie R. Salas,**

*Secretary.*

[FR Doc. E5–2034 Filed 4–27–05; 8:45 am]

BILLING CODE 6717–01–P

## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

**[Docket Nos. CP05–119–000, CP05–120–000, and CP05–121–000]**

### Cameron LNG, LLC; Cameron Interstate Pipeline, LLC; Notice of Application

April 20, 2005.

Take notice that on April 11, 2005, Cameron LNG, LLC and Cameron Interstate Pipeline, LLC, 101 Ash Street, San Diego, CA 92101, filed in the above-referenced dockets, applications for: (1) abandonment by intra-corporate transfer pursuant to section 7(b) of the Natural Gas Act of the pipeline certificates issued to Cameron LNG, LLC at Docket Nos. CP02–374–000, CP02–376–000 and CP02–377–000; and (2) a certificate of public convenience and necessity under section 7(c) of the Natural Gas Act and Part 157, Subpart A of the Commission's regulations authorizing Cameron Interstate Pipeline to construct, own, operate, and maintain the pipeline facilities described therein. Cameron Interstate Pipeline also seeks (a) a blanket certificate pursuant to Part 157, Subpart F of the Commission's regulations; and (b) a blanket certificate pursuant to Part 284, Subpart G of the Commission's regulations.

The applications are on file with the Commission and open to public inspection. The filing may also be viewed on the Web at *http://www.ferc.gov* using the ''eLibrary'' link. Enter the docket number excluding the last three digits in the docket number field to access the document. For assistance, call (202) 502–3676 or TYY, (202) 502–8659. Any questions regarding the parties' application should be directed to: Carlos F. Pefia, Senior Regulatory Counsel, HQI3, 101 Ash Street, San Diego, CA, 92101; phone (619) 699–5037.

Cameron LNG, LLC proposes to transfer development of the previously certificated interstate pipeline aspects of its project to Cameron Interstate Pipeline, LLC. The application states that there will be no change to the siting, operation and maintenance of the pipeline as previously certificated at Docket Nos. CP02–374–000, CP02–376–000 and CP02–377–000.

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 shown below. 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. 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.

*Comment Date:* May 11, 2005.

**Magalie R. Salas,**

*Secretary.*

[FR Doc. E5–2017 Filed 4–27–05; 8:45 am]

BILLING CODE 6717–01–P

## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

**[Docket No. CP05–122–000 and CP05–123–000]**

### Cantera Gas Company and PVR Gas Pipeline, LLC; Notice of Application

April 20, 2005.

Take notice that Cantera Gas Company (Cantera) and PVR Gas Pipeline, LLC (PVR), 3 Radnor Corporate Center, Suite 230, 100 Matson Ford Road, Radnor, Pennsylvania, 19087, filed in Docket Nos. CP05–122–000 and CP05–123–000 on April 11, 2005, an application pursuant to sections 7(b) and 7 (c) of the Natural Gas Act (NGA) and the Commission's Regulations, for authorization (i) for Cantera to abandon its section 7 (c) certificate of public convenience and necessity and blanket certificate under Subpart F of Part 157 of the Commission's Regulations, and (ii) to grant PVR a Section 7 (c) certificate of public convenience and necessity and a blanket certificate under Subpart F of Part 157 of the Commission's Regulations. The authorization is to effectuate Cantera's transfer of its sole 11-mile, 10-inch diameter pipeline, its sole jurisdictional facility, to its affiliate PVR, all as more fully set forth in the application which is on file with the Commission and open to public inspection. This filing may be also viewed on the Web at *http://www.ferc.gov* using the ''eLibrary'' link. Enter the docket number excluding the last three digits in the docket number field to access the document. For assistance, call (202) 502–8659 or TTY, (202) 208–3676.

Any questions regarding this application should be directed to Randy Lentz, Penn Virginia Resource GP, LLC, the General Partner of Penn Virginia Resource Partners, L.P., 8080 North Central Expressway, Suite 900, Dallas,

Texas 75206, at (214) 750–9223 or fax (610) 687-6388.

There are two ways to become involved in the Commission's review of this project. First, any person wishing to obtain legal status by becoming a party to the proceedings for this project should, on or before the comment date stated below, file with the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, a motion to intervene in accordance with the requirements of the Commission's Rules of Practice and Procedure (18 CFR 385.214 or 385.211) and the Regulations under the NGA (18 CFR 157.10). A person obtaining party status will be placed on the service list maintained by the Secretary of the Commission and will receive copies of all documents filed by the applicant and by all other parties. A party must submit 14 copies of filings made with the Commission and must mail a copy to the applicant and to every other party in the proceeding. Only parties to the proceeding can ask for court review of Commission orders in the proceeding.

However, a person does not have to intervene in order to have comments considered. The second way to participate is by filing with the Secretary of the Commission, as soon as possible, an original and two copies of comments in support of or in opposition to this project. The Commission will consider these comments in determining the appropriate action to be taken, but the filing of a comment alone will not serve to make the filer a party to the proceeding. The Commission's rules require that persons filing comments in opposition to the project provide copies of their protests only to the party or parties directly involved in the protest.

Persons who wish to comment only on the environmental review of this project should submit an original and two copies of their comments to the Secretary of the Commission. Environmental commenters will be placed on the Commission's environmental mailing list, will receive copies of the environmental documents, and will be notified of meetings associated with the Commission's environmental review process. Environmental commenters will not be required to serve copies of filed documents on all other parties. However, the non-party commenters will not receive copies of all documents filed by other parties or issued by the Commission (except for the mailing of environmental documents issued by the Commission) and will not have the right to seek court review of the Commission's final order.

Comments, protests and interventions may be filed electronically via the Internet in lieu of paper. See, 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site under the ''e-Filing'' link.

*Comment Date:* May 11, 2005.

**Magalie R. Salas,**

*Secretary.*

[FR Doc. E5–2005 Filed 4–27–05; 8:45 am]

**BILLING CODE 6717–01–P**

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## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

**[Docket No. RP00–305–022]**

### CenterPoint Energy—Mississippi River Transmission Corporation; Notice of Compliance Filing

April 21, 2005.

Take notice that on April 15, 2005, CenterPoint Energy—Mississippi River Transmission Corporation (MRT) tendered for filing and approval an amendment to a negotiated rate agreement between MRT and Union Electric Company, d/b/a AmerenUE, to be effective May 1, 2005. MRT further states it also has submitted this agreement as a non-conforming agreement, to be included as part of its FERC Gas Tariff, Third Revised Volume No. 1, also to be effective May 1, 2005.

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 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. E5–2022 Filed 4–27–05; 8:45 am]

**BILLING CODE 6717–01–P**

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## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

**[Docket No. RP05–180–001]**

### Discovery Gas Transmission LLC; Notice of Compliance Filing

April 21, 2005.

Take notice that on April 15, 2005, Discovery Gas Transmission LLC (Discovery) tendered for filing as part of its FERC Gas Tariff, Original Volume No. 1, the following tariff sheets, to be effective April 1, 2005:

Revised Sheet No. 143 Substitute Third Revised Sheet No. 144 Substitute First Revised Sheet No. 194

Discovery states that this filing is intended to comply with the Commission's Letter Order issued on March 31, 2005.

Discovery further states that copies of the filing have been mailed to each of its customers, interested State Commissions and other interested persons.

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 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. E5–2025 Filed 4–27–05; 8:45 am]

**BILLING CODE 6717–01–P**

## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

**[Docket No. RP04–197–004]**

### Dominion Cove Point LNG, LP; Notice of Compliance Filing

April 21, 2005.

Take notice that on April 18, 2005, Dominion Cove Point LNG, LP (Cove Point) tendered for filing as part of its FERC Gas Tariff, Original Volume No. 1, 2004, Second Sub. Fourth Revised Sheet No. 10; and First Revised Sheet No. 75, to become effective April 1, 2004.

Cove Point states that the sheets are being filed in compliance with the Commission's ''Order on Compliance and Rehearing and Establishing Hearing'' issued March 25, 2005, in the above captioned 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 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. E5–2024 Filed 4–27–05; 8:45 am]

**BILLING CODE 6717–01–P**

## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

**[Docket Nos. ER05–658–000]**

### Harvard Dedicated Energy Limited; Notice of Issuance of Order

April 21, 2005.

Harvard Dedicated Energy Limited (HDEL) filed an application for market-based rate authority, with an accompanying rate tariff. The proposed rate tariff provides for the sales of capacity and energy at market-based rates. HDEL also requested waiver of various Commission regulations. In particular, HDEL requested that the Commission grant blanket approval under 18 CFR part 34 of all future issuances of securities and assumptions of liability by HDEL.

On April 20, 2005, pursuant to delegated authority, the Director, Division of Tariffs and Market Development—South, granted the request for blanket approval under part 34. The Director's order also stated that the Commission would publish a separate notice in the **Federal Register** establishing a period of time for the filing of protests. Accordingly, any person desiring to be heard or to protest the blanket approval of issuances of securities or assumptions of liability by HDEL should file a motion to intervene or protest with the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure. 18 CFR 385.211, 385.214 (2004).

Notice is hereby given that the deadline for filing motions to intervene or protest is May 20, 2005.

Absent a request to be heard in opposition by the deadline above, HDEL is authorized to issue securities and assume obligations or liabilities as a guarantor, indorser, surety, or otherwise in respect of any security of another person; provided that such issuance or assumption is for some lawful object within the corporate purposes of HDEL, compatible with the public interest, and is reasonably necessary or appropriate for such purposes.

The Commission reserves the right to require a further showing that neither public nor private interests will be adversely affected by continued approval of HDEL's issuances of securities or assumptions of liability.

Copies of the full text of the Director's Order are available from the Commission's Public Reference Room, 888 First Street, NE., Washington, DC 20426. The Order may also be viewed on the Commission's Web site at *http://www.ferc.gov*, using the eLibrary link. Enter the docket number excluding the last three digits in the docket number filed to access the document. Comments, protests, and interventions may be filed electronically via the internet in lieu of paper. See, 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site under the ''e-Filing'' link. The Commission strongly encourages electronic filings.

**Magalie R. Salas,**

*Secretary.*

[FR Doc. E5–2019 Filed 4–27–05; 8:45 am]

**BILLING CODE 6717–01–P**

## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

**[Docket No. EL05–91–000]**

### ISO New England Inc.; Notice of Institution of Proceeding and Refund Effective Date

April 20, 2005.

On April 19, 2005, the Commission issued an order initiating a proceeding in Docket No. EL05–91–000 under section 206 of the Federal Power Act concerning the continued justness and reasonableness of New England ISO's previously-accepted Schedule 3 for Reliability Administration Service. *ISO New England Inc.* 111 FERC ¶ 61,096 (2005).

The refund effective date in Docket No. EL05–91–000, established pursuant to section 206 of the Federal Power Act, will be 60 days from the date of

publication of this notice in the **Federal Register**.

**Magalie R. Salas,**

*Secretary.*

[FR Doc. E5–2008 Filed 4–27–05; 8:45 am]

BILLING CODE 6717–01–P

## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

**[Docket No. EL05–84–000]**

### New York Independent System Operator, Inc.; Notice of Institution of Proceeding and Refund Effective Date

April 19, 2005.

On April 15, 2005, the Commission issued an order initiating a proceeding in Docket No. EL05–84–000 under section 206 of the Federal Power Act to determine whether the Tri-Lakes Agreement and a Conversion Agreement between Niagara Mohawk Power Corporation (Niagara Mohawk), the New York Power Authority and the Villages of Tupper Lake and Lake Placid, as well as the revisions to Niagara Mohawk's Rate Schedule 204 necessary to effectuate these agreements, should be filed under the New York Independent System Operator, Inc. tariff. 111 FERC ¶ 61,048 (2005).

The refund effective date in Docket No. EL05–84–000, established pursuant to section 206 of the Federal Power Act, will be 60 days following publication of this notice in the **Federal Register.**

**Magalie R. Salas,**

*Secretary.*

[FR Doc. E5–2029 Filed 4–27–05; 8:45 am]

BILLING CODE 6717–01–P

## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

**[Docket No. EL05–84–000]**

### New York Independent System Operator, Inc.; Notice of Institution of Proceeding and Refund Effective Date

April 19, 2005.

On April 15, 2005, the Commission issued an order initiating a proceeding in Docket No. EL05–84–000 under section 206 of the Federal Power Act to determine whether the Tri-Lakes Agreement and a Conversion Agreement between Niagara Mohawk Power Corporation (Niagara Mohawk), the New York Power Authority and the Villages of Tupper Lake and Lake Placid, as well as the revisions to Niagara Mohawk's Rate Schedule 204 necessary to effectuate these agreements, should be filed under the New York Independent System Operator, Inc. tariff. 111 FERC ¶ 61,048 (2005).

The refund effective date in Docket No. EL05–84–000, established pursuant to section 206 of the Federal Power Act, will be 60 days following publication of this notice in the **Federal Register**.

**Magalie R. Salas,**

*Secretary.*

[FR Doc. E5–2031 Filed 4–27–05; 8:45 am]

BILLING CODE 6717–01–P

## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

**[Docket No. RP05–271–000]**

### Northern Natural Gas Company; Notice of Proposed Changes in FERC Gas Tariff

April 20, 2005.

Take notice that on April 14, 2005, Northern Natural Gas Company (Northern) tendered for filing to become part of its FERC Gas Tariff, Fifth Revised Volume No. 1, Tenth Revised Sheet No. 303, to be effective on May 15, 2005.

Northern states that it is filing the above-referenced tariff sheet to incorporate additional types of permissible discounts in section 54(B) of the General Terms and Conditions of its Tariff.

Northern further states that copies of the filing have been mailed to each of its customers and interested state commissions.

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 in accordance with the provisions of Section 154.210 of the Commission's regulations (18 CFR 154.210). Anyone filing an intervention or protest must serve a copy of that document on the Applicant. Anyone filing an intervention or protest on or before the intervention or protest date need not 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. E5–2016 Filed 4–27–05; 8:45 am]

BILLING CODE 6717–01–P

## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

**[Docket No. RP03–398–015]**

### Northern Natural Gas Company; Notice Of Compliance Filing

April 21, 2005.

Take notice that on April 19, 2005, Northern Natural Gas Company (Northern) tendered for filing to become part of Northern's FERC Gas Tariff, Fifth Revised Volume No. 1, Substitute Sixth Revised Sheet No. 297, with an effective date of December 30, 2004. Northern states it is filing the above-referenced tariff sheet in compliance with the Commission's March 25, 2005 Order.

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 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. E5–2023 Filed 4–27–05; 8:45 am]

**BILLING CODE 6717–01–P**

## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

**[Docket No. RP05–271–000]**

### Northern Natural Gas Company; Notice of Tariff Filing

April 21, 2005.

Take notice that on April 14, 2005, Northern Natural Gas Company (Northern) tendered for filing as part of its FERC Gas Tariff, Fifth Revised Volume No. 1, Tenth Revised Sheet No. 303, with an effective date of May 15, 2005.

Northern states that the filing is being made to incorporate additional types of permissible discounts in section 54(B) of the General Terms and Conditions of its Tariff.

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 in accordance with the provisions of Section 154.210 of the Commission's regulations (18 CFR 154.210). Anyone filing an intervention or protest must serve a copy of that document on the Applicant. Anyone filing an intervention or protest on or before the intervention or protest date need not 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. E5–2026 Filed 4–27–05; 8:45 am]

**BILLING CODE 6717–01–P**

## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

**[Docket No. EL05–90–000]**

### PJM Interconnection, L.L.C.; Notice of Institution of Proceeding and Refund Effective Date

April 20, 2005.

On April 19, 2005, the Commission issued an order initiating a proceeding in Docket No. EL05–90–000 under section 206 of the Federal Power Act to examine whether the interconnection portion of PJM Interconnection, L.L.C.'s (PJM) open access transmission tariff (OATT) needs to be modified to allow PJM to enter into conforming interconnection agreements. *PJM Interconnection, L.L.C.,* 111 FERC ¶ 61, 098 (2005).

The refund effective date in Docket No. EL05–90–000, established pursuant to section 206 of the Federal Power Act, will be 60 days from the date of publication of this notice in the **Federal Register.**

**Magalie R. Salas,**

*Secretary.*

[FR Doc. E5–2007 Filed 4–27–05; 8:45 am]

**BILLING CODE 6717–01–P**

## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

**[Docket No. RP05–272–000]**

### Questar Pipeline Company; Notice of Tariff Filing

April 20, 2005.

Take notice that on April 11, 2005, Questar Pipeline Company (Questar), tendered for filing as part of its FERC Gas Tariff, First Revised Volume No. 1, the following tariff sheets, to be effective May 14, 2005:

Tenth Revised Sheet No. 67
Second Revised Sheet No. 67A
Ninth Revised Sheet No. 68
Fourth Revised Sheet No. 69

Questar states that, due to shipper inquiries regarding the section of Questar's tariff pertaining to the right of first refusal (ROFR) for firm shippers, Questar has determined that further clarification of this section is necessary. Questar states that this filing proposes changes that restate concisely the scope of a shipper's ROFR and the procedure for exercising a shipper's ROFR. Questar further states that these changes are proposed in order to reduce or eliminate confusion on this issue.

Questar states that copies of this filing were served upon Questar's customers, the Public Service Commission of Utah and the Public Service Commission of Wyoming.

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 in accordance with the provisions of Section 154.210 of the Commission's regulations (18 CFR 154.210). Anyone filing an intervention or protest must serve a copy of that document on the Applicant. Anyone filing an intervention or protest on or before the intervention or protest date need not 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. E5–2004 Filed 4–27–05; 8:45 am]

**BILLING CODE 6717–01–P**

## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

**[Docket Nos. RP01–205–007, RP01–205–006, and RP01–205–005]**

### Southern Natural Gas Company; Notice of Amendment to Negotiated Rate Filings

April 22, 2005.

Take notice that on April 18, 2005, Southern Natural Gas Company (Southern) tendered for filing its Negotiated Rate Tariff Filing in Docket No. RP01–205–007 to reflect a name change for Lester PDC, LTD and to correct the backhaul rates shown on the First Revised Sheet Nos. 23N and 23O, which amends its filings in Docket Nos. RP01–205–005 and 006.

Southern requests that the Commission grant such approval of the tariff sheets effective April 1, 2005 and March 1, 2005, respectively.

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 in accordance with the provisions of Section 154.210 of the Commission's regulations (18 CFR 154.210). Anyone filing an intervention or protest must serve a copy of that document on the Applicant. Anyone filing an intervention or protest on or before the intervention or protest date need not 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. E5–2049 Filed 4–27–05; 8:45 am]

**BILLING CODE 6717–01–P**

## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

**[Docket Nos. ER05–687–000 and ER05–687–001]**

### Total Gas & Electricity (PA), Inc.; Notice of Issuance of Order

April 19, 2005.

Total Gas & Electricity (PA), Inc. (TG&E PA) filed an application for market-based rate authority, with an accompanying rate tariff. The proposed rate tariff provides for the sales of capacity, energy, and ancillary services at market-based rates. TG&E PA also requested waiver of various Commission regulations. In particular, TG&E PA requested that the Commission grant blanket approval under 18 CFR part 34 of all future issuances of securities and assumptions of liability by TG&E PA.

On April 14, 2005, pursuant to delegated authority, the Director, Division of Tariffs and Market Development—South, granted the request for blanket approval under part 34. The Director's order also stated that the Commission would publish a separate notice in the **Federal Register** establishing a period of time for the filing of protests. Accordingly, any person desiring to be heard or to protest the blanket approval of issuances of securities or assumptions of liability by TG&E PA should file a motion to intervene or protest with the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure. 18 CFR 385.211, 385.214 (2004).

Notice is hereby given that the deadline for filing motions to intervene or protest is May 16, 2005.

Absent a request to be heard in opposition by the deadline above, TG&E PA is authorized to issue securities and assume obligations or liabilities as a guarantor, indorser, surety, or otherwise in respect of any security of another person; provided that such issuance or assumption is for some lawful object within the corporate purposes of TG&E PA, compatible with the public interest, and is reasonably necessary or appropriate for such purposes.

The Commission reserves the right to require a further showing that neither public nor private interests will be adversely affected by continued approval of TG&E PA's issuances of securities or assumptions of liability.

Copies of the full text of the Director's Order are available from the Commission's Public Reference Room, 888 First Street, NE., Washington, DC 20426. The Order may also be viewed on the Commission's Web site at *http://www.ferc.gov,* using the eLibrary link. Enter the docket number excluding the last three digits in the docket number filed to access the document. Comments, protests, and interventions may be filed electronically via the internet in lieu of paper. See, 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site under the ''e-Filing'' link. The Commission strongly encourages electronic filings.

**Magalie R. Salas,**

*Secretary.*

[FR Doc. E5–2030 Filed 4–27–05; 8:45 am]

**BILLING CODE 6717–01–P**

## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

**[Docket No. RP05-276-000]**

### Transcontinental Gas Pipe Line Corporation; Notice of Proposed Changes In FERC Gas Tariff

April 22, 2005.

Take notice that on April 20, 2005, Transcontinental Gas Pipe Line Corporation (Transco) tendered for filing as part of its FERC Gas Tariff, Third Revised Volume No. 1, Fourth Revised Sheet No. 135F to be effective March 31, 2005.

Transco states that the purpose of the instant filing is to revise section 8.2 of Rate Schedule WSS-Open Access by deleting Public Service Electric & Gas (PSE&G) from the list of buyers as a result of a permanent release of WSS-OA service effective March 31, 2005.

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 in accordance with the provisions of Section 154.210 of the Commission's regulations (18 CFR 154.210). Anyone filing an intervention or protest must serve a copy of that document on the Applicant. Anyone filing an intervention or protest on or before the intervention or protest date need not 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. E5–2048 Filed 4–27–05; 8:45 am]

BILLING CODE 6717–01–P

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## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

**[Docket No. EL05–87–000]**

### Tucson Electric Power Company; Notice of Institution of Proceeding and Refund Effective Date

April 19, 2005.

On April 14, 2005, the Commission issued an order initiating a proceeding in Docket No. EL05–87–000 under section 206 of the Federal Power Act concerning the justness and reasonableness of Tucson Electric Power Company's market-based rates in the Tucson control area. *Tucson Electric Power Company* 111 FERC ¶61,037 (2005).

The refund effective date in Docket No. EL05–87–000, established pursuant to section 206 of the Federal Power Act, will be 60 days following publication of this notice in the **Federal Register**.

**Magalie R. Salas,**

*Secretary.*

[FR Doc. E5–2032 Filed 4–27–05; 8:45 am]

BILLING CODE 6717–01–P

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## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

**[Docket No. RP05–275–000]**

### Williston Basin Interstate Pipeline Company; Notice of Tariff Filing

April 21, 2005.

Take notice that on April 15, 2005, Williston Basin Interstate Pipeline Company (Williston Basin) tendered for filing as part of its FERC Gas Tariff, Second Revised Volume No. 1, Fifth Revised Sheet No. 293, to become effective May 15, 2005.

Williston Basin states that it is proposing to revise its tariff language to define the timeline governing situations where no acceptable third party bids for released capacity are received during the right of first refusal process.

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 in accordance with the provisions of Section 154.210 of the Commission's regulations (18 CFR 154.210). Anyone filing an intervention or protest must serve a copy of that document on the Applicant. Anyone filing an intervention or protest on or before the intervention or protest date need not 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. E5–2018 Filed 4–27–05; 8:45 am]

BILLING CODE 6717–01–P

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## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

**[Docket No. RP05–273–000]**

### Williston Basin Interstate Pipeline Company Notice of Proposed Changes in FERC Gas Tariff

April 21, 2005.

Take notice that on April 15, 2005, Williston Basin Interstate Pipeline Company (Williston Basin) tendered for filing as part of its FERC Gas Tariff, Second Revised Volume No. 1, the

following tariff sheets, to become effective April 15, 2005:

Eighth Revised Sheet No. 373
Twelfth Revised Sheet No. 375

Williston Basin states that it has revised the above-referenced tariff sheets found in section 48 of the general terms and conditions of its FERC Gas Tariff, Second Revised Volume No. 1, to rename two existing receipt points: Point ID No. 00880 (Bowdoin Whitewater to Whitewater) in Williston Basin's Bowdoin Pool, and Point ID No. 04840 (Billy Creek Plant to Kinder Morgan-Billy Creek) in Williston Basin's Billy Creek Pool.

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 in accordance with the provisions of Section 154.210 of the Commission's regulations (18 CFR 154.210). Anyone filing an intervention or protest must serve a copy of that document on the Applicant. Anyone filing an intervention or protest on or before the intervention or protest date need not 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. E5–2027 Filed 4–27–05; 8:45 am]

**BILLING CODE 6717–01–P**

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## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

**[Docket No. RP05–274–000]**

### Williston Basin Interstate Pipeline Company; Notice of Proposed Changes in FERC Gas Tariff

April 21, 2005.

Take notice that on April 15, 2005, Williston Basin Interstate Pipeline Company (Williston Basin) tendered for filing as part of its FERC Gas Tariff, Second Revised Volume No. 1, the following tariff sheets, to become effective May 15, 2005:

Twelfth Revised Sheet No. 206
Original Sheet No. 206A
First Revised Sheet No. 207B

Williston Basin states that it is proposing the tariff changes in order to provide additional flexibility for Williston Basin's shippers and potential shippers by allowing such shippers the opportunity to request additional or new discounted services in conjunction with the evening and/or intra-day nomination cycles.

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 in accordance with the provisions of Section 154.210 of the Commission's regulations (18 CFR 154.210). Anyone filing an intervention or protest must serve a copy of that document on the Applicant. Anyone filing an intervention or protest on or before the intervention or protest date need not 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. E5–2028 Filed 4–27–05; 8:45 am]

**BILLING CODE 6717–01–P**

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## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

**[Docket No. EC05–68–000, et al.]**

### Tenaska Power Fund, L.P., et al.; Electric Rate and Corporate Filings

April 19, 2005.

The following filings have been made with the Commission. The filings are listed in ascending order within each docket classification.

**1. Tenaska Power Fund, L.P., TPF Calumet, LLC, Calumet Energy Team, LLC, CET Two, LLC**

[Docket No. EC05–68–000]

Take notice that on April 14, 2005, Tenaska Power Fund, L.P. (Power Fund), TPF Calumet, LLC (TPF Calumet), Calumet Energy Team, LLC (CET), and CET Two, LLC (CET Two) (collectively, Applicants) tendered for filing with the Federal Energy Regulatory Commission pursuant to section 203 of the Federal Power Act and Part 33 of the Commission's regulations, an application authorizing TPF Calumet to purchase all of the membership interests in CET from CET Two. CET states it owns an approximately 300 MW electric generating facility located in Chicago, Illinois. Applicants request confidential treatment of certain parts of the Application.

Applicants state that a copy of the filing was served on the Illinois Commerce Commission.

*Comment Date:* 5 p.m. eastern time on May 5, 2005.

**2. Pinnacle West Energy Corporation; Arizona Public Service Company**

[Docket No. EC05–69–000]

Take notice that on April 15, 2005, Pinnacle West Energy Corporation (PWEC) and Arizona Public Service Company (APS) filed with the Federal Energy Regulatory Commission an application pursuant to section 203 of the Federal Power Act for authorization of a disposition by PWEC and the acquisition by APS of jurisdictional facilities. Applicants states that it seeks authorization for the transfer, directly or indirectly, by PWEC to APS of certain jurisdictional facilities, specifically the step-up transformers, tie lines, switchyard and associated jurisdictional facilities of the following generating units: Saguaro Combustion Turbine Unit 3 located in Red Rock, Arizona; West Phoenix Combined Cycle Unit 4 located in Phoenix, Arizona; West Phoenix Combined Cycle Unit 5 located in Phoenix, Arizona; Redhawk Combined Cycle Unit 1 located in Arlington, Arizona; and Redhawk Combined Cycle Unit 2 located in Arlington, Arizona.

*Comment Date:* 5 p.m. eastern time on May 6, 2005.

**3. FPL Energy Horse Hollow Wind, LP**

[Docket No. EG05–58–000]

Take notice that on April 13, 2005, FPL Energy Horse Hollow Wind, LP (FPLE Horse Hollow), filed with the Federal Energy Regulatory Commission an application for determination of exempt wholesale generator status pursuant to part 365 of the Commission's regulations.

FPLE Horse Hollow states it will own an approximate wind-powered generating facility of up to 305 MW located in Taylor County, Texas.

*Comment Date:* 5 p.m. eastern time on May 4, 2005.

**4. San Joaquin Cogen, L.L.C.**

[Docket No. EG05–59–000]

Take notice that on April 14, 2005, San Joaquin Cogen, L.L.C. (San Joaquin), filed with the Commission an application for prospective determination of exempt wholesale generator status pursuant to part 365 of the Commission's regulations.

San Joaquin states that it is a limited liability company, organized under the laws of the State of Delaware, and engaged directly and exclusively in owning and operating the San Juaquin Cogen, L.L.C. electric generating facility located in Lathrop, California, and selling electric energy at wholesale from the facility.

*Comment Date:* 5 p.m. eastern time on May 5, 2005.

**5. Brascan Power Piney & Deep Creek LLC**

[Docket No. EG05–60–000]

Take notice that on April 15, 2005, Brascan Power Piney & Deep Creek LLC (Brascan Power PDC) filed an application for a determination of exempt wholesale generator status pursuant to part 365 of the Commission's regulations. Brascan Power PDC states that it is a Delaware limited liability company that will acquire and operate the Piney Hydroelectric Project (Project No. 309) and the Deep Creek Hydroelectric Project (formerly licensed by the Commission as Project No. 2370), from Reliant Energy Mid-Atlantic Power Holdings, LLC and Reliant Energy Maryland Holdings, LLC, respectively.

*Comment date:* 5 p.m. eastern standard time on May 6, 2005.

**6. Central Hudson Gas & Electric Corporation; Niagara Mohawk Power Corporation**

[Docket Nos. ER97–1523–084, OA97–470–076, ER97–4234–074, and OA96–194–012]

Take notice that April 12, 2005, Niagara Mohawk Power Corporation, a National Grid Company, and the New York Independent System Operator, Inc. jointly submit this compliance filing pursuant to the Commission's Order Approving Uncontested Settlement Agreement issued on March 25, 2005 in the above-referenced proceedings.

*Comment Date:* 5 p.m. eastern time on May 3, 2005.

**7. Oklahoma Gas and Electric Company; OGE Energy Resources, Inc.**

[Docket Nos. ER98–511–004 and ER97–4345–016]

Take notice that on April 11, 2005, Oklahoma Gas and Electric Company (OG&E) and OGE Energy Resources, Inc. (OERI) submitted blacklined versions of the market-based rate tariffs of Oklahoma Gas and Electric Company (FERC Electric Tariff, First Revised Volume No. 3) and OGE Energy Resources, Inc. (Second Revised Rate Schedule FERC No. 1) originally filed on February 7, 2005 in Docket Nos. ER98–511–013 and ER97–4345–015.

OG&E states that copies of the filing were served upon all parties in Docket Nos. ER98–511–000 and ER97–4345–000.

*Comment Date:* 5 p.m. eastern time on May 2, 2005.

**8. California Independent System Operator Corporation**

[Docket Nos. ER98–997–007, ER98–1309–006, ER02–2297–006, and ER02–2298–006]

Take notice that, on April 12, 2005, the California Independent System Operator Corporation (ISO) submitted a filing in compliance with the Commission's ''order ''issued on February 11, 2005, in the above-identified dockets, 110 FERC ¶ 61,124.

The ISO states that this filing has been served on all parties on the official service lists for the captioned dockets. In addition, the ISO is posting this filing on the ISO Home Page.

*Comment Date:* 5 p.m. eastern time on May 3, 2005.

**9. UGI Development Company**

[Docket No. ER99–2817–003]

Take notice that on April 12, 2005, UGI Development Company filed its market-based rate update pursuant to the Commission's Order in *AEP Power Marketing, Inc. et al.,* 107 FERC ¶ 61,018 (2004).

*Comment Date:* 5 p.m. eastern time on May 3, 2005.

**10. Casco Bay Energy Company, LLC**

[Docket No. ER99–3822–006]

Take notice that, on April 12, 2005, Casco Bay Energy Company, LLC submitted for filing revisions to its market-based rate tariff, designated as FERC Electric Tariff, Original Volume No. 1, to include the change in status reporting requirements adopted in *Reporting Requirement for Changes in Status for Public Utilities With Market-Based Rate Authority,* Order No. 652, 110 FERC ¶ 61,097 (2005).

Casco Bay states that copies of the filing were served upon the parties on the official service list in the above-captioned proceeding.

*Comment Date:* 5 p.m. eastern time on May 3, 2005.

**11. Pinnacle West Capital Corporation; Arizona Public Service Company; Pinnacle West Energy Corporation; APS Energy Services Company, Inc.**

[Docket Nos. ER00–2268–011, EL05–10–003, ER99–4124–009, EL05–11–003, ER00–3312–010, EL05–12–003, ER99–4122–012, and EL05–13–003]

Take notice that on April 11, 2005, Arizona Public Service Company (APS) and Electrical District Number Seven of Maricopa County, Roosevelt Irrigation District, Buckeye Water Conservation and Drainage District, Maricopa County Municipal Water Conservation District Number One, Aguila Irrigation District, Harquahala Valley Power District, Electrical District Number Eight of

Maricopa County, McMullen Valley Water Conservation and Drainage District, Tonopah Irrigation District, and Electrical District Number 6 of Pinal County (collectively the Majority Districts), submitted a Settlement Agreement in order to resolve issued raised by the Majority Districts concerning APS' market-based rates.

*Comment Date:* 5 p.m. eastern time on May 2, 2005.

**12. Otter Tail Power Company**

[Docket No. ER00–3080–002]

Take notice that on April 11, 2005, Otter Tail Power Company (Otter Tail) submitted its updated market analysis as required by the Federal Energy Regulatory Commission's orders in *AEP Power Marketing, Inc.* 107 FERC ¶ 61,018, *order on reh'g,* 108 FERC ¶ 61,026 (2004).

Otter Tail states that copies of the public version of this filing have been served on all parties to the proceeding captioned above, as well as the state commissions of Minnesota, North Dakota, and South Dakota.

*Comment Date:* 5 p.m. eastern time on May 2, 2005.

**13. Mill Run Windpower, LLC**

[Docket Nos. ER01–1710–005 and ER05–660–001]

Take notice that on April 15, 2005, Mill Run Windpower, LLC (Mill Run) filed a supplement to its February 28, 2005 filing in Docket Nos. ER01–1710–004 and ER05–660–000.

Mill Run states that copies of the filing were served on parties on the official service lists for Docket Nos. ER01–1710 and ER05–660 and on the Florida Public Service Commission.

*Comment Date:* 5 p.m. eastern time on April 22, 2005.

**14. Somerset Windpower, LLC**

[Docket Nos. ER01–2139–006 and ER05–661–001]

Take notice that, on April 15, 2005, Somerset Windpower, LLC (Mill Run) filed a supplement to its February 28, 2005 filing in Docket Nos. ER01–2139–005 and ER05–661–000.

Mill Run states that copies of the filing were served on parties on the official service list for Docket Nos. ER01–2139 and ER05–661 and on the Florida Public Service Commission.

*Comment Date:* 5 p.m. eastern time on April 22, 2005.

**15. Ontario Energy Trading International Corp.**

[Docket No. ER02–1021–004]

Take notice that on April 11, 2005, Ontario Energy Trading International Corp. (Ontario Energy) submitted a compliance filing pursuant to the Commission's new interim generation market power screens issued on April 14, 2004 in *AEP Power Marketing Inc., et al.,* 107 FERC ¶ 61,018 (2004), *order on reh'g.,* 108 FERC ¶ 61,026 (2004).

Ontario Energy states that copies of the filing were served on parties on the official service list in Docket No. ER02–1021–000.

*Comment Date:* 5 p.m. eastern time on May 2, 2005.

**16. Entergy Services, Inc.**

[Docket No. ER03–811–003]

Take notice that on April 12, 2005, Entergy Services, Inc., on behalf of Entergy Louisiana, Inc., tendered for filing with the Federal Energy Regulatory Commission, a compliance Interconnection and Operating Agreement with Occidental Chemical Corporation in response to the Commission's December 22, 2004, order in *Entergy Services, Inc.,* 109 FERC ¶ 61,342 (2004), *reh'g denied,* 110 FERC ¶ 61,365 (2005).

*Comment Date:* 5 p.m. eastern time on May 3, 2005.

**17. California Independent System Operator Corporation**

[Docket No. ER05–416–004]

Take notice that, on April 12, 2005, the California Independent System Operator Corporation (ISO) submitted an informational filing regarding to the ISO's updated transmission Access Charge rates effective as of January 1, 2005.

The ISO states that this filing has been served upon the Public Utilities Commission of the State of California, the California Energy Commission, the California Electricity Oversight Board, the Participating Transmission Owners, and upon all parties with effective Scheduling Coordinator Service Agreements under the ISO Tariff. In addition, ISO states it is posting the filing on the ISO Home Page.

*Comment Date:* 5 p.m. eastern time on May 3, 2005.

**18. Midwest Independent Transmission System Operator, Inc.**

[Docket No. ER05–579–000]

Take notice that on April 8, 2005 Midwest Independent Transmission System Operator, Inc. (Midwest ISO) submitted for filing a withdrawal of its February 15, 2005 filing of Amendment No. 1 to the Generation-Transmission Interconnection Agreement among Wisconsin Electric Power Company, the Midwest ISO and American Transmission Company LLC for the Elm Road Generating Facility.

Midwest ISO states that it has served the foregoing document upon each person designated on the official service list compiled by the Secretary in the above-captioned proceeding.

*Comment Date:* 5 p.m. eastern time on April 29, 2005.

**19. Midwest Independent Transmission System Operator, Inc.**

[Docket No. ER05–590–000]

Take notice that on April 8, 2005, Midwest Independent Transmission System Operator, Inc. (Midwest ISO) submitted for filing a withdrawal of its February 16, 2005 filing of Amendment No. 1 to the Generation-Transmission Interconnection Agreement among Wisconsin Electric Power Company, the Midwest ISO and American Transmission Company LLC for the Port Washington Generating Facility.

Midwest ISO states that it has served the foregoing document upon each person designated on the official service list compiled by the Secretary in the above-captioned proceeding.

*Comment Date:* 5 p.m. eastern time on April 29, 2005.

**20. Gexa Energy LLC**

[Docket No. ER05–714–001]

Take notice that on April 8, 2005, Gexa Energy LLC (Gexa), filed an amendment to its March 21, 2005 petition requesting Commission acceptance of Gexa's Rate Schedule FERC No. 1; the granting of certain blanket approvals, including the authority to sell electricity at market-based rates; and the waiver of certain Commission regulations.

*Comment Date:* 5 p.m eastern time on April 29, 2005.

**21. ISO New England Inc.**

[Docket No. ER05–767–001]

Take notice that on April 15, 2005, ISO New England Inc. (the ISO) submitted for filing a motion for expedited consideration and to revise the effective date requested in the Amendments to Appendix A of Market Rule 1 Regarding Reference Price Calculations, filed in this proceeding jointly by the ISO and the New England Power Pool Participants Committee on April 1, 2005.

*Comment Date:* 5 p.m. eastern time on April 22, 2005.

**22. California Independent System Operator Corporation**

[Docket No. ER05–796–000]

Take notice that on April 8, 2005, the California Independent System Operator Corporation (ISO) tendered for filing an amendment to the ISO Tariff

(Amendment No. 67) for acceptance by the Commission. The ISO states that the purpose of Amendment No. 67 is to revise the ISO Tariff provisions concerning the deadline for submitting supplemental energy bids to the CAISO, to provide for a deadline of 62 minutes prior to the operating hour rather than 60 minutes prior to the operating hour as currently stated in the ISO Tariff. The ISO requests an effective date of April 9, 2005.

The ISO states that this filing has been served on the California Public Utilities Commission, the California Energy Commission, the California Electricity Oversight Board, all parties with effective Scheduling Coordinator Service Agreements under the ISO Tariff, and all parties in Docket No. EL04–132. In addition, the ISO states that it has posted the filing on its Web site.

*Comment Date:* 5 p.m. eastern time on April 29, 2005.

**23. Orange and Rockland Utilities, Inc.**

[Docket No. ER05–797–000]

Take notice that on April 8, 2005, Orange and Rockland Utilities, Inc. (O&R) tendered for filing an amendment to its open access transmission tariff, FERC Electric Tariff, Original Volume No. 3. O&R states that the filing proposes a surcharge mechanism applicable to costs associated with the undergrounding of existing transmission facilities at the request or requirement of municipal governmental authorities. O&R requests an effective date of May 1, 2005.

*Comment Date:* 5 p.m. eastern time on April 29, 2005.

**24. Virtual Energy, Inc.**

[Docket No. ER05–798–000]

Take notice that on April 8, 2005, Virtual Energy, Inc. (Virtual Energy) petitioned the Commission for acceptance of Virtual Energy, Inc. Rate Schedule FERC No. 1, under which Virtual Energy will engage in wholesale electric power and energy transactions as a marketer; the granting of certain blanket approvals, including the authority to sell electricity at market based rates; and the waiver of certain Commission regulations.

*Comment Date:* 5 p.m. eastern time on April 29, 2005.

**25. Southwest Power Pool, Inc.**

[Docket No. ER05–799–000]

Take notice that on April 8, 2005, Southwest Power Pool, Inc. (SPP) submitted for filing a partially executed service agreement for network integration transmission service (service agreement) between SPP and Oklahoma Municipal Power Authority (OMPA), as well as an executed Network Operating Agreement (NOA) between SPP, OMPA and Oklahoma Gas and Electric Company (OKGE). SPP requests an effective date of April 1, 2005.

SPP states that both OMPA and OKGE were served with a copy of this filing.

*Comment Date:* 5 p.m. eastern time on April 29, 2005.

**26. Mirabito Gas & Electric, Inc.**

[Docket No. ER05–800–000]

Take notice that on April 8, 2005, Mirabito Gas & Electric, Inc. (Marabito) filed a Notice of Cancellation of its market-based rate authority in Docket No. ER00–3717–000, effective December 8, 2000.

*Comment Date:* 5 p.m. eastern time on April 29, 2005.

**27. Naniwa Energy LLC**

[Docket No. ER05–801–000]

Take notice that on April 8, 2005, Naniwa Energy LLC (Naniwa) submitted Notices of Cancellation of Service Agreement Nos. 1 and 2 under Naniwa's FERC Electric Tariff, Original Volume No. 1, effective July 20, 2004. Naniwa states that all consents have been obtained for such cancellation and that a copy of this filing has been served upon the customers under the service agreements.

*Comment Date:* 5 p.m. eastern time on April 29, 2005.

**28. Midwest Independent Transmission System Operator, Inc.**

[Docket No. ER05–802–000]

Take notice that on April 8, 2005, the Midwest Independent Transmission System Operator, Inc. (Midwest ISO) submitted, pursuant to section 205 of the Federal Power Act, revisions to the Midwest ISO's open access transmission and energy markets tariff to address several issues related to financial transmission rights. The Midwest ISO requests and effective date of May 6, 2005.

The Midwest ISO has requested waiver of the service requirements set forth in 18 CFR § 385.2010. The Midwest ISO states that it has electronically served a copy of this filing, with attachments, upon all Tariff Customers under the EMT, Midwest ISO Members, Member representatives of Transmission Owners and Non-Transmission Owners, the Midwest ISO Advisory Committee participants, as well as all state commissions within the region. In addition, the Midwest ISO states that the filing has been electronically posted on the Midwest ISO's Web site at *http://www.midwestiso.org* under the heading ''Filings to FERC'' for other interested parties in this matter. The Midwest ISO further states that it will provide hard copies to any interested parties upon request.

*Comment Date:* 5 p.m. eastern time on April 29, 2005.

**29. Midwest Independent Transmission System Operator, Inc.**

[Docket No. ER05–803–000]

Take notice that, on April 8, 2005, the Midwest Independent Transmission System Operator, Inc. (Midwest ISO) submitted proposed revisions to Attachment H–1 (Index of Interconnection Agreement Customers) of its energy markets tariff to reflect the addition of an interconnection agreement to be executed between Indiana & Michigan, Northern Indiana Public Service Company, PJM Interconnection, Inc. and the Midwest ISO as Service Agreement No. 1524 in compliance with the Commission's March 9, 2005 *Order Conditionally Accepting Filing and Instituting section 206 Proceeding,* 110 FERC ¶ 61,276 (2005).

The Midwest ISO states that copies of the filing were served on parties on the official service list in Docket Nos. ER05–31–000 and EL05–70–000. In addition, the Midwest ISO states that it has served a copy of this filing electronically, including attachments, upon all Tariff Customers under the EMT, Midwest ISO Members, Member representatives of Transmission Owners and Non-Transmission Owners, the Midwest ISO Advisory Committee participants, as well as all state commissions within the region. The Midwest ISO further states that the filing has also been posted electronically on the Midwest ISO's Web site at *http://www.midwestiso.org* under the heading ''Filings to FERC'' for other interested parties in this matter.

*Comment Date:* 5 p.m. eastern time on April 29, 2005.

**30. Southern California Edison Company**

[Docket No. ER05–804–000]

Take notice that on April 8, 2005, Southern California Edison Company (SCE) submitted for filing an Interconnection Facilities Agreement (Interconnection Agreement), Service Agreement No. 137 under SCE's Wholesale Distribution Access Tariff (WDAT), FERC Electric Tariff, First Revised Volume No. 5, and an associated Service Agreement for Wholesale Distribution Service (WDAT Service Agreement), Service Agreement

No. 138 under the WDAT, between SCE and the City of Moreno Valley (Moreno Valley). SCE states that the purpose of the Interconnection Agreement and the WDAT Service Agreement is to specify the terms and conditions under which SCE will provide Wholesale Distribution Service from the California Independent System Operator Controlled Grid at SCE's Valley Substation to a new Moreno Valley 12 kV interconnection at Moreno Valley owned property located on the southwest corner of Cottonwood Avenue and Redlands Boulevard in Riverside County, California.

SCE states that copies of the filing were served upon the Public Utilities Commission of the State of California and Moreno Valley.

*Comment Date:* 5 p.m. eastern time on April 29, 2005.

**31. Westar Energy, Inc.**

[Docket No. ER05–805–000]

Take notice that on April 8, 2005, Westar Energy, Inc. (Westar) submitted for filing a Notice of Cancellation for Rate Schedule FERC No. 230, an Electric Power Supply Agreement between Westar and the City of Enterprise, Kansas.

Westar states that copies of the filing were served upon the Kansas Corporation Commission and the City of Enterprise, Kansas.

*Comment Date:* 5 p.m. eastern time on April 29, 2005.

**32. Westar Energy, Inc.**

[Docket No. ER05–806–000]

Take notice that on April 11, 2005, Kansas Gas and Electric Company and Westar Energy, Inc. (collectively Westar Energy) submitted for filing a Notice of Cancellation for Rate Schedules FERC Nos. 193, 195, 196, 197 and 198, Generating Municipal Electric Service Agreements between Westar Energy and the City of Burlington, Kansas; City of Mulvane, Kansas; City of Neodesha, Kansas; City of Wellington, Kansas and the City of Winfield, Kansas.

Westar Energy states that copies of the filing were served upon the City of Burlington, Kansas; City of Mulvane, Kansas, City of Neodesha, Kansas, City of Wellington, Kansas; City of Winfield, Kansas and the Kansas Corporation Commission.

*Comment Date:* 5 p.m. eastern time on May 2, 2005.

**33. Pacific Gas and Electric Company**

[Docket No. ER05–807–000]

Take notice that on April 11, 2005, Pacific Gas and Electric Company (PG&E) tendered for filing a Generator Special Facilities Agreement (GSFA), and Generator Interconnection Agreement (GIA) between PG&E and Diablo Winds, LLC (Diablo Winds) (collectively, Parties). PG&E states that the GSFA permits PG&E to recover the ongoing costs associated with owning, operating and maintaining the Special Facilities for the Parties. PG&E states that the GIA provides terms and conditions for billing, operation, maintenance and metering. PG&E further states that as detailed in the GSFA, PG&E proposes to charge Diablo Winds a monthly Cost-of-Ownership Charge equal to the rate for transmission-level, customer-financed facilities.

PG&E states that copies of this filing have been served upon Diablo Winds, California Independent System Operator Corporation and the California Public Utilities Commission.

*Comment Date:* 5 p.m. eastern time on May 2, 2005.

**34. Eagle Point Cogeneration Partnership**

[Docket No. ER05–808–000]

Take notice that on April 11, 2005, pursuant to section 35.15, 18 CFR 35.15 (2004), of the Commission's Regulations, Eagle Point Cogeneration Partnership (Eagle Point) filed with the Commission a Notice of Cancellation of market-based rate authority under the applicant's FERC Electric Tariff, Revised Volume No. 1. Eagle Point requests an effective date of April 11, 2005.

*Comment Date:* 5 p.m. eastern time on May 2, 2005.

**35. Midwest Independent Transmission**

[Docket No. ER05–809–000]

Take notice that on April 12, 2005 the Midwest Independent Transmission System Operator, Inc. (Midwest ISO) submitted, pursuant to section 205 of the Federal Power Act, revisions to section 7 (Billing and Payments; Defaults and Remedies) and Attachment L (Credit Policy) of the Midwest ISO's Open Access Transmission and Energy Markets Tariff. The Midwest ISO has requested June 11, 2005 as the effective date for the tariff sheets submitted as part of this filing.

*Comment Date:* 5 p.m. eastern time on May 3, 2005.

**36. UGI Energy Services, Inc.**

[Docket No. ER05–810–000]

Take notice that on April 12, 2005, UGI Energy Services, Inc. filed a wholesale power sales tariff to sell capacity, energy, and certain ancillary services at market-based rates.

*Comment Date:* 5 p.m. eastern time on May 3, 2005.

**37. New England Power Pool; ISO New England Inc.**

[Docket Nos. ER05–811–000 and PL05–3–000]

Take notice that on April 12, 2005, ISO New England Inc. (the ISO) and the New England Power Pool (NEPOOL) Participants Committee jointly filed for acceptance amendments (the Amendments) to the ISO Financial Assurance Policy for Market Participants, the ISO Financial Assurance Policy for Non-Market Participant Transmission Customers, and the ISO Financial Assurance Policy for Non-Market Participant FTR Customers and Non-Market Participant Demand Response Providers, which are, respectively, Exhibits 1A, 1B & 1C to Section I of the ISO Transmission, Markets and Services Tariff. A June 1, 2005 effective date for the filed changes is requested. The ISO states that they also filed the Amendments as an update to its prior compliance filing in Docket No. PL05–3–000.

NEPOOL and the ISO state that copies of these materials were sent to the New England state governors and regulatory commissions and all customers under the ISO Transmission, Markets and Services Tariff.

*Comment Date:* 5 p.m. eastern time on May 3, 2005.

**38. Consolidated Edison Company of New York, Inc.**

[Docket No. ER05–812–000]

Take notice that on April 12, 2005, Consolidated Edison Company of New York, Inc. (Con Edison) tendered for filing amendments to Con Edison's Delivery Rate Schedule No. 96 (PASNY Tariff) and Economic Development Delivery Service Rate Schedule No. 92 (EDDS Tariff). Con Edison states that the filing proposes to revise the rates, terms, and conditions for delivery services that Con Edison provides under contracts with the New York Power Authority, the County of Westchester Public Utility Service Agency, and the New York City Public Utility Service. Con Edison requests that the proposed amendments be made effective on April 1, 2005.

*Comment Date:* 5 p.m. eastern time on May 3, 2005.

**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 and all parties to this proceeding.

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. E5–2035 Filed 4–27–05; 8:45 am]

**BILLING CODE 6717–01–P**

## DEPARTMENT OF ENERGY

## Federal Energy Regulatory Commission

**[Docket No. ER01–1527–006, et al.]**

## Sierra Pacific Power Company, et al.; Electric Rate and Corporate Filings

April 20, 2005.

The following filings have been made with the Commission. The filings are listed in ascending order within each docket classification.

### 1. Sierra Pacific Power Company; Nevada Power Company

[Docket Nos. ER01–1527–006 and ER01–1529–006]

Take notice that on March 3, 2005, Sierra Pacific Power Company and Nevada Power Company (collectively, Sierra) submitted a response to recent Commission staff inquiries regarding Sierra's triennial market power study filed October 28, 2004, as supplemented on November 12, 2004.

*Comment Date:* 5 p.m. eastern time on May 2, 2005.

### 2. Somerset Windpower, LLC

[Docket Nos. ER01–2139–006 and ER05–661–001]

Take notice that, on April 15, 2005, Somerset Windpower, LLC (Somerset) filed a supplement to its February 28, 2005 filing in Docket Nos. ER01–2139–005 and ER05–661–000.

Somerset states that copies of the filing were served on parties on the official service list for Docket Nos. ER01–2139 and ER05–661 and on the Florida Public Service Commission.

*Comment Date:* 5 p.m. eastern time on April 22, 2005.

### 3. Midwest Independent Transmission System Operator, Inc.

[Docket Nos. ER04–691–035 and EL04–104–033]

Take notice that on April 14, 2005 the Midwest Independent Transmission System Operator, Inc. (Midwest ISO) submitted its errata filing to its April 6, 2005 filing in Docket Nos. ER04–691–034 and EL04–104–032. The Midwest ISO requests an effective date of April 1, 2005 for the tariff sheets submitted as part of this filing.

The Midwest ISO states that it has electronically served a copy of this filing, with attachments, upon all Midwest ISO Members, Member representatives of Transmission Owners and Non-Transmission Owners, the Midwest ISO Advisory Committee participants, as well as all State commissions within the region. In addition, the Midwest ISO states that the filing has been electronically posted on the Midwest ISO's Web site at *http://www.midwestiso.org* under the heading ''Filings to FERC'' for other interested parties in this matter. The Midwest ISO indicates that it will provide hard copies to any interested parties upon request.

*Comment Date:* 5 p.m. eastern time on May 5, 2005.

### 4. Georgia Power Company

[Docket Nos. ER05–282–001 and ER04–939–002]

Take notice that on April 14, 2005, Georgia Power Company (Georgia Power) resubmitted the Control Area Compact by and among Georgia Power Company, Oglethorpe Power Corporation, and Georgia System Operations Corporation (Control Area Compact), accepted by the Commission's letter order issued January 27, 2005 in the above captioned dockets, to reflect a rate schedule designation and other information in accordance with section 35.9 of the Commission's regulations, 18 CFR 35.9 (2004). Georgia Power Company also submitted a Notice of Termination of the Revised and Restated Coordination Services Agreement Between and Among Georgia Power Company, Oglethorpe Power Corporation, and Georgia System Operations Corporation, which has been supplanted by the Control Area Compact.

*Comment Date:* 5 p.m. eastern time on May 5, 2005.

### 5. Saracen Energy LP

[Docket No. ER05–493–001]

Take notice that on April 14, 2005, Saracen Energy LP (Saracen Energy) submitted a compliance filing pursuant to the Commission's March 24, 2005 order in this proceeding, 110 FERC ¶ 61,332 (2005). Saracen Energy states that the compliance filing consists of an amendment to Saracen Energy's Rate Schedule FERC No. 1 to reflect the change-in-status reporting requirement adopted in Order No. 652, *Reporting Requirement for Change in Status for Public Utilities with Market-Based Rate Authority*, 110 FERC ¶ 61,097 (2005).

Saracen Energy 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 May 5, 2005.

### 6. Saracen Energy Power Advisors LP

[Docket No. ER05–494–001]

Take notice that on April 14, 2005, Saracen Energy Power Advisors LP (Saracen Power Advisors) submitted a compliance filing pursuant to the Commission's March 24, 2005 order in this proceeding, 110 FERC ¶ 61,332 (2005). Saracen states that the compliance filing consists of an amendment to Saracen Power Advisors's Rate Schedule FERC No. 1 to reflect the change-in-status reporting requirement adopted in Order No. 652, *Reporting Requirement for Change in Status for Public Utilities with Market-Based Rate Authority,* 110 FERC ¶ 61,097 (2005).

Saracen Power Advisors 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 May 5, 2005.

### 7. Saracen Merchant Energy LP

[Docket No. ER05–495–001]

Take notice that, on April 14, 2005, Saracen Merchant Energy LP (Saracen Merchant) submitted a compliance filing pursuant to the Commission's March 24, 2005 order in this proceeding, 110 FERC ¶ 61,332 (2005). Saracen Merchant states that the

compliance filing consists of an amendment to Saracen Merchant's Rate Schedule FERC No. 1 to reflect the change-in-status reporting requirement adopted in Order No. 652, *Reporting Requirement for Change in Status for Public Utilities with Market-Based Rate Authority*, 110 FERC ¶ 61,097 (2005).

Saracen Merchant states that copies of the filing were served on parties on the official service list in the proceeding.

*Comment Date:* 5 p.m. eastern time on May 5, 2005.

**8. Wabash Valley Power Association, Inc.**

[Docket No. ER05–814–000]

Take notice that on April 13, 2005, Wabash Valley Power Association, Inc. (Wabash Valley) submitted Wabash Valley Rate Schedule Nos. 33 through 47 and a request for certain waivers of the Commission's regulations.

Wabash Valley states that copies of the filing were served upon Wabash Valley's Members, AES Power, Inc., American Municipal Power-Ohio, Inc., Big Rivers Electric Corporation, Cincinnati Gas and Electric Company, Central Illinois Public Service Company, Indiana Municipal Power Agency, Hoosier Energy Rural Electric Cooperative, Southern Indiana Gas and Electric Company, PSI Energy, Inc., Cinergy Services, Inc., Ontario Power Generation, Inc., Soyland Power Cooperative, Inc., Illinois Municipal Electric Agency, Louisville Gas and Electric Company, Indianapolis Power & Light Company, Northern Indiana Public Service Company, and the State public service commissions in Illinois, Indiana, Michigan and Ohio.

*Comment Date:* 5 p.m. eastern time on May 4, 2005.

**9. PJM Interconnection, L.L.C.**

[Docket No. ER05–815–000]

Take notice that on April 13, 2005, PJM Interconnection, L.L.C. (PJM) submitted for filing an executed interconnection service agreement (ISA) among PJM, PSEG Nuclear LLC, Public Service Electric and Gas Company and Atlantic City Electric Company, and a notice of cancellation for an ISA that has been superseded. PJM requests an effective date of March 14, 1005.

PJM states that copies of this filing were served upon the parties to the agreement and the State regulatory commissions within the PJM region.

*Comment Date:* 5 p.m. eastern time on May 4, 2005.

**10. CES Marketing VI, LLC , CES Marketing VII, LLC, CES Marketing VIII, LLC, CES Marketing IX, LLC, CES Marketing X, LLC**

[Docket Nos. ER05–816–000, ER05–817–000, ER05–818–000, ER05–819–000, and ER05–820–000]

Take notice that on April 13, 2005, CES Marketing VI, LLC, CES Marketing VII, LLC, CES Marketing VIII, LLC, CES Marketing IX, LLC and CES Marketing X, LLC (Applicants) submitted: (1) proposed rate schedules under which Applicants will 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; (2) requests for the grant of certain blanket approvals; (3) and requests for the grant of certain waivers.

*Comment Date:* 5 p.m. eastern time on May 4, 2005.

**11. Pastoria Energy Facility, L.L.C.**

[Docket No. ER05–822–000]

Take notice that on April 14, 2005, Pastoria Energy Facility, L.L.C. (Pastoria) submitted: (1) Notification of a change in the name of the company from Pastoria Energy Center, LLC to Pastoria Energy Facility, L.L.C.; and (2) a revised market-based rate tariff to provide the correct name of the company and to incorporate the reporting requirements adopted by the Commission in Order No. 652, *Reporting Requirements for Changes in Status for Public Utilities with Market-Based Rate Authority*, 110 FERC ¶ 61,097 (2005).

Pastoria states that a copy of this filing has been mailed to each person designated on the official service list compiled by the Secretary of this proceeding.

*Comment Date:* 5 p.m. eastern time on May 5, 2005.

**12. Florida Power & Light Company**

[Docket No. ER05–823–000]

Take notice that on April 14, 2005, Florida Power & Light Company (FPL) tendered for filing a Notice of Cancellation of Service Agreement No. 196, an Interconnection & Operation Agreement between FPL and Blue Heron Energy Center, LLC (Blue Heron). FPL states that the Cancellation of Service Agreement No. 196 has been mutually agreed to by FPL and Blue Heron. FPL requests that the cancellation be made effective March 21, 2005.

FPL states that a copy of the filing was served upon Blue Heron.

*Comment Date:* 5 p.m. eastern time on May 5, 2005.

**13. American Electric Power Service Corporation**

[Docket No. ER05–824–000]

Take notice that on April 14, 2004, American Electric Power Service Corporation (AEPSC), tendered for filing a Interconnection and Local Delivery Service Agreement (ILDSA) for Wabash Valley Power Association, Inc. (Wabash Valley) of the Indianapolis, Indiana, and a Facilities Agreement, as an attachment to the ILDSA, for the establishment of a new Delivery Point (the Huntertown Delivery Point) between Wabash Valley and AEP. The ILDSA is being designated and filed as Service Agreement No. 1262 under the PJM Interconnection, LLC (PJM's) FERC Open Access Transmission Tariff Sixth Revised Volume No. 1, pursuant to FERC Order dated February 25, 2005 under Docket Nos. ER04–1003–002 *et al.* and EL05–62–000. Service Agreement No. 1262 is needed to eliminate from the Network Integration Transmission Service Agreement between AEP and Wabash Valley those transmission related services that are now provided by PJM. AEPSC requests an effective date of April 1, 2005.

AEPSC states that a copy of the filing was served upon Wabash Valley and the Public Service Commissions affected by the filing.

*Comment Date:* 5 p.m. eastern time on May 5, 2005.

**14. Midwest Independent Transmission System Operator, Inc.**

[Docket No. ER05–825–000]

Take notice that on April 15, 2005, Midwest Independent Transmission System Operator, Inc., (Midwest ISO) pursuant to section 205 of the Federal Power Act and section 35.13 of the Commission's regulations, 18 CFR 35.13 (2002), submitted for filing revisions to Exhibit A and Exhibit B of the Network Integration Transmission Service Agreement under the Midwest ISO's Open Access Transmission Tariff, FERC Electric Tariff, Second Revised Volume No. 1, between the City of St. Louis, Michigan and the Midwest ISO.

Midwest ISO states that a copy of this filing has been served on all parties on the official service list compiled by the Secretary in this proceeding.

*Comment Date:* 5 p.m. eastern time on May 6, 2005.

**15. Consolidated Edison Company of New York, Inc.**

[Docket No. ER05–826–000]

Take notice that on April 15, 2005, Consolidated Edison Company of New

York, Inc. (Con Edison) tendered for filing amendments to Con Edison's Open Access Transmission Tariff, FERC Electric Tariff, First Revised Volume No. 1. Con Edison states that the filing proposes to revise the rate design for unbundled retail transmission service to customers that own on-site electric generators. Con Edison requests an effective date of June 14, 2005.

*Comment Date:* 5 p.m. eastern time on May 6, 2005.

**16. Northeast Utilities Service Company**

[Docket No. ER05–827–000]

Take notice that on April 15, 2005, Northeast Utilities Service Company (NUSCO), on behalf of its operating company affiliates, The Connecticut Light and Power Company (CL&P), Western Massachusetts Electric Company (WMECO), Holyoke Water Power Company (HWP), Holyoke Power and Electric Company (HP&E), and Public Service Company of New Hampshire (PSNH), submitted a Notice of Cancellation of the Memorandum of Understanding—Pooling of Generation and Transmission (NUG&T) between CL&P, WMECO, HWP, and HP&E; Notice of Cancellation of the Sharing Agreement between PSNH and CL&P; and Notice of Cancellation of the Capacity Transfer Agreements between CL&P and PSNH.

NUSCO states that copies of the filing were served upon the NUSCO's jurisdictional customers, Connecticut Department of Public Utility Control, New Hampshire Public Utilities Commission, and Massachusetts Department of Telecommunications and Energy.

*Comment Date:* 5 p.m. eastern time on May 6, 2005.

**17. Northwestern Wisconsin Electric Company**

[Docket No. ER05–828–000]

Take notice that April 15, 2005, Northwestern Wisconsin Electric Company, (NWEC) tendered for filing proposed changes in its Transmission Use Charge, Rate Schedule FERC No. 2. NWEC states that the proposed changes would increase revenues from jurisdictional sales by $4,409.20 based on the 12-month period ending April 30, 2005. NWEC also states that it is proposing this rate schedule change to more accurately reflect the actual cost of transmitting energy from one utility to another based on current cost data. NWEC further states that the service agreement for which this rate is calculated calls for the Transmission Use Charge to be reviewed annually and revised on May 1. NWEC requests an effective date of May 1, 2005.

NWEC states that copies of this filing have been provided to the respective parties and to the Public Service Commission of Wisconsin.

*Comment Date:* 5 p.m. eastern time on May 6, 2005.

**18. American Transmission Company LLC**

[Docket No. ER05–829–000]

Take notice that on April 15, 2005, American Transmission Company LLC (ATCLLC) tendered for filing a Distribution-Transmission Interconnection Agreement between ATCLLC and Lodi Utilities. ATCLLC requests an effective date of March 31, 2005.

ATCLLC states that it has served a copy of this filing on Lodi Utilities, the Midwest ISO, and the Public Service Commission of Wisconsin.

*Comment Date:* 5 p.m. eastern time on May 6, 2005.

**19. Xcel Energy Services Inc.**

[Docket No. ER05–830–000]

Take notice that on April 15, 2005, Xcel Energy Services Inc., on behalf of Public Service Company of Colorado (PSCo), submitted an Amended and Restated Generation Interconnection Agreement between Ridge Crest Wind Partners, LLC and PSCo.

*Comment Date:* 5 p.m. eastern time on May 6, 2005.

**20. East Texas Electric Cooperative, Inc.**

[Docket No. ER05–831–000]

Take notice that on April 13, 2005, East Texas Electric Cooperative, Inc. (ETEC) submitted for filing a withdrawal of its filed rates, effective upon ETEC's April 13, 2005 receipt of Rural Utilities Service guaranteed loan funds, ETEC will no longer meet the definition of a ''public utility'' pursuant to section 201 of the Federal Power Act, 16 U.S.C. 824 and thus will not be subject to regulation by the Commission for so long as ETEC has RUS loan funds outstanding.

ETEC states that it has provided its three constituent members with a copy of this filing.

*Comment Date:* 5 p.m. eastern time on May 4, 2005.

**21. American Transmission Company LLC**

[Docket No. ER05–833–000]

Take notice that on April 13, 2005, American Transmission Company LLC (ATCLLC) tendered for filing an Amended and Restated Generation-Transmission Interconnection Agreement among American Transmission Company LLC, Wisconsin Electric Power Company, and the Midwest Independent Transmission System Operator, Inc., (for the Elm Road Generating Facility) Docket No. ER02–548–001. ATCLLC requests an effective date of April 16, 2005.

*Comment Date:* 5 p.m. eastern time on May 4, 2005.

**22. American Transmission Company LLC**

[Docket No. ER05–834–000]

Take notice that on April 14, 2005, American Transmission Company LLC (ATCLLC) tendered for filing an Amended and Restated Generation-Transmission Interconnection Agreement among American Transmission Company LLC, Wisconsin Electric Power Company, and the Midwest Independent Transmission System Operator, Inc., (for Port Washington Generating Facility) Docket No. ER02–548–001. ATCLLC requests an effective date of April 17, 2005.

*Comment Date:* 5 p.m. eastern time on May 5, 2005.

**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 and all parties to this proceeding.

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.

**Linda Mitry,**

*Deputy Secretary.*

[FR Doc. E5–2039 Filed 4–27–05; 8:45 am]

**BILLING CODE 6717–01–P**

## DEPARTMENT OF ENERGY

## Federal Energy Regulatory Commission

**[Docket No. ER99–3491–004, et al.]**

## PPL Montana, LLC, et al.; Electric Rate and Corporate Filings

April 21, 2005.

The following filings have been made with the Commission. The filings are listed in ascending order within each docket classification.

### 1. PPL Montana, LLC, PPL Colstrip I, LLC, PPL Colstrip II, LLC

[Docket Nos. ER99–3491–004, ER00–2184–002, and ER00–2185–002]

Take notice that on April 15, 2005, PPL Montana, LLC; PPL Colstrip I, LLC; and PPL Colstrip II, LLC (collectively the PPL MT Parties) submitted a compliance filing pursuant to the Commission's deficiency letter issued on March 25, 2005, in Docket Nos. ER99–3491–002, *et al.*, and pursuant to the Commission's order issued on February 10, 2005, in Docket No. RM04–14–000, *Reporting Requirement for Changes in Status for Public Utilities With Market-Based Rate Authority*, Order No. 652, 70 FR 8253 (Feb 18, 2005). The PPL MT Parties state that the compliance filing consists of responses Commission Staff's questions contained in the March 25, 2005 deficiency letter regarding the PPL and MT Parties' triennial market-based rate update, and revised tariff sheets to incorporate the Commission's change in status reporting requirements.

The PPL MT Parties state that copies of the filing were served on parties on the official service list in Docket Nos. ER99–3491–003, ER00–2184–001 and ER00–2185–001.

*Comment Date:* 5 p.m. eastern time on May 6, 2005.

### 2. Promet Energy Partners LLC

[Docket No. ER05–331–001]

Take notice that on April 13, 2005, Promet Energy Partners LLC, (Promet) submitted for filing a revised Rate Schedule FERC No. 1, Sheet No. 1. Promet states that this revision was necessary in order to comply with Order No. 652, 110 FERC ¶ 61,097, (2005), which requires change in status reporting requirement be incorporated in the market-based rate tariff of each entity authorized to make sales at market-based rates.

*Comment Date:* 5 p.m. eastern time on May 4, 2005.

### 3. Mitchell Electric Membership Corporation

[Docket No. ER05–350–002]

Take notice that on April 15, 2005, Mitchell Electric Membership Corporation submitted a compliance filing pursuant to the Commission's order issued March 25, 2005, Mitchell Electric Membership Corporation, 110 FERC ¶ 61,350 (2005).

*Comment Date:* 5 p.m. eastern time on May 6, 2005.

### 4. Wisconsin River Power Company

[Docket No. ER05–453–002]

Take notice that on April 14, 2005, Wisconsin River Power Company (Wisconsin River) filed revised tariff sheets and information regarding interlocking directorates in compliance with the Commission's Letter Order issued March 25, 2005 (110 FERC ¶ 61,342).

*Comment Date:* 5 p.m. eastern time on May 6, 2005.

### 5. Tucson Electric Power Company and UNS Electric, Inc.

[Docket No. ER05–610–002]

Take notice that on April 19, 2005, Tuscon Electric Power Company (Tucson Electric) and UNS Electric, Inc. filed substitute revised tariff sheets to its February 18, 2005 filing in Docket Nos. ER05–610–000 and 001 in compliance with *Standardization of Generator Interconnection Agreements and Procedures,* 109 FERC ¶ 61,287 (2004). Tucson Electric requests an effective date of January 19, 2005.

*Comment Date:* 5 p.m. eastern time on May 10, 2005.

### 6. KRK Energy

[Docket No. ER05–713–001]

Take notice that on April 15, 2005, KRK Energy submitted an amendment to its March 17, 2005 filing in Docket No. ER05–713–001.

*Comment Date:* 5 p.m. eastern time on May 6, 2005.

### 7. Cokinos Power Trading Company

[Docket No. ER05–832–000]

Take notice that on April 15, 2005, Cokinos Power Trading Company, submitted for filing a Notice of Cancellation of its market-based rate authority approved by the Commission's order issued May 14, 2002 in Docket No. ER02–1365–000.

*Comment Date:* 5 p.m. eastern time on May 6, 2005.

### 8. New England Power Company

[Docket No. ER05–835–000]

Take notice that on April 18, 2005, New England Power Company (NEP) submitted two local service agreements for local network service with Bear Swamp Power Co., LLC (Bear Swamp Power), under ISO New England Inc.'s Transmission, Markets and Services Tariff (ISO New England Inc., FERC Electric Tariff No. 3).

NEP states that a copy of this filing has been served upon Bear Swamp Power, ISO New England Inc., and regulators in the Commonwealth of Massachusetts.

*Comment Date:* 5 p.m. eastern time on May 9, 2005.

### 9. American Electric Power Service Corporation

[Docket No. ER05–836–000 ]

Take notice that on April 18, 2005, American Electric Power Service Corporation (AEP), on behalf of its affiliate Public Service Company of Oklahoma, submitted for filing a letter agreement that provides for AEP to begin engineering, equipment procurement and construction work on the network upgrades required on the AEP transmission system as a result of interconnecting the wind power project being developed by Blue Canyon Windpower II, LLC to the Western Farmers Electric Cooperative transmission system. AEP requests an effective date of April 4, 2005.

AEP states that a copy of the filing was served upon Blue Canyon Windpower II, LLC.

*Comment Date:* 5 p.m. eastern time on May 9, 2005.

### 10. American Electric Power Service Corporation

[Docket No. ER05–837–000]

Take notice that on April 15, 2005, the American Electric Power Service Corporation, on behalf of its affiliate Ohio Power Company (AEP) tendered for filing pursuant to section 35.15 of the Commission's regulations, 18 CFR section 35.15, a notice of termination of an amended interconnection and operation agreement between Ohio Power Company and Lima Energy Company, LLC. designated as Service Agreement No. 463 under American Electric Power Operating Companies' open access transmission tariff. AEP requests an effective date of April 15 2005.

AEP states that a copy of the filing was served upon Lima Energy

Company, LLC and upon the Public Utilities Commission of Ohio.

*Comment Date:* 5 p.m. eastern time on May 6, 2005.

**11. California Independent System Operator Corporation**

[Docket No. ER05–838–000]

Take notice that on April 18, 2005, the California Independent System Operator Corporation (ISO), tendered for filing an amendment (Amendment No. 5) to revise the metered subsystem agreement between the ISO and Silicon Valley Power (SVP) for acceptance by the Commission. The ISO states that the purpose of Amendment No. 5 is to add information regarding metering at the proposed new SVP Switching Station. The ISO requests privileged treatment, pursuant to 18 CFR 388.112, with regard to portions of the filing of Amendment No. 5. The ISO requests an effective date of April 19, 2005.

The ISO states that the non-privileged elements of this filing have been served on SVP, the California Public Utilities Commission, and all entities on the official service lists for Docket Nos. ER02–2321–000, ER04–185–000, ER04–940–000, ER05–81–000, ER05–449–000.

*Comment Date:* 5 p.m. eastern time on May 9, 2005.

**12. Oregon Trail Electric Consumers Cooperative, Inc.**

[Docket No. ES05–27–000]

Take notice that on April 8, 2005, Oregon Trail Electric Consumers Cooperative, Inc. (Oregon Trail) submitted an application pursuant to section 204 of the Federal Power Act seeking authorization to: (1) make long-term borrowings under a loan agreement with the National Rural Utilities Cooperative Finance Corporation (CFC) in an amount not to exceed $10 million; and (2) make no more than $5 million of short-term borrowings under a line of credit with CFC.

Oregon Trail also requests a waiver of the Commission's competitive bidding and negotiated placement requirements at 18 CFR 34.2.

*Comment Date:* 5 p.m. eastern time on May 12, 2005.

**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 and all parties to this proceeding.

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.

**Linda Mitry,**

*Deputy Secretary.*

[FR Doc. E5–2045 Filed 4–27–05; 8:45 am]

BILLING CODE 6717–01–P

## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

**[Project No. 2725–068 Georgia]**

### Oglethorpe Power Corporation, Georgia Power Company; Notice of Availability of Environmental Assessment

April 21, 2005.

In accordance with the National Environmental Policy Act of 1969, as amended, and the Federal Energy Regulatory Commission's (Commission) regulations (18 CFR part 380), Commission staff have reviewed an application for amendment of license for the Rocky Mountain Pumped Storage Project, filed January 24, 2005, to increase the project's authorized generating capacity. The project is located on Heath Creek, near the City of Rome, in Floyd County, Georgia.

The project licensees, Oglethorpe Power Corporation and Georgia Power Company, propose to increase the project's generating capacity through replacing the project's existing pump-turbine runners and possibly modifying the pump-turbine, motor-generator, and auxiliary equipment components. These changes would increase the project's maximum hydraulic capacity at peak generation by 20 to 25 percent, and increase the firm peak generating capacity by 202 megawatts.

In the environmental assessment (EA), Commission staff has analyzed the probable environmental effects of the proposed work and has concluded that approval, with appropriate environmental measures, would not constitute a major federal action significantly affecting the quality of the human environment.

A copy of the EA is attached to a Commission order titled ''Order Amending License,'' which was issued April 20, 2005, and is available for review at the Commission's Public Reference Room. A copy of the EA may also be viewed on the Commission's Web site at *http://www.ferc.gov* using the ''elibrary'' link. Enter the docket number (P–2725) in the docket number field to access the document. For assistance, call (202) 502–8222, or (202) 502–8659 (for TTY).

**Magalie R. Salas,**

*Secretary.*

[FR Doc. E5–2021 Filed 4–27–05; 8:45 am]

BILLING CODE 6717–01–P

## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

### Notice of Declaration of Intention and Soliciting Comments, Protests, and/or Motions To Intervene

April 20, 2005.

Take notice that the following application has been filed with the Commission and is available for public inspection:

a. *Application Type:* Declaration of Intention.

b. *Docket No:* DI05–2–000.

c. *Date Filed:* April 8, 2005.

d. *Applicant:* Rick Hubberd.

e. *Name of Project:* Buttermilk Falls Micro Hydroelectric Project.

f. *Location:* The proposed Buttermilk Falls Micro Hydroelectric Project will be located on Falls Brook, tributary to Neversink River, near the town of Cuddebackville, Orange County, New York.

g. *Filed Pursuant to:* Section 23(b)(1) of the Federal Power Act, 16 U.S.C. 817(b).

h. *Applicant Contact:* Mr. Rick Hibberd, 544 Oakland Valley Road, Cuddebackville, NY 12729, telephone

(845) 754–8318, e-mail: *rick@hibberd.com.*

i. *FERC Contact:* Any questions on this notice should be addressed to Henry Ecton, (202) 502–8768, or e-mail address: *henry.ecton@ferc.gov.*

j. *Deadline for filing comments, protests, and/or motions:* May 20, 2005.

All documents (original and eight copies) should be filed with: Magalie R. Salas, Secretary, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426. Comments, protests, and interventions may be filed electronically via the Internet in lieu of paper. Any questions, please contact the Secretary's Office. See, 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site at *http://www.ferc.gov.*

Please include the docket number (DI05–2–000) on any comments, protests, or motions filed.

k. *Description of Project:* The proposed Buttermilk Falls Micro Hydroelectric Project, a run-of-river facility, would include (1) An existing 5-foot-high, 20-foot-wide, concrete-and-stone dam; (2) a reservoir capacity of approximately 1,200 cubic feet; (3) an 8-inch-diameter, 500-foot-long penstock; (4) a powerhouse containing two generators with a total capacity of 15 kW; (5) a 650-foot-long transmission line; and (6) appurtenant facilities. The proposed project replaces a project damaged by a flood in August 2004. The power would be used in a residence, and the project will employ a switching system that would automatically reconnect the residence to the interstate grid if generation falls below a certain level. The project will not occupy any tribal or federal lands.

When a Declaration of Intention is filed with the Federal Energy Regulatory Commission, the Federal Power Act requires the Commission to investigate and determine if the interests of interstate or foreign commerce would be affected by the project. The Commission also determines whether or not the project: (1) Would be located on a navigable waterway; (2) would occupy or affect public lands or reservations of the United States; (3) would utilize surplus water or water power from a government dam; or (4) if applicable, has involved or would involve any construction subsequent to 1935 that may have increased or would increase the project's head or generating capacity, or have otherwise significantly modified the project's pre-1935 design or operation.

l. *Locations of the Application:* Copies of this filing are on file with the Commission and are available for public inspection. This filing may be viewed on the Web at *http://www.ferc.gov* using the ''eLibrary'' link. Enter the docket number excluding the last three digits in the docket number field to access the document. For assistance, please contact FERC Online Support at *FERCOnlineSupport@ferc.gov* or toll-free at (866) 208–3676, or TTY, contact (202) 502–8659.

m. Individuals desiring to be included on the Commission's mailing list should so indicate by writing to the Secretary of the Commission.

n. Comments, Protests, or Motions to Intervene—Anyone may submit comments, a protest, or a motion to intervene in accordance with the requirements of Rules of Practice and Procedure, 18 CFR 385.210, .211, .214. In determining the appropriate action to take, the Commission will consider all protests or other comments filed, but only those who file a motion to intervene in accordance with the Commission's Rules may become a party to the proceeding. Any comments, protests, or motions to intervene must be received on or before the specified comment date for the particular application.

o. Filing and Service of Responsive Documents—Any filings must bear in all capital letters the title ''COMMENTS'', ''PROTESTS'', AND/OR ''MOTIONS TO INTERVENE'', as applicable, and the Docket Number of the particular application to which the filing refers. A copy of any motion to intervene must also be served upon each representative of the Applicant specified in the particular application.

p. Agency Comments—Federal, State, and local agencies are invited to file comments on the described application. A copy of the application may be obtained by agencies directly from the Applicant. If an agency does not file comments within the time specified for filing comments, it will be presumed to have no comments. One copy of an agency's comments must also be sent to the Applicant's representatives.

**Magalie R. Salas,**

*Secretary.*

[FR Doc. E5–2006 Filed 4–27–05; 8:45 am]

**BILLING CODE 6717–01–P**

## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

### Notice of Application for Transfer of License and Soliciting Comments, Motions To Intervene, and Protests

April 20, 2005.

Take notice that the following hydroelectric application has been filed with the Commission and is available for public inspection:

a. *Application Type:* Transfer of License.

b. *Project No.:* 10806–012.

c. *Date Filed:* April 12, 2005.

d. *Applicants:* Holyoke Economic Development and Industrial Corporation (HEDIC, Transferor) City of Holyoke Gas & Electric Department (HG&E, Transferee).

e. *Name and Location of Project:* The Station No. 5 Project is located on the Holyoke Canal system, a diversion of the Connecticut River in Hampden County, Massachusetts.

f. *Filed Pursuant to:* Federal Power Act, 16 U.S.C. 791a–825r.

g. *Applicant Contacts:* For Transferor: Carl Eger, Jr., Holyoke Economic Development and Industrial Corporation, One Court Plaza, Holyoke, MA 01040. For Transferee: James M. Lavelle, City of Holyoke Gas & Electric Department, 99 Suffolk Street, Holyoke, MA 01040 and Nancy J. Skancke, Law Offices of GKRSE, 1500 K St., NW., Suite 330, Washington, DC 20005, (202) 408–5400.

h. *FERC Contact:* James Hunter, (202) 502–6086.

i. *Deadline for filing comments, protests, and motions to intervene:* May 13, 2005.

All documents (original and eight copies) should be filed with: Magalie R. Salas, Secretary, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426. Comments, protests, and interventions may be filed electronically via the Internet in lieu of paper; see 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site under the ''e-Filing'' link. The Commission strongly encourages electronic filings. Please include the Project Number on any comments or motions filed.

The Commission's Rules of Practice and Procedure require all interveners filing a document with the Commission to serve a copy of that document on each person in the official service list for the project. Further, if an intervener files comments or documents with the Commission relating to the merits of an issue that may affect the responsibilities

of a particular resource agency, they must also serve a copy of the documents on that resource agency.

j. *Description of Application:* The applicants seek Commission approval to transfer the license for the project from HEDIC to HG&E. The transfer is predicated on the expiration of a sale and leaseback arrangement for the project.

k. This filing is available for review at the Commission in the Public Reference Room or may be viewed on the Commission's Web site at *http://www.ferc.gov* using the ''FERRIS'' link. Enter the docket number (P–10806) in the docket number field to access the document. For assistance, call toll-free 1–866–208–3676 or e-mail *FERCOnlineSupport@ferc.gov.* For TTY, call (202) 502–8659. A copy is also available for inspection and reproduction at the addresses in item g. above.

l. Individuals desiring to be included on the Commission's mailing list should so indicate by writing to the Secretary of the Commission.

m. Comments, Protests, or Motions to Intervene—Anyone may submit comments, a protest, or a motion to intervene in accordance with the requirements of Rules of Practice and Procedure, 18 CFR 385.210, .211, .214. In determining the appropriate action to take, the Commission will consider all protests or other comments filed, but only those who file a motion to intervene in accordance with the Commission's Rules may become a party to the proceeding. Any comments, protests, or motions to intervene must be received on or before the specified comment date for the particular application.

n. Filing and Service of Responsive Documents—Any filings must bear in all capital letters the title ''COMMENTS'', ''PROTEST'', OR ''MOTION TO INTERVENE'', as applicable, and the Project Number of the particular application to which the filing refers. Any of the above-named documents must be filed by providing the original and eight copies to: The Secretary, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426. A copy of any motion to intervene must also be served upon each representative of the Applicant specified in the particular application.

o. Agency Comments—Federal, State, and local agencies are invited to file comments on the described application. A copy of the application may be obtained by agencies directly from the Applicant. If an agency does not file comments within the time specified for filing comments, it will be presumed to have no comments. One copy of an agency's comments must also be sent to the Applicant's representatives.

**Magalie R. Salas,**

*Secretary.*

[FR Doc. E5–2009 Filed 4–27–05; 8:45 am]

BILLING CODE 6717–01–P

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## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

### Notice of Application for a Waiver of Releases Under Article 405 of License for the 2004–2005 Water Year and Soliciting Comments, Motions To Intervene, and Protests

April 20, 2005.

Take notice that the following hydroelectric application has been filed with the Commission and is available for public inspection:

a. *Type of Application:* Request for a waiver of non-irrigation releases under Article 405 of the license for the water year 2004–2005.

b. *Project No:* P–1417–161.

c. *Date Filed:* April 6, 2005.

d. *Applicant:* Central Nebraska Public Power & Irrigation District.

e. *Name of Project:* Kingsley Dam Project.

f. *Location:* The project is located on the North Platte and Platte Rivers in Garden, Keith, Lincoln, Dawson, and Gosper Counties in south-central Nebraska.

g. *Pursuant to:* Federal Power Act, 16 U.S.C. 791a–825r.

h. *Applicant Contact:* Mr. Mike Drain, Natural Resources Supervisor, Central Nebraska Public Power and Irrigation District, 415 Lincoln Street, P.O. Box 740, Holdrege, NE 68949; (308) 995–3801.

i. *FERC Contact:* Any questions on this notice should be addressed to Mr. Vedula Sarma at (202) 502–6190, or e-mail address: *vedula.sarma@ferc.gov.*

j. *Deadline for filing comments and or motions:* May 6, 2005.

k. *Description of Request:* Because of prolonged and severe drought, Nebraska Public Power and Irrigation District requests a waiver for non-irrigation releases for the water year 2004–2005 from Lake McConaughy for diversion at the Keystone Diversion Dam as required under Article 405 of the license.

l. *Locations of the Application:* A of the application is available for inspection and reproduction at the Commission's Public Reference Room, located at 888 First Street, NE., Room 2A, Washington, DC 20426, or by calling (202) 502–8371. This filing may also be viewed on the Commission's Web site at *http://www.ferc.gov* using the ''eLibrary'' link. Enter the docket number excluding the last three digits in the docket number field to access the document. You may also register online at *http://www.ferc.gov/docs-filing/esubscription.asp* to be notified via e-mail of new filings and issuances related to this or other pending projects. For assistance, call 1–866–208–3676 or e-mail *FERCOnlineSupport@ferc.gov,* for TTY, call (202) 502–8659. A copy is also available for inspection and reproduction at the address in item (h) above.

m. Individuals desiring to be included on the Commission's mailing list should so indicate by writing to the Secretary of the Commission.

n. Comments, Protests, or Motions to Intervene—Anyone may submit comments, a protest, or a motion to intervene in accordance with the requirements of Rules of Practice and Procedure, 18 CFR 385.210, .211, .214. In determining the appropriate action to take, the Commission will consider all protests or other comments filed, but only those who file a motion to intervene in accordance with the Commission's Rules may become a party to the proceeding. Any comments, protests, or motions to intervene must be received on or before the specified comment date for the particular application.

o. Filing and Service of Responsive Documents—Any filings must bear in all capital letters the title ''COMMENTS'', ''RECOMMENDATIONS FOR TERMS AND CONDITIONS'', ''PROTEST'', OR ''MOTION TO INTERVENE'', as applicable, and the Project Number of the particular application to which the filing refers. All documents (original and eight copies) should be filed with: Magalie R. Salas, Secretary, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426. A copy of any motion to intervene must also be served upon each representative of the Applicant specified in the particular application.

p. Agency Comments—Federal, state, and local agencies are invited to file comments on the described application. A copy of the application may be obtained by agencies directly from the Applicant. If an agency does not file comments within the time specified for filing comments, it will be presumed to have no comments. One copy of an agency's comments must also be sent to the Applicant's representatives.

q. Comments, protests and interventions may be filed electronically

via the Internet in lieu of paper. See, 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site at *http://www.ferc.gov* under the ''e-Filing'' link.

**Magalie R. Salas,**

*Secretary.*

[FR Doc. E5–2010 Filed 4–27–05; 8:45 am]

**BILLING CODE 6717–01–P**

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## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

**[Project No. 199–205]**

### South Carolina Public Service Authority; Notice of Scoping Meetings and Site Visit and Technical Meeting and Soliciting Scoping Comments

April 20, 2005.

Take notice that the following hydroelectric applications have been filed with the Commission and are available for public inspection:

a. *Type of Application:* New Major License.

b. *Project No.:* 199–205

c. *Date filed:* March 15, 2004.

d. *Applicant:* South Carolina Public Service Authority.

e. *Name of Project:* Santee Cooper.

f. *Location:* On the Santee and Cooper Rivers, in Berkeley, Calhoun, Clarendon, Orangeburg, and Sumter Counties, South Carolina.

g. *Filed Pursuant to:* Federal Power Act, 16 U.S.C. 791(a)–825(r).

h. *Applicant Contact:* John Dulude, South Carolina Public Service Authority, One Riverwood Plaza, P.O. Box 2946101, Moncks Corner, SC 29461–2901, (843) 761.4046.

i. *FERC Contact:* Ronald McKitrick, *ronald.mckitrick@ferc.gov,* (770) 452.3778.

j. *Deadline for filing scoping comments:* June 20, 2005.

All documents (original and eight copies) should be filed with: Magalie R. Salas, Secretary, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

The Commission's Rules of Practice and Procedure require all interveners filing documents with the Commission to serve a copy of that document on each person on the official service list for the project. Further, if an intervener files comments or documents with the Commission relating to the merits of an issue that may affect the responsibilities of a particular resource agency, they must also serve a copy of the document on that resource agency.

Scoping comments may be filed electronically via the Internet in lieu of paper. The Commission strongly encourages electronic filings. See 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site (*http://www.ferc.gov*) under the ''e-Filing'' link.

k. This application is not ready for environmental analysis at this time.

l. The existing project structures consist of the Santee Dam (also known as the Wilson Dam) on the Santee River, the Pinopolis Dam on the Cooper River, the Diversion Canal, the Santee Spillway Hydroelectric Station, and the Jefferies (formerly known as Pinopolis) Hydroelectric Station. The project includes an estimated 179,990 acres of land and water resources. The project has two major impoundments—Lake Marion and Lake Moultrie—that are connected by the Diversion Canal. Lake Marion is up to 40 miles long and has a normal pool elevation of 75.0 feet. Lake Moultrie is about 10 miles long and has a normal pool elevation typically from 0.2 to 1.0 foot lower than Lake Marion. The two impoundments have a combined area of approximately 160,000 acres. The combined usable storage capacity of the two impoundments is approximately 529,000 acre-feet. The total installed capacity is 134.52 MW. The SCPSA operates the Santee Spillway and Jefferies Stations and the U.S. Army Corps of Engineers' (Corps) St. Stephen Station, which is not a part of the Commission-licensed Santee Cooper Project.

m. A copy of the application is available for review at the Commission in the Public Reference Room or may be viewed on the Commission's Web site at *http://www.ferc.gov* using the ''eLibrary'' link. Enter the docket number excluding the last three digits in the docket number field to access the document. For assistance, contact FERC Online Support at *FERCOnlineSupport@ferc.gov* or toll-free at 1–866–208–3676, or for TTY, (202) 502–8659. A copy is also available for inspection and reproduction at the address in item h above.

You may also register online at *http://www.ferc.gov/docs-filing/esubscription.asp* to be notified via e-mail of new filings and issuances related to this or other pending projects. For assistance, contact FERC Online Support.

n. Scoping Process

The Commission intends to prepare an Environmental assessment (EA) on the project in accordance with the National Environmental Policy Act. The EA will consider both site-specific and cumulative environmental impacts and reasonable alternatives to the proposed action.

#### Scoping Meetings

FERC staff will conduct one agency scoping meeting and two public meetings. The agency scoping meeting will focus on resource agency and non-governmental organization (NGO) concerns, while the public scoping meeting is primarily for public input. All interested individuals, organizations, and agencies are invited to attend one or both of the meetings, and to assist the staff in identifying the scope of the environmental issues that should be analyzed in the EA. The times and locations of these meetings are as follows:

#### Agency Scoping Meeting

*Date:* Thursday May 19, 2005.
*Time:* 10 a.m.
*Place:* Holiday Inn Express.
*Address:* 505 R.C. Dennis Blvd., Moncks Corner, South Carolina.

#### Public Scoping Meetings

*Date:* Tuesday, May 17, 2005.
*Time:* 7:30 p.m.
*Place:* Holiday Inn Express.
*Address:* 505 R.C. Dennis Blvd., Moncks Corner, South Carolina.

*Date:* Wednesday, May 18, 2005.
*Time:* 7 p.m.
*Place:* Clarendon County Hospital Center, Cypress Center for Health and Wellness.
*Address:* 40 Hospital Street, Manning, South Carolina.

Copies of the Scoping Document (SD1) outlining the subject areas to be addressed in the EIS were distributed to the parties on the Commission's mailing list. Copies of the SD1 will be available at the scoping meeting or may be viewed on the Web at *http://www.ferc.gov* using the ''eLibrary'' link (see item m above).

#### Site Visit

The Applicant and FERC staff will conduct a project site visit beginning at 9 a.m. on May 17 and 18, 2005. All interested individuals, organizations, and agencies are invited to attend. All participants should meet at the Jefferies Hydroelectric Station at 9 a.m. on May 17, 2005 and at Wilson Landing near the Santee Dam spillway at 9 a.m. on May 18, 2005. All participants are responsible for their own transportation to the site. Anyone with questions about the site visit should contact Mr. John Dulude of SCPSA at (843) 761–4046.

#### Technical Conference

Commission staff will hold a technical conference to discuss the issue

of fish passage, entrainment, and outmigration survival related to operation of the Santee Cooper Project. This conference will be held at the Holiday Inn Express in Moncks Corner, South Carolina at 2 p.m. on May 19, 2005. All interested parties are invited to attend. The meeting will not be recorded by a stenographer, but the Commission staff will prepare notes on the meeting for inclusion in the public record.

**Objectives**

At the scoping meetings, the staff will: (1) Summarize the environmental issues tentatively identified for analysis in the EA; (2) solicit from the meeting participants all available information, especially quantifiable data, on the resources at issue; (3) encourage statements from experts and the public on issues that should be analyzed in the EA, including viewpoints in opposition to, or in support of, the staff's preliminary views; (4) determine the resource issues to be addressed in the EA; and (5) identify those issues that require a detailed analysis, as well as those issues that do not require a detailed analysis.

**Procedures**

The meetings are recorded by a stenographer and become part of the formal record of the Commission proceeding on the project.

Individuals, organizations, and agencies with environmental expertise and concerns are encouraged to attend the meeting and to assist the staff in defining and clarifying the issues to be addressed in the EA.

**Magalie R. Salas,**

*Secretary.*

[FR Doc. E5–2011 Filed 4–27–05; 8:45 am]

**BILLING CODE 6717–01–P**

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## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

**[Project No. 2204–024]**

### City and County of Denver, CO; Notice of Application and Applicant-Prepared Ea Accepted for Filing, Soliciting Motions To Intervene and Protests, and Soliciting Comments, and Terms and Conditions

April 20, 2005.

Take notice that the following hydroelectric application and applicant-prepared environmental assessment have been filed with the Commission and are available for public inspection.

a. *Type of Application:* Small hydroelectric power project exemption from licensing.

b. *Project No.:* 2204–024.

c. *Date filed:* December 30, 2004.

d. *Applicant:* City and County of Denver, Colorado, acting by and through its Board of Water Commissioners.

e. *Name of Project:* Williams Fork Reservoir Project.

f. *Location:* On the Williams Fork River near its confluence with the Colorado River at Parshall, in Grand County, Colorado. No Federal lands would be affected.

g. *Filed Pursuant to:* Public Utility Regulatory Policies Act of 1978, 16 U.S.C. 2705, 2708.

h. *Applicant Contact:* Kevin Urie, Environmental Planner, Denver Water, 1600 W. 12th Ave., Denver, CO 80204, (303) 628–5987.

i. *FERC Contact:* Dianne Rodman, (202) 502–6077 or *dianne.rodman@ferc.gov.*

j. Deadline for filing motions to intervene and protests, comments, and terms and conditions is 60 days from the issuance of this notice; reply comments are due 105 days from the issuance date of this notice.

All documents (original and eight copies) should be filed with: Magalie R. Salas, Secretary, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

The Commission's Rules of Practice require all intervenors filing documents with the Commission to serve a copy of that document on each person on the official service list for the project. Further, if an intervenor files comments or documents with the Commission relating to the merits of an issue that may affect the responsibilities of a particular resource agency, they must also serve a copy of the document on that resource agency.

Motions to intervene and protests, comments, and terms and conditions may be filed electronically via the Internet in lieu of paper. The Commission strongly encourages electronic filings. See 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site (*http://www.ferc.gov*) under the ''e-Filing'' link.

k. This application has been accepted for filing.

l. *The existing project consists of:* (1) The 209-foot-high, 670-foot-long concrete thin arch dam with a crest elevation of 7,814 feet above mean sea level (msl); (2) the Williams Fork reservoir with a surface area of 1,628 acres and storage of 96,822 acre-feet at elevation 7,811 feet msl; (3) a reinforced concrete penstock intake on the face of the dam, with a 7-foot by 5-foot fixed wheel penstock gate controlling flows into a 66-inch-diameter steel penstock running through the dam; (4) river outlet works on the face of the dam, leading to a 54-inch-diameter steel embedded pipe that conveys water to the outlet works valves; (5) a 66-foot-long, 30-foot-wide, 60-foot-high concrete powerhouse at the toe of the dam, containing one vertical-axis turbine/generator with a capacity of 3,150 kilowatts (kW); (6) a tailrace excavated in the streambed rock, carrying the combined powerhouse and river outlet discharges; (7) a 60-foot by 40-foot switchyard; (8) and appurtenant equipment.

The applicant would increase the project's generating capacity to 3,650 kW by installing a second, 500-kW vertical turbine/generator. The new unit would be located adjacent to the existing powerhouse inside the river outlet works structure and would discharge into the same tailrace as the existing turbine via a weir box. The new unit would use water being released from the reservoir for other purposes, and operation of the dam would not be changed to increase power production.

m. A copy of the application is available for review at the Commission in the Public Reference Room or may be viewed on the Commission's Web site at *http://www.ferc.gov* using the ''eLibrary'' link. Enter the docket number excluding the last three digits in the docket number field to access the document. For assistance, contact FERC Online Support at *FERCOnlineSupport@ferc.gov* or toll-free at 1–866–208–3676, or for TTY, (202) 502–8659. A copy is also available for inspection and reproduction at the address in item h above.

n. Anyone may submit comments, a protest, or a motion to intervene in accordance with the requirements of Rules of Practice and Procedure, 18 CFR 385.210, .211, .214. In determining the appropriate action to take, the Commission will consider all protests or other comments filed, but only those who file a motion to intervene in accordance with the Commission's Rules may become a party to the proceeding. Any comments, protests, or motions to intervene must be received on or before the specified comment date for the particular application.

All filings must (1) Bear in all capital letters the title ''PROTEST'', ''MOTION TO INTERVENE'', ''COMMENTS,'' ''REPLY COMMENTS,'' or ''TERMS AND CONDITIONS;'' (2) set forth in the heading the name of the applicant and the project number of the application to which the filing responds; (3) furnish the name, address, and telephone

number of the person protesting or intervening; and (4) otherwise comply with the requirements of 18 CFR 385.2001 through 385.2005. All comments or terms and conditions must set forth their evidentiary basis and otherwise comply with the requirements of 18 CFR 4.34(b). Agencies may obtain copies of the application directly from the applicant. A copy of any protest or motion to intervene must be served upon each representative of the applicant specified in the particular application. A copy of all other filings in reference to this application must be accompanied by proof of service on all persons listed in the service list prepared by the Commission in this proceeding, in accordance with 18 CFR 4.34(b) and 385.2010.

You may also register online at *http://www.ferc.gov/docs-filing/esubscription.asp* to be notified via e-mail of new filings and issuances related to this or other pending projects. For assistance, contact FERC Online Support.

**Magalie R. Salas,**

*Secretary.*

[FR Doc. E5–2012 Filed 4–27–05; 8:45 am]

**BILLING CODE 6717–01–P**

## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

### Notice of Application for Non-Project Use of Project Lands and Waters and Soliciting Comments, Motions To Intervene, and Protests

April 20, 2005.

Take notice that the following application has been filed with the Commission and is available for public inspection:

a. *Application Type:* Non-Project Use of Project Lands and Waters.

b. *Project No:* 2503–089.

c. *Date Filed:* March 17, 2005.

d. *Applicant:* Duke Power, a division of Duke Energy Corporation.

e. *Name of Project:* Keowee-Toxaway Project.

f. *Location:* Lake Keowee is located in Oconee County, South Carolina. This project does not occupy any Tribal or Federal lands.

g. *Filed Pursuant to:* Federal Power Act, 16 U.S.C. 791(a)–825(r) and §§ 799 and 801.

h. *Applicant Contact:* Mr. Joe Hall, Lake Management Representative; Duke Energy Corporation; P.O. Box 1006; Charlotte, NC; 28201–1006; (704) 382–8576.

i. *FERC Contact:* Any questions on this notice should be addressed to Brian Romanek at (202) 502–6175 or by e-mail: *Brian.Romanek@ferc.gov.*

j. *Deadline for filing comments and or motions:* May 20, 2005.

All documents (original and eight copies) should be filed with: Ms. Magalie R. Salas, Secretary, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426. Please include the project number (P–2503–089) on any comments or motions filed. Comments, protests, and interventions may be filed electronically via the internet in lieu of paper. See, 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site under the ''e-Filing'' link. The Commission strongly encourages e-filings.

k. *Description of Request:* Duke Power, licensee for the Keowee-Toxaway Hydroelectric Project, has requested Commission authorization to lease to the Sunrise Pointe Association, Inc., (Sunrise Pointe) 0.29 acres of project lands to expand a marina previously approved by the Commission for a Commercial/ Residential Marina. The marina expansion would consist of one cluster dock that would accommodate twelve boats. Sunrise Pointe is located on Lake Keowee in Oconee County.

l. *Location of the Application:* This filing is available for review at the Commission or may be viewed on the Commission's Web site at *http://www.ferc.gov,* using the ''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.

m. Individuals desiring to be included on the Commission's mailing list should so indicate by writing to the Secretary of the Commission.

n. Comments, Protests, or Motions to Intervene—Anyone may submit comments, a protest, or a motion to intervene in accordance with the requirements of Rules of Practice and Procedure, 18 CFR 385.210, .211, .214. In determining the appropriate action to take, the Commission will consider all protests or other comments filed, but only those who file a motion to intervene in accordance with the Commission's Rules may become a party to the proceeding. Any comments, protests, or motions to intervene must be received on or before the specified comment date for the particular application.

o. Filing and Service of Responsive Documents—Any filings must bear in all capital letters the title ''COMMENTS'', ''RECOMMENDATIONS FOR TERMS AND CONDITIONS'', ''PROTEST'', OR ''MOTION TO INTERVENE'', as applicable, and the Project Number of the particular application to which the filing refers. A copy of any motion to intervene must also be served upon each representative of the Applicant specified in the particular application.

p. Agency Comments—Federal, State, and local agencies are invited to file comments on the described applications. A copy of the applications may be obtained by agencies directly from the Applicant. If an agency does not file comments within the time specified for filing comments, it will be presumed to have no comments. One copy of an agency's comments must also be sent to the Applicant's representatives.

**Magalie R. Salas,**

*Secretary.*

[FR Doc. E5–2013 Filed 4–27–05; 8:45 am]

**BILLING CODE 6717–01–P**

## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

### Notice of Application for Amendment of Exemption and Soliciting Comments, Motions To Intervene, and Protests

April 20, 2005.

Take notice that the following hydroelectric application has been filed with the Commission and is available for public inspection:

a. *Type of Application:* Amendment of license to rehabilitate one of the eight generating units of the Ohio Falls Project.

b. *Project No:* 289–016.

c. *Date Filed:* April 13, 2005.

d. *Applicant:* Louisville Gas & Electric Company.

e. *Name of Project:* Ohio Falls Project.

f. *Location:* The project is located on the Ohio River in Jefferson County, Kentucky.

g. *Pursuant to:* Federal Power Act, 16 U.S.C. 791a–825r.

h. *Applicant Contact:* Mr. Roger D. Hickman, Senior Regulatory Analyst, Louisville Gas & Electric Company, 220 Main Street, Louisville, KY 40202; (502) 627–4031, or e-mail address: *roger.hickman@lgeenergy.com.*

i. *FERC Contact:* Any questions on this notice should be addressed to Mr.

Vedula Sarma at (202) 502–6190, or e-mail address: *vedula.sarma@ferc.gov.*

j. *Deadline for filing comments and or motions:* May 20, 2005.

k. *Description of Request:* Louisville Gas & Electric Company propose to rehabilitate one of the existing generator units by rewinding generator and the wicket gate, restoring the draft tube, replacing discharge ring liner and runner. The proposal would increase the nameplate rating of the rehabilitated unit from 10.04 MW to 13.077 MW, and the hydraulic capacity of the unit would increase from 4,400 cfs to 5,297 cfs. The increase in maximum hydraulic capacity of the project would be 2.5%.

l. *Locations of the Application:* A of the application is available for inspection and reproduction at the Commission's Public Reference Room, located at 888 First Street, NE., Room 2A, Washington, DC 20426, or by calling (202) 502–8371. This filing may also be viewed on the Commission's Web site at *http://www.ferc.gov* using the ''eLibrary'' link. Enter the docket number excluding the last three digits in the docket number field to access the document. You may also register online at *http://www.ferc.gov/docs-filing/esubscription.asp* to be notified via e-mail of new filings and issuances related to this or other pending projects. For assistance, call 1–866–208–3676 or e-mail *FERCOnlineSupport@ferc.gov,* for TTY, call (202) 502–8659. A copy is also available for inspection and reproduction at the address in item (h) above.

m. Individuals desiring to be included on the Commission's mailing list should so indicate by writing to the Secretary of the Commission.

n. Comments, Protests, or Motions to Intervene—Anyone may submit comments, a protest, or a motion to intervene in accordance with the requirements of Rules of Practice and Procedure, 18 CFR 385.210, .211, .214. In determining the appropriate action to take, the Commission will consider all protests or other comments filed, but only those who file a motion to intervene in accordance with the Commission's Rules may become a party to the proceeding. Any comments, protests, or motions to intervene must be received on or before the specified comment date for the particular application.

o. Filing and Service of Responsive Documents—Any filings must bear in all capital letters the title ''COMMENTS'', ''RECOMMENDATIONS FOR TERMS AND CONDITIONS'', ''PROTEST'', OR ''MOTION TO INTERVENE'', as applicable, and the Project Number of the particular application to which the filing refers. All documents (original and eight copies) should be filed with: Magalie R. Salas, Secretary, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426. A copy of any motion to intervene must also be served upon each representative of the Applicant specified in the particular application.

p. Agency Comments—Federal, State, and local agencies are invited to file comments on the described application. A copy of the application may be obtained by agencies directly from the Applicant. If an agency does not file comments within the time specified for filing comments, it will be presumed to have no comments. One copy of an agency's comments must also be sent to the Applicant's representatives.

q. Comments, protests and interventions may be filed electronically via the Internet in lieu of paper. See, 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site at *http://www.ferc.gov* under the ''e-Filing'' link.

**Magalie R. Salas,**

*Secretary.*

[FR Doc. E5–2014 Filed 4–27–05; 8:45 am]

**BILLING CODE 6717–01–P**

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## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

**[P–12514–000]**

### Northern Indiana Public Service Company; Notice of Scoping Meetings and Site Visits and Soliciting Scoping Comments

April 21, 2005.

Take notice that the following hydroelectric application has been filed with the Commission and is available for public inspection:

a. *Type of Application:* Original Major License.

b. *Project No:* 12514–000.

c. *Date Filed:* June 28, 2004.

d. *Applicant:* Northern Indiana Public Service Company (NIPSCO).

e. *Name of Project:* Norway-Oakdale Hydroelectric Project.

f. *Location:* On the Tippecanoe River in Carroll and White counties, Indiana. The project does not affect Federal lands.

g. *Filed Pursuant to:* Federal Power Act, 16 U.S.C. 791(a)–825(r).

h. *Applicant Contact:* Jerome B. Weeden, Vice President Generation; Northern Indiana Public Service Company; 801 East 86th Avenue; Merrillville, IN 46410; (219) 647–5730.

i. *FERC Contact:* Sergiu Serban at (202) 502–6211 or *sergiu.serban@ferc.gov.*

j. *Deadline for filing scoping comments:* May 31, 2005.

All documents (original and eight copies) should be filed with Magalie R. Salas, Secretary, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

The Commission's Rules of Practice and Procedure require all intervenors filing documents with the Commission to serve a copy of that document on each person on the official service list for the project. Further, if an intervenor files comments or documents with the Commission relating to the merits of an issue that may affect the responsibilities of a particular resource agency, they must also serve a copy of the document on that resource agency.

Scoping comments may be filed electronically via the Internet in lieu of paper. The Commission strongly encourages electronic filings. See 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site (*http://www.ferc.gov*) through the Commission's eLibrary using the ''Documents & Filing'' link.

k. This application is not ready for environmental analysis at this time.

l. *Description of the Project:* The existing Norway-Oakdale Hydroelectric Project consists of the Norway development and the Oakdale development and has a combined installed capacity of 16.4 megawatts (MW). The project produces an average annual generation of 65,000 megawatt-hours (MWh). All power is dispatched directly into the local grid and is used within the East Central Area Reliability Coordination Agreement.

The Norway development includes the following constructed facilities: (1) A 915-foot-long dam consisting of (a) a 410-foot-long, 34-foot-maximum-height earth fill embankment with a concrete core wall; (b) a 225-foot-long, 29-foot-high concrete gravity overflow spillway with flashboards; (c) a 120-foot-long, 30-foot-high concrete gated spillway with three 30-foot-wide, 22-foot-high spillway gates; (d) an 18-foot-wide, 30-foot-high trash sluice housing with one 8-foot-wide, 11-foot-high gate; and (e) a 142-foot-long, 64-foot-wide powerhouse integral with the dam containing four vertical Francis turbine-generating units with a rated head of 28 feet, total hydraulic capacity of 3,675 cubic feet per second (cfs), and a total electric output of 7.2 MW; (2) a 10-mile-long, 10-foot average depth, 1,291-acre reservoir; (3) a 2-mile-long, 69,000-volt transmission line; and (4) appurtenant facilities.

The Oakdale development includes the following constructed facilities: (1) A 1,688-foot-long dam consisting of (a) a 126-foot-long, 58-foot maximum-height east concrete buttress and slab dam connecting the left abutment to the powerhouse; (b) a 114-foot-long, 70-foot-wide powerhouse integral with the dam containing three vertical Francis turbine-generating units with a rated head of 42 to 48 feet, total hydraulic capacity of 3,200 cfs and a total electric output of 9.2 MW; (c) an 18-foot-wide structure containing a nonfunctional fish ladder and a gated trash sluice; (d) an 84-foot-long ogee-shaped concrete gated spillway with two 30-foot-wide, 22-foot-high vertical lift gates; (e) a 90-foot-long, six bay concrete gravity siphon-type auxiliary spillway; and (f) a 1,260-foot-long, west earth embankment with a maximum height of 58 feet and a 30-foot-wide crest; (2) a 10-mile-long, 16-foot-average depth, 1,547-acre reservoir; and (3) appurtenant facilities.

m. A copy of the application is available for review at the Commission in the Public Reference Room or may be viewed on the Commission's Web site at *http://www.ferc.gov* using the ''eLibrary'' link. Enter the docket number, excluding the last three digits in the docket number field (P–12514), to access the document. For assistance, contact FERC Online Support at *FERCOnlineSupport@ferc.gov;* call toll-free at (866) 208–3676; or, for TTY, call (202) 502–8659. A copy is also available for inspection and reproduction at the address in item h above.

You may also register online at *http://www.ferc.gov/esubscribenow.htm* to be notified via e-mail of new filings and issuances related to this or other pending projects. For assistance, contact FERC Online Support.

n. *Scoping Process:* The Commission intends to prepare a single environmental document in accordance with the National Environmental Policy Act. The environmental assessment (EA) will consider both site-specific and cumulative environmental effects and reasonable alternatives to the proposed action.

*Site Visit:* NIPSCO and the Commission staff will conduct a project site visit on May 18, 2005. We will meet at the Norway Powerhouse and then proceed to the project power plants. Site visitors will be responsible for their own transportation. Anyone with questions regarding the site visits, including directions, should contact Mike Canner of NIPSCO at (219) 956–5163.

*Date:* Wednesday, May 18, 2005.

*Time:* 8:45 am (c.s.t.).

*Place:* Norway Powerhouse.

**Scoping Meetings**

Commission staff will conduct two public scoping meetings in the project area to solicit comments and viewpoints the public may wish to offer concerning project effects associated with the Norway and Oakdale developments. The evening meeting will focus on input from the public, and the morning meeting will focus on resource agency concerns. We invite all interested agencies, nongovernmental organizations, Native American tribes, and individuals to attend one or both of the meetings to help us identify the scope of environmental issues to be analyzed in the EA. The times and locations of these meetings are as follows:

*Public Scoping Meeting*

*Date:* May 18, 2005.

*Time:* 7 p.m. (c.s.t.).

*Place:* Best Western Brandywine Complex.

*Address:* 728 South Sixth Street, Monticello, IN 47960.

*Agency Scoping Meeting:*

*Date:* May 19, 2005.

*Time:* 10 a.m.

*Place:* Best Western Brandywine Complex.

*Address:* 728 South Sixth Street, Monticello, IN 47960.

Copies of the Scoping Document (SD1) outlining the subject areas to be addressed in the EA will be available at the scoping meetings or may be viewed on the Commission's Web site at *http://www.ferc.gov* using the ''eLibrary'' link [see item (m) above]. These meetings are posted on the Commission's calendar located on the Internet at *http://www.ferc.gov/EventCalendar/EventsList.aspx* along with other related information.

*Objectives:* At the scoping meetings, staff will (1) Summarize the environmental issues tentatively identified for analysis in the EA; (2) solicit from the meeting participants all available information, especially empirical data, on the resources at issue; (3) encourage statements from experts and participants on issues that should be analyzed in the EA, including viewpoints in opposition to, or in support of, the staff's preliminary view; (4) determine the resource issues to be addressed in the EA; and (5) identify those issues that do not require a detailed analysis.

*Procedures:* The meetings will be recorded by a stenographer and become part of the formal record of the Commission proceeding on the project.

Individuals, organizations, resource agencies, and Indian tribes with environmental expertise and concerns are encouraged to attend the meetings and to assist Commission staff in defining and clarifying the issues to be addressed in the EA.

**Magalie R. Salas,**

*Secretary.*

[FR Doc. E5–2020 Filed 4–27–05; 8:45 am]

**BILLING CODE 6717–01–P**

## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

**[Docket No. ER02–1656–000]**

### California Independent System Operator Corporation; Notice of FERC Staff Attendance

April 19, 2005.

The Federal Energy Regulatory Commission (Commission) hereby gives notice that on April 21, 22 and 29, 2005, members of its staff will attend workshops on Resource Adequacy hosted by the California Public Utilities Commission (CPUC). The workshops will take place in Commission Courtroom A of the CPUC, located at 505 Van Ness Avenue, San Francisco, CA 94102.

Sponsored by the CPUC, the meeting is open to the public, and staff's attendance is part of the Commission's ongoing outreach efforts. The meeting may discuss matters at issue in Docket No. ER02–1656–000.

*For Further Information Contact:* Katherine Gensler at *katherine.gensler@ferc.gov*; (916) 294–0275.

**Magalie R. Salas,**

*Secretary.*

[FR Doc. E5–2033 Filed 4–27–05; 8:45 am]

**BILLING CODE 6717–01–P**

## ENVIRONMENTAL PROTECTION AGENCY

**[AMS–FRL–7905–3]**

### California State Motor Vehicle Pollution Control Standards; Notice of Within-the-Scope Determination for Amendments to California's Low Emission Vehicle Standards (''LEV II'')

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Notice regarding within-the-scope determination.

**SUMMARY:** The California Air Resources Board (CARB) requested that EPA confirm CARB's finding that two sets of

follow-up amendments to its LEV II regulations, which were approved by the CARB Board on November 15, 2001 and December 12, 2002, respectively, are within-the-scope of an existing EPA waiver of federal preemption. In a separate request, CARB requested EPA to grant a full waiver for a particular provision contained in one of these sets of LEV II amendments, and thus to not include that provision as part of the within-the-scope request. EPA in this notice has made the requested confirmation that the amendments in CARB's within-the-scope request are within-the-scope of the existing waiver. EPA will in a subsequent **Federal Register** notice consider the request for a full waiver for the separate provision.

**DATES:** Any objections to the findings in this notice regarding EPA's determination that California's amendments are within-the-scope of a previous waiver must be filed by May 31, 2005. Otherwise, at the end of this 30-day period, these findings will become final. Upon receipt of any timely objection, EPA will consider scheduling a public hearing to reconsider these findings in a subsequent **Federal Register** notice.

**ADDRESSES:** Any objections to the within-the-scope findings in this notice should be filed with David Dickinson at the address noted below. The Agency's Decision Document, containing an explanation of the Assistant Administrator's decision, as well as all documents relied upon in making that decision, including those submitted to EPA by CARB, are contained in the public docket. The official public docket is the collection of materials that is available for public viewing. The EPA Docket Center Public Reading Room is open from 8:30 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 Air and Radiation Docket is (202) 566–1743. The reference number for this docket is OAR–2004–0057. The location of the Docket Center is the Environmental Protection Agency, (EPA/DC) EPA West, Room B102, 1301 Constitution Ave., NW., Washington, DC. Copies of the Decision Document for this determination can also be obtained by contacting David Dickinson as noted below, or can be accessed on the EPA's Office of Transportation and Air Quality Web site, also noted below.

**FOR FURTHER INFORMATION CONTACT:** David Dickinson, Attorney-Advisor, Certification and Compliance Division, (6405J), U.S. Environmental Protection Agency, 1200 Pennsylvania Avenue, NW., Washington, DC 20460. Telephone: (202) 343–9256, Fax: (202) 343–2804, E-Mail: *Dickinson.David@epa.gov.*

**SUPPLEMENTARY INFORMATION:**

## I. Obtaining Electronic Copies of Documents

Electronic copies of this Notice and the accompanying Decision Document are available via the Internet on the Office of Transportation and Air Quality (OTAQ) Web site (*http://www.epa.gov/OTAQ*). Users can find these documents by accessing the OTAQ Home Page and looking at the path entitled ''Chronological List of All OTAQ Regulations.'' This service is free of charge, except for any cost you already incur for Internet connectivity. The official **Federal Register** version of the notice is made available on the day of publication on the primary Web site (*http://www.epa.gov/docs/fedrgstr/EPA-AIR/*).

Please note that due to differences between the software used to develop the documents and the software into which the documents may be downloaded, changes in format, page length, etc. may occur.

*Docket:* An electronic version of the public docket is available through EPA's electronic public docket and comment system. You may use EPA dockets at *http://www.epa.gov/edocket/* to submit or view the 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 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. Once in the edocket system, select ''search,'' then key in the appropriate docket ID number. [1]

## II. Second Set of LEV II Amendments

I have determined that these amendments to the CARB's LEV II regulation are within-the-scope of a prior waiver issued under section 209(b) of the Clean Air Act (Act), 42 U.S.C. 7543(b), granted by EPA to CARB.[2] The amendments to the regulations, outlined in CARB's request letter [3], and fully described in CARB's submissions, provide for: (1) An NMOG certification factor to account for carbonyls and a statement of compliance for meeting the formaldehyde standards in lieu of full testing; (2) an extension of the generic reactivity adjustment factors (RAFs); (3) revisions to the emission offset requirements for ''AB 965'' vehicles which allow new vehicles certified to EPA emission levels (as opposed to CARB's standards) to be averaged into a manufacturer's fleet mix in California; (4) additional intermediate in-use compliance standards for light-duty trucks engineered for heavier duty cycles that have a base payload capacity of 2,500 lbs. or higher, or for vehicles certified to CARB's optional 150,000 mile standards; (5) revisions to California's NMOG test procedures; and (6) revisions to the fleet average NMOG requirements for independent low volume manufacturers.

In an April 12, 2004 letter to EPA, CARB notified EPA of the above-described amendments to its LEV II regulations and asked EPA to confirm that these amendments are within-the-scope of EPA's previous waiver for the LEV II regulation. EPA can make such a confirmation if certain conditions are present. Specifically, if California acts to amend a previously waived standard or accompanying enforcement procedure, the amendment may be considered within-the-scope of a previously granted waiver provided that it does not undermine California's determination that its standards in the aggregate are as protective of public health and welfare as applicable Federal standards, does not affect the consistency with section 202(a) of the Act, and raises no new issues affecting EPA's previous authorization determination.[4]

In its request letter, CARB stated that the amendments will not cause the California standards, in the aggregate, to be less protective of public health and welfare than the applicable Federal standards. Regarding consistency with

[1] CARB's ''first'' set of LEV II follow-up amendments, which included the ''cleaner federal vehicle'' provisions, were adopted by the CARB Board on December 27, 2000, and were covered by EPA's LEV II waiver published April 22, 2003. The ''second'' set of follow-up amendments included an amendment to section 1962, title 13, CCR, the section regarding zero-emission vehicles (ZEVs). The LEV II waiver previously issued by EPA does not include this provision and by today's decision EPA is also not considering the ZEV provisions. The second set of amendments also include a provision in a table at section 1961(a)(1), title 13, CCR, which has the effect of making the particulate standard applicable to all motor vehicles regardless of fuel (the previous regulation only applied to diesel-fueled vehicles). Per CARB's request of December 20, 2004 (see OAR–2004–0057–0031) EPA is not considering this provision as part of today's decision.

[2] EPA previously granted CARB a waiver of federal preemption for the LEV II standards. (68 FR 19811 (April 22, 2003)).

[3] Docket entry OAR 2004–0057–0002, letter to EPA, from CARB, dated April 12, 2004.

[4] Decision Document accompanying scope of waiver determination in 51 FR 12391 (April 10, 1986).

section 202(a), CARB stated that the amendments do not raise any concerns of inadequate leadtime or technological feasibility or impose any inconsistent certification requirements (compared to the Federal requirements). Finally, CARB stated that the amendments raise no new issues affecting the prior EPA authorization determinations.

EPA's analysis confirms CARB's finding that the criteria for these amendments meeting a within-the-scope designation have been met. Thus, EPA finds that these amendments are within-the-scope of a previous waiver. A full explanation of EPA's decision is contained in a Decision Document which may be obtained from EPA as noted above.

### III. Third Set of LEV II Amendments

I have determined that the third set of amendments to the CARB's LEV II regulation are within-the-scope of a prior waiver issued under section 209(b) of the Clean Air Act (Act), 42 U.S.C. 7543(b), granted by EPA to CARB.[5] The amendments to the regulations, outlined in CARB's request letter[6], and fully described in CARB's submissions, provide for: (1) A change in the allowed maintenance schedule for test vehicles to account for new full useful life periods; (2) revisions to the California Label Specifications; (3) revisions to the test cycle for direct ozone reduction technologies; (4) extending the high mileage testing requirement for vehicles certifying to the 150,000-mile emission standards; (5) corrections to the number of ''significant figures'' to be included in measuring the 50° F standards; (6) clarification of onboard refueling vapor recovery (ORVR) requirements for gaseous fueled vehicles; and (7) various minor changes to the LEV II regulatory language which have no new substantive effect.

In an April 12, 2004 letter to EPA, CARB notified EPA of the above-described amendments to its LEV II regulations and asked EPA to confirm that these amendments are within-the-scope of a previous waiver.

In its request letter, CARB stated that the amendments will not cause the California standards, in the aggregate, to be less protective of public health and welfare than the applicable Federal standards. Regarding consistency with section 202(a), CARB stated that the amendments do not raise any concerns of inadequate leadtime or technological feasibility or impose any inconsistent certification requirements (compared to the Federal requirements). Finally, CARB stated that the amendments raise no new issues affecting the prior EPA waiver determination.

EPA's analysis confirms CARB's finding that the criteria for these amendments meeting a within-the-scope designation have been met. Thus, EPA finds that these amendments are within-the-scope of previous authorizations. A full explanation of EPA's decision is contained in a Decision Document which may be obtained from EPA as noted above.

Because these amendments are within the scope of a previous waiver, a public hearing to consider them is not necessary. However, if any party asserts an objection to these findings by May 31, 2005, EPA will consider holding a public hearing to provide interested parties an opportunity to present testimony and evidence to show that there are issues to be addressed through a section 209(b) waiver proceeding and that EPA should reconsider its findings. Otherwise, these findings will become final on May 31, 2005.

My decision will affect not only persons in California but also the manufacturers outside the State who must comply with California's requirements in order to produce vehicles for sale in California. For this reason, I hereby determine and find that this is a final action of national applicability.

Under section 307(b)(1) of the Act, judicial review of this final action may be sought only in the United States Court of Appeals for the District of Columbia Circuit. Petitions for review must be filed by June 27, 2005. Under section 307(b)(2) of the Act, judicial review of this final action may not be obtained in subsequent enforcement proceedings.

EPA's determination that these California regulations are within-the-scope of a prior waiver determination by EPA does not constitute a significant regulatory action under the terms of Executive Order 12866 and this action is therefore not subject to Office of Management and Budget review.

In addition, this action is not a rule as defined in the Regulatory Flexibility Act, 5 U.S.C. 601(2). Therefore, EPA has not prepared a supporting regulatory flexibility analysis addressing the impact of this action on small business entities.

The Congressional Review Act, 5 U.S.C. 801 *et seq.*, as added by the Small Business Regulatory Enforcement Fairness Act of 1996, does not apply because this action is not a rule, for purposes of 5 U.S.C. 804(3).

Finally, the Administrator has delegated the authority to make determinations regarding waivers under section 209(b) of the Act to the Assistant Administrator for Air and Radiation.

Dated: April 21, 2005.

**Jeffrey R. Holmstead,**

*Assistant Administrator, Office of Air and Radiation.*

[FR Doc. 05–8529 Filed 4–27–05; 8:45 am]

**BILLING CODE 6560–50–P**

[5] EPA previously granted CARB a waiver of federal preemption for the LEV II standards. (68 FR 19811 (April 22, 2003)).

[6] Docket entry OAR–2004–0057–0001, letter to EPA, from CARB, dated April 12, 2004.

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## ENVIRONMENTAL PROTECTION AGENCY

**[OPP–2005–0006; FRL–7703–2]**

## Tribal Pesticide and Special Projects; Request for Proposals

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Notice.

**SUMMARY:** The Office of Pesticide Programs (OPP), in coordination with the EPA regional offices, is soliciting pesticide and special project proposals from eligible Tribes, Alaska native villages, and intertribal consortia for fiscal year (FY) 2005 funding. Under this program, cooperative agreement awards will provide financial assistance to eligible Tribal governments, Alaska native village governments, or intertribal consortia to carry out projects that assess or reduce risks to human health and the environment from pesticide exposure. The total amount of funding available for award in FY 2005 is expected to be approximately $445,000, with a maximum funding level of $50,000 per project.

**DATES:** Proposals must be received by EPA on or before 5 p.m. eastern standard time, June 13, 2005.

**ADDRESSES:** Proposals may be submitted to your EPA regional office by mail. An electronic copy of the proposal is also required and may be sent via e-mail to the regional contact. Please follow the detailed instructions provided in Unit V.1. of the **SUPPLEMENTARY INFORMATION**.

**FOR FURTHER INFORMATION CONTACT:** Georgia McDuffie, Field and External Affairs Division (7506C), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001; telephone number: (703) 605–0195; e-mail address: *mcduffie.georgia@epa.gov*.

**SUPPLEMENTARY INFORMATION:**

### Overview Information

The following listing provides certain key information concerning this funding opportunity.

- *Federal agency name*: Environmental Protection Agency.
- *Funding opportunity title*: Tribal Pesticide and Special Projects: Request for Proposals.
- *Funding opportunity number*: OPP–007.
- *Announcement type*: The initial announcement of a funding opportunity.
- *Catalog of Federal Domestic Assistance (CFDA) number*: This program is included in the Catalog of Federal Domestic Assistance under number 66.716 at *http://www.cfda.gov*.
- *Dates*: Applications must be received by EPA on or before June 13, 2005.

## I. Funding Opportunity Description

### *A. Authority*

EPA expects to enter into grants and cooperative agreements under the authority provided in the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA). Section 20 of FIFRA authorizes the Agency to issue grants or cooperative agreements for research, public education, training, monitoring, demonstration, and studies.

The award and administration of these grants will be governed by the Uniform Administrative Requirements for Grants and Cooperative Agreements to states, Tribes, and local governments set forth at 40 CFR part 31. Grants awarded pursuant to this solicitation are program grants subject to the regulations for ''Environmental Program Grants for Tribes'' set forth at 40 CFR 35.500–35.518. In addition, the provisions in 40 CFR part 32, governing government wide debarment and suspension, and the provisions in 40 CFR part 40, regarding restrictions on lobbying, apply.

All costs incurred under this program must be allowable under the applicable OMB Cost Circular A–87. Copies of this circular can be found at *http://www.whitehouse.gov/omb/circulars/*. In accordance with EPA policy and the OMB circular, any recipient of funding must agree not to use assistance funds for fund raising, or political activities such as lobbying members of Congress or lobbying for other Federal grants, cooperative agreements, or contracts. See 40 CFR part 40.

### *B. Program Description*

1. *Purpose and scope*. Cooperative agreements awarded under this program are intended to provide financial assistance to eligible Tribal governments or intertribal consortia for projects that assess and/or reduce the risks of pesticide exposure to human health and the environment. For this solicitation, the word ''Tribe'' refers to federally recognized Tribes as well as to federally recognized Alaska native villages, and an intertribal consortium defined as a partnership of two or more federally recognized Tribes that is authorized by its membership to apply for, and receive, assistance under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA).

Funds may be used to support new activities that fit the requirements of this solicitation. Projects may be targeted to any pesticide-related concern or need facing a Tribe or intertribal consortium. Although the proposal may request funding for activities that will further long-term objectives, this program provides one-time funding, and the maximum period of performance for funded activities is expected to be approximately 12 months.

2. *Goal and objectives*. EPA intends that recipients will use funding provided under this Tribal Pesticide and Special Project Program to help address the specific, pesticide-related concerns of their communities. The Agency will consider funding a broad range of projects that assess or reduce pesticide exposure risks to human health and the environment in Indian country.

3. *History*. Since 1997, EPA has provided funding for projects that supported pesticide management and water quality protection in Indian country. For the purposes of this solicitation, the term ''Indian country'' means:

(i) All land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and including rights-of-way running throughout the reservation;

(ii) All dependent Indian communities within the borders of the United States, whether within the original or subsequently acquired territory thereof, and whether within or without the limits of the State; and

(iii) All Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

4. *EPA Strategic Plan Linkage and Anticipated Outcomes/Outputs*.

i. Linkage to EPA Strategic Plan/GPRA Architecture. These assistance agreements will support progress towards EPA Strategic Plan Goal 4--Healthy Communities and Ecosystems; Objective 4.1--Chemical, Organism and Pesticide Risk; Program/Project 09--Categorical Grants: Pesticides Program Implementation (STAG).

ii. *Outcomes*. Through these agreements EPA hopes to work with the Tribes to assess and/or reduce risks to human health and the environment from pesticide exposure by funding projects that target areas of pesticide concern, i.e., water quality, exposure and risk assessment; effects of pesticides on cultural activities; integrated pest management, or alternatives to other pesticides.

iii. *Outputs*. The anticipated output of these tribal projects may include educational and outreach materials, conferences and training, and other programs, policies and activities that will result in the reduction of pesticide exposure.

Each year since 1997, EPA's Office of Pesticide Programs, in coordination with the EPA regional offices, has awarded approximately $445,000 annually to eligible Tribes and intertribal consortia for projects supporting pesticide management and water quality goals.

This **Federal Register** notice provides qualification and application requirements to parties who may be interested in submitting proposals for FY 2005 monies. The total amount available for award during this funding cycle is expected to be approximately $445,000. The maximum award amount per proposal is set at $50,000, and only one proposal per applicant will be accepted for consideration. Indirect cost rates will not increase the $50,000 maximum funding amount.

## II. Award Information

Funding for each award recipient will be in the form of a cooperative agreement for $50,000 or less, under FIFRA section 20 and section 23(a)(1). Total funding available for award is expected to be approximately $445,000.

Should additional funding become available for award, the Agency may make additional monies available, based on this solicitation and in accordance with the final selection process, without further notice of competition. The Agency also reserves the right to decrease available funding for this program, or to make no awards based on this solicitation. All costs charged to these awards must be allowable under the applicable OMB Cost Circular, A–87 which may be found at *http://www.whitehouse.gov/omb/circulars/*.

## III. Eligibility Information

1. *Threshold eligibility factors*. To be eligible for consideration, applicants must meet the following criteria. Failure to meet these criteria will result in the automatic disqualification of the proposal for consideration for funding:

- Be an applicant who is eligible to receive funding under this announcement, including federally recognized Tribal governments,

federally recognized Alaska native villages, or an intertribal consortium (If you are applying as a consortium, you must provide verification of your eligibility according to the requirements of Unit I.B.1.). Only one project proposal may be submitted per applicant.

- The proposal must meet all format and content requirements contained in this Notice.
- The proposal submittal must comply with the directions for submittal contained in this Notice.

2. *Eligibility criteria*. Applicants will be evaluated on the following criteria:

i. Projects must be targeted to a pesticide concern or need facing a Tribe or intertribal consortium, including, but not limited to:

- Water quality.
- Development/support of exposure and risk assessment capacity.
- Traditional Tribal lifeways/subsistence. Effects of pesticides on cultural activities.
- Assessment of the need for and/or development of a pesticide management policy or plan.
- Consideration of integrated pest management, reduced pesticide use, or alternatives to pesticides.
- Sampling.
- Concerns associated with the return of culturally and spiritually significant items that may have been exposed to pesticides as part of historical preservation efforts by museums or other collectors.
- Noxious weed education materials and/or control alternatives.
- Public outreach/education materials relating to pest management and/or pesticide safety.

In addition, eligible proposals may be focused on the monitoring of surface water or ground water (e.g., assessing dietary exposure to pesticides via drinking water, determining those water bodies that may be impaired by pesticides, predicting potential exposure to endangered or threatened aquatic species, or establishing a baseline of contamination from which to measure progress toward future improvement in the environment).

Water quality projects may involve: (1) Information gathering; (2) baseline development including vulnerability assessment, identifying pesticides (from either on or off reservation sources) that are most likely to impact water quality; (3) providing information to pesticide users on ways they can assist in protecting the quality of water sources; (4) developing other measures that protect water from pesticides; or (5) developing projects aimed at preventing contamination of water sources, mitigating contaminated water sources or developing best management practices.

Other projects, not necessarily linked to water quality issues, may include: (1) Training on the establishment of Tribal pesticide codes; (2) creating and implementing a system for the proper disposal of pesticides, and/or; (3) educational outreach to the community on pesticide controls. Sampling projects may include soil sampling, residue sampling on culturally significant/medicinal plants, or sampling to determine the effects of pesticides on cultural activities, such as subsistence hunting and fishing.

Water quality and non-water quality pesticide-related projects are equally eligible for funding under this grant program. Reviewers will give additional consideration to proposals that recognize and build upon existing, publicly available, technical and educational information.

ii. *Outcomes*. Applicants must provide a description of expected outcomes. Nominees must be able to account for the environmental improvement that is expected to result from the project and adequately show how the project will be evaluated. Criteria by which the project will be judged and whether or not it will be considered a success should be incorporated into the description.

iii. *Past awards and performance*. Applicants must provide information, if the applicant has received project funding in prior years through the Office of Pesticide Programs Tribal grant program, that outcomes of prior projects were beneficial, sustainable, and/or transferable. If the applicant has never received an award under this grant program, that should be clearly noted. If unexpected barriers were encountered during the implementation of a prior project, those should be noted and briefly discussed as well.

3. *Cost sharing and matching*. There are no cost share requirements for this project.

## IV. Application and Submission Information

1. *Address to request proposal package*. The applicant must submit the project proposal to the appropriate EPA regional contact, as listed below. One original, signed package must be sent by mail. An electronic copy of the proposal is also required and must be sent via e-mail to the regional contact. The proposal must be received by your EPA region no later than close of business, June 13, 2005. Incomplete or late proposals will be disqualified for funding consideration. Contact the appropriate regional staff person if you need assistance or have questions regarding the creation or submission of a project proposal. To ensure proper receipt by EPA, it is imperative that you identify docket ID number OPP–2005–0006 in the subject line on the first page of your proposal.

EPA regional Tribal pesticide contacts are as follows:

EPA Region I (Connecticut, Maine, New Hampshire, Rhode Island, Vermont). Rob Koethe, EPA Region I, One Congress St., Suite 1100, (CPT), Boston, MA 02114–2023, telephone: (617) 918–1535, fax: (617) 918–1505, e-mail: *koethe.robert@epa.gov*.

EPA Region II (New Jersey, New York, Puerto Rico, Virgin Islands). Tracy Truesdale, EPA Region II, U.S. EPA Facilities, Raritan Depot (MS500), 2890 Woodbridge Ave., Edison, NJ 08837–3679, telephone: (732) 906–6894, fax: (732) 321–6771, e-mail: *truesdale.tracy@epa.gov*.

EPA Region III (Delaware, Maryland, Pennsylvania, Virginia, West Virginia, District of Columbia). Fatima El Abdaoui, EPA Region III, Chestnut Building (3AT11), Philadelphia, PA 19107, telephone: (215) 814–2129, fax: (215) 814–3114, e-mail: *el-abdaoui.fatima@epa.gov*.

EPA Region IV (Alabama, Florida, Georgia, Kentucky, Mississippi, North Carolina, South Carolina, Tennessee). Randy Dominy, EPA Region IV, 61 Forsyth St., SW., Atlanta, GA 30303, telephone: (404) 562–8996, fax: (404) 562–8973, e-mail: *dominy.randy@epa.gov*.

EPA Region V (Illinois, Indiana, Michigan, Minnesota, Wisconsin). Meonii Crenshaw, EPA Region V, 77 West Jackson Boulevard (DT–8J), Chicago, IL 60604–3507, telephone: (312) 353–4716, fax: (312) 353–4788, e-mail: *crenshaw.meonii@epa.gov*.

EPA Region VI (Arkansas, Louisiana, New Mexico, Oklahoma, Texas). Jerry Collins, EPA Region VI, 1445 Ross Avenue, (6PD–P), Dallas, TX 75202–2733, telephone: (214) 665–7562, fax: (214) 665–7263, e-mail: *collins.jerry@epa.gov*.

EPA Region VII (Iowa, Kansas, Missouri, Nebraska). John Tice, EPA Region VII, 100 Centennial Mall N., Room 289, Lincoln, NE 68508, telephone: (402) 437–5080, fax: (402) 323–9079, e-mail: *tice.john@epa.gov*.

EPA Region VIII (Colorado, Montana, North Dakota, South Dakota, Utah, Wyoming). Margaret Collins, EPA Region VIII, 999 18th St., (8P–P3T), Denver, CO 80202–2466, telephone: (303) 312–6023, fax: (303) 312–6044, e-mail: *collins.margaret@epa.gov*.

EPA Region IX (Arizona, California, Hawaii, Nevada, American Samoa, the Commonwealth of the Northern Mariana Islands, Guam). Marcy Katzin, EPA Region IX, 75 Hawthorne St., (CMD 5), San Francisco, CA 94105, telephone: (415) 947–4215, fax: (415) 947–3583, e-mail: *katzin.marcy@epa.gov*.

EPA Region X (Alaska, Idaho, Oregon, Washington). Theresa Pimentel, EPA Region X, 1200 Sixth Avenue, (OCE-084), Seattle, WA 98101, telephone: (206) 553–0257, fax: (206) 553–1775, e-mail: *pimentel.theresa@epa.gov*.

2. *Notification process*. Regions will notify their respective applicants of the selections. Those applicants not awarded funds may request an explanation for the lack of award from EPA regional staff.

3. *Content and form of proposal submission*. Proposals must be typewritten, in 12 point or larger print, using 8.5 x 11 inch paper with minimum 1 inch horizontal and vertical margins. Pages must be numbered, in order starting with the cover page and continuing through the appendices. One original hard copy and one electronic copy (e-mail or disk) is required.

Your application package must include the following:

• *Completed Standard Form SF 424*, Application for Federal Assistance. Your organization fax number and e-mail address must be included. The application forms are available at *http://www.epa/gov.ogd/grants/how_to_apply.htm*.

• *Completed Section B*. Budget Categories on page 1 of Standard Form SF 424A. The estimated budget should outline costs for personnel, fringe benefits, travel, equipment, supplies, contractual, indirect cost rate, and any other costs associated with the proposed project.

• *Detailed itemization of the amounts budgeted by individual Object Class Categories* (see ''allowable costs'' discussion below).

• *Statement regarding whether this proposal is a continuation of a previously funded project*. If so, please provide the assistance number and status of the current grant/cooperative agreement.

• *Cover page*. Including descriptive project title.

• *Executive summary*. The executive summary shall be a stand alone document, not to exceed one page, containing the specifics of what is proposed and what you expect to accomplish regarding measuring or movement toward achieving project goals. This summary should identify the measurable environmental results you expect including potential human health benefits.

• *Table of contents*. A one page table listing the different parts of your proposal, including any appendices, and the page number on which each part begins.

• *Proposal narrative*. Includes Parts I-V as identified below (not to exceed 10 pages).

• *Part I: Project title*. Your proposal should be given a descriptive project title.

• *Part II - Objectives*. A number list (1, 2, etc.) of concisely written project objectives, in most cases, each objective can be stated in a single sentence.

• *Part III - Justification*. For each objective listed in Part II, discuss the potential outcome in terms of human health, environmental and/or pesticide risk reduction.

• *Part IV - Approach and methods*. Describe in detail how the program will be carried out. Describe how the system or approach will support the program goals.

• *Part V - Impact assessment*. In this section, describe how you will evaluate the success of the program in terms of measurable results. How and with what measures will human health and the environment be better protected as a result of the program. Quantifiable risk reduction measures should be described.

• *Appendices*. Appendices must be included as part of the proposal package and contain specific information that directly supports the likely ability of the applicant to successfully meet the performance requirements of this solicitation. Additional appendices are not permitted.

• *Timetable (Draft work plan 1–2 pages)*. The timetable includes what will be accomplished in terms of milestones and goals and who is resposible for the achievement and should outline:

-- Description/list of deliverables.

-- The separate phases of the project.

-- The tasks associated with each phase of the project.

-- The time frames for completion of each phase or task.

The name, title of the person(s) who will conduct each phase or task. The dates when progress reports will be provided to EPA, clearly showing deliverables, accomplishments, delays and/or obstacles. (Project costs cannot be incurred until a final work plan has been approved by the appropriate EPA regional office.)

• *Major participants*. Brief resumes for each major project participant (not to exceed two pages) should be submitted in this appendix. The name, title of the person(s) who will conduct each phase or task.

• *Letter or resolution from the Tribal leadership showing support for, and commitment to, the project should be submitted*. (If it is not possible to obtain a letter/resolution from your Tribal leader to submit with your project proposal, an interim letter of explanation must be included with the proposal. An original letter/resolution from your Tribal leadership will be required prior to project award.) If the applicant is a consortium of federally recognized Tribes (as defined in Unit II.B.), a letter from the consortium leadership, on consortium letterhead, affirming consortium status and member Tribes' support for the project, must accompany the proposal.

• *Letter of confirmation of availability for any other funds needed to complete the project*. If your proposal requires the use of additional funds for leveraging, please include a letter from the funding source, confirming that these monies are available for the project. If the budget includes a Tribal in-kind contribution, a letter of confirmation is not needed.

• *Additional information*. Additional information, including maps, data tables, excerpts from studies, photographs, news media reports, or other documents should be included in appendices to the main project proposal, when they add significant supporting detail to the main proposal. Appendix titles, and their starting page numbers, should be included in the Table of Contents, just after the proposal cover page.

3. *Submission dates and times*. All applications must be submitted by mail. An electronic copy of the proposal is also required. It can be sent via e-mail to the regional contact. Regardless of submission method, all applications must be received by EPA on or before June 13, 2005.

4. *Intergovernmental Review*. All applicants should be aware that formal requests for assistance (i.e., SF 424 and associated documentation) may be subject to intergovernmental review under Executive Order 12372, ''Intergovernmental Review of Federal Programs.'' Applicants should contact their state's single point of contact (SPOC) for further information. There is a list of these contacts at the following web site: *http:/whitehouse.gov/omb/grants/spoc.html*.

5. *Funding restrictions*. Cooperative agreements awarded under this program are intended to provide financial assistance to eligible Tribal governments or intertribal consortia for projects that assess and/or reduce the risks of pesticide exposure to human health and

the environment. EPA cooperative agreement funds may only be used for the purpose set forth in the agreement, and use must be consistent with the statutory authority for the award. Funds may not be used for matching funds for other Federal grants, lobbying, or intervention in Federal regulatory or adjudicatory proceedings. In addition, Federal funds may not be used to sue the Federal government or any other government entity. All costs identified in the budget must conform to the applicable Federal Cost Principles contained in OMB Circulars A–21, A–87, A–122, as appropriate.

6. *Other submission requirements*. Each application must include the original paper copy of the submission, as well as one electronic copy. The electronic copy of your application package, whether submitted via e-mail or on a disk, must be consolidated into a single Microsoft Word or Adobe PDF 5/6 file. If you send your electronic copy via e-mail, please identify it as ''FY 2005 Proposal for Tribal Pesticide and Special Projects'' on the subject line and attach it as an e-mail to the appropriate regional contact person listed in IV.1. Be sure you identify the proposal originator in the body of the e-mail, before the attachment, to enable us to match it with your hard copy. If mailing a disk, please use a 3.5 disk that is labeled as a proposal for the ''FY 2005 Tribal Pesticide and Special Projects'' and enclose it in the proposal package. For further information on submission, contact the EPA regional Tribal pesticide representative listed in Unit IV.1.

7. *Confidential business information*. In accordance with 40 CFR 2.203, applicants may claim all or a portion of their application/proposal as confidential business information. EPA will evaluate confidential claims in accordance with 40 CFR part 2. Applicants must clearly mark applications/proposals or portions of applications/proposals they claim as confidential. If no claim of confidentiality is made, EPA is not required to make the inquiry to the applicant otherwise required by 40 CFR 2.204(2) prior to disclosure.

## V. Application Review Information

1. *Review and selection process*. Proposals will be reviewed and approved for validity and completeness by EPA regional office personnel. If the region determines that an application is incomplete, the proposal will not be considered further. The region will forward all complete proposal packages, along with regional comments, to an EPA review panel convened by the Office of Pesticide Programs. If necessary, the panel will consult with regional staff regarding proposal content and regional comments. If money remains after the award selection process is completed, the review team will determine the allocation of the remaining money. Final selections will be made by close of business 60 days after the closing date for receipt of proposals.

Applicants must submit information, as specified in this solicitation, to address award criteria. Applicants must also provide information specified in this solicitation that will assist EPA in assessing the Tribe's capacity to do the work outlined in the project proposal. The proposed work plan and budget should reflect activities that can realistically be completed during the period of performance of the cooperative agreement. Criteria that will be used to review, rank, and award funding are found below.

i. *General background information requirement*. Pesticide-related projects that address a wide variety of issues of concern to Indian country are eligible for funding under this grant program. If the applicant Tribe or consortium has previously received project funding from the Office of Pesticide Programs Tribal Grant Program, specific information about those funded projects should be included with this proposal, for example:

- What was the project?
- When was the award made, and for what dollar amount?
- What successes or barriers were encountered as the project moved forward?
- What outputs from previously funded OPP projects continue to provide benefits to the Tribe (e.g., retention of trained personnel, continued use of purchased equipment, accretion of baseline, sampling and analysis data)?

Information on projects previously funded by this OPP Tribal grant program may be provided in several ways: You may include descriptive language either in the narrative of the current proposal or as an appendix to the current proposal, or you may include a copy of the previous project's final report as an appendix to this proposal. The name of the EPA Project Officer for any projects previously funded under this grant program should also be included. If the applicant has never received funding under this grant program, that should be clearly noted in the proposal. Failure to address this information request may render your proposal non-responsive to this solicitation. If you have questions about this requirement, please contact your EPA region, or the person listed under **FOR FURTHER INFORMATION CONTACT**.

ii. *Selection criteria*. The proposals will be reviewed, evaluated, and ranked by a selected panel of EPA reviewers, based on the evaluation criteria and weighting factors that follow immediately below. (Total possible points: 100).

*Criterion 1: Technical Qualifications, Overall Management Plan, Past Awards and Performance (25 Points)*

- Does the person(s) designated to lead the project have the technical expertise he or she will need to successfully complete it? Does the project leader have experience in grant and project management?
- Proposals should provide complete information on the education, skills, training and relevant experience of the project leader. As appropriate, please cite technical qualifications and specific examples of prior, relevant experience. If this project will develop new Tribal capacity, describe how the project leader and/or staff will gain necessary training and expertise.
- To whom does the project leader report? What systems of accountability and management oversight are in place to ensure that this project stays on track?
- If previously performed work directly impacts this project, briefly describe the connection. If a directly relevant project is currently ongoing, what progress has been made? If this new project builds upon earlier efforts, how will the Tribe use the knowledge, data, and experience derived from previous projects to shape this new proposed activity?
- If appropriate, reviewers will give additional consideration to proposals that recognize and build upon existing, publicly available, technical and educational information.

*Criterion 2: Justification for Need of the Project, Soundness of Technical Approach (30 Points)*

To provide reviewers with context for your proposed project, and to assist them in gaining the clearest possible sense of the positive impact of this project on your Tribe and the environment, please briefly provide some information about your reservation:

- Specify the location, size, geography, and general climate of the reservation.
- About how many residents are Tribal members and how many are not Tribal members?
- How much of the reservation is under cultivation where pesticides are used?

• Does the reservation include wetlands or other natural resource preserves?

• If there is relevance to your project, briefly describe the Tribal and non-Tribal populations of surrounding counties/states, and surrounding land use.

• How many people (tribal/non-Tribal) are employed by the Tribal government (e.g., in government services, including environmental monitoring or management, health care, police and fire protection)?

• How many are employed on the reservation in other areas that use pesticides or may be impacted by their use (e.g., agriculture, animal husbandry, fisheries/fishing, forestry, construction, casinos/resorts/golf course maintenance, etc.)?

• If you are concerned about pesticide pollution that may originate within reservation boundaries, what are the potential sources and what chemicals might be involved?

• If you are concerned with pollution migration from off-reservation sources, what are those potential sources, and what chemicals are of specific concern?

• Is the Tribe concerned about water quality issues? If so, please describe the nature of these concerns.

• Does the Tribe currently have any pesticide policy or pesticide management program in place? If not is it seeking to establish a code?

• Why is this project important to the Tribe or the Tribal consortium? What environmental issues(s) will it address and how serious and/or pervasive are these issues? What is the expected outcome of the project? What benefits will this project bring to the Tribe in terms of human and environmental health?

• Has the tribe identified a need to coordinate or consult with other parties (Tribal and/or non-Tribal) to ensure the success of this project? If so, who are they and what is your plan to involve them? How will they be affected by the outcome of the project?

• What are the key outputs of this project? How do you propose to quantify and measure progress? Have interim milestones for this project been established? If so, what are they? How will you evaluate the success of the project in terms of measurable environmental results?

• Does your budget request accurately reflect the work you propose? Please provide a clear correlation between expenses and project objectives. Will EPA funding for this project be supplemented with funding from other source(s)? If so, please identify them.

• Please describe the steps you will take to ensure successful completion of the project. Provide a time-line and description of interim and final results and deliverables.

*Criterion 3: Benefits, Sustainability, Transferable Results (30 Points)*

Discuss if the results from this project will continue to provide benefits to the Tribe or other Tribes after the period of performance has expired and this funding is no longer available.

• How are the benefits of this effort expected to be sustained over time?

• Can the project results be incorporated into existing and/or future pesticide-related Tribal environmental activities?

• Are any of the deliverables, experiences, products, or outcomes resulting from the project transferable to other communities? Might this project readily be implemented by another Tribe?

• What ecological or human health benefits does this project provide? What quality of life issues does the project address?

• Does the project have limited or broad application to address risks related to pesticides?

• Does the applicant recognize a need for coordination between Tribal agencies and outside communities, and/or Federal, State or local agencies?

• Will the project help build Tribal infrastructure and capacity? How?

*Criterion 4: Outcomes (15 Points)*

The proposals will be scored based on how well they are supported by a clearly articulated set of performance and progress measures. Reviewers will evaluate the workplan in relation to its likelihood to achieve predicted environmental results, including the likelihood of attaining expected outcomes, reaching project goals, and producing on-the-ground, quantifiable environmental change. A description of expected outcomes must be included. Reviewer consideration included:

• What is the environmental improvement that is expected to result from the project?

• Does the applicant adequately show how the project will be evaluated?

• Has the applicant developed criteria by which the project will be judged and whether or not it will be considered a success?

iii. *Selection official*. The final funding decision will be made from the group of top rated proposals by the Chief of the Government and International Services Branch, Field and External Affairs Division, Office of Pesticide Programs. The Agency reserves the right to reject all proposals and make no awards.

iv. *Disputes*. Assistance agreement competition-related disputes will be resolved in accordance with the dispute resolution procedures published in the *Federal Register* of January 26, 2005 (70 FR 3629), which can be found at *http://a257.g.akamaitech.net/7/257/ 2422/01jan20051800/edocket.access.gop.gov/2005/05-1371.htm*. Copies of these procedures may also be requested by contacting the appropriate EPA Regional Tribal Coordinator listed in Unit IV.1.

## VI. Award Administration Information

1. *Notification process*. Regions will notify their respective applicants of the selections. Those applicants not awarded funds may request an explanation for the lack of award from EPA regional staff.

2. *Post-selection regulatory requirements*. Selected applicants must negotiate a final work plan, including reporting requirements, with the designated EPA regional project officer. In addition, selected applicants must negotiate a final work plan, including reporting requirements, with the designated EPA regional project officer. For more general information on post award requirements and the evaluation of grantee performance, see 40 CFR part 31.

## VII. Agency Contact

For additional information contact: Georgia McDuffie, Field and External Affairs Division (7506C), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001; telephone number: (703) 305–6463; fax number: (703) 308–1850; e-mail address: *mcduffie.georgia@epa.gov* or contact the EPA regional Tribal pesticide representative listed in Unit IV.1.

## VIII. Other Information

### *A. Does this Action Apply to Me?*

Potentially affected entities include federally recognized Tribal governments, federally recognized Alaska native village governments, or qualified intertribal consortia. Only one project proposal from each Tribal government or intertribal consortium will be considered for funding. 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–2005–0006. 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 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 VIII.B.1. Once in the system, select ''search,'' then key in the appropriate docket ID number.

## IX. Submission to Congress and the Comptroller General

Grant solicitations containing binding legal requirements are considered rules for the purpose of the Congressional Review Act (CRA) (5 U.S.C. 801 *et seq.*). The CRA 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 grant solicitation 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 in the **Federal Register**. This rule is not a ''major rule'' as defined by 5 U.S.C. 804(2).

## List of Subjects

Environmental protection, Grants, Pesticides, Training.

Dated: April 25, 2005.

**Susan B. Hazen,**

*Acting Assistant Administrator, Office of Prevention, Pesticides and Toxic Substances.*

[FR Doc. 05–8611 Filed 4–26–05; 2:19 pm]

**BILLING CODE 6560–50–S**

## FEDERAL COMMUNICATIONS COMMISSION

**[Report No. AUC–05–81–D (Auction No. 81); DA 05–1048]**

## Low Power Television Auction No. 81 Scheduled for September 14, 2005, Auction Inventory Revised, Applicants Proposing ''Non-Commercial Educational Broadcast Station'' Must Respond by May 13, 2005

**AGENCY:** Federal Communications Commission.

**ACTION:** Notice.

**SUMMARY:** The Wireless Telecommunications Bureau and Media Bureau set forth a revised list of construction permits for certain low power television (''LPTV''), television translator and Class A television broadcast stations available for auction in Auction No. 81.

**DATE:** Applicants seeking designation as a noncommercial educational (''NCE'') station applicant must submit specified information to the Commission no later than May 13, 2005.

**FOR FURTHER INFORMATION CONTACT:** *For auction questions:* Lynne Milne, Wireless Telecommunications Bureau, Auctions and Spectrum Access Division at (202) 418–0660. *For questions on auction inventory or NCE status:* Shaun Maher or Hossein Hasemzadeh, Media Bureau, Video Division at (202) 418–1600.

**SUPPLEMENTARY INFORMATION:** This is a summary of the *Low Power Television Auction No. 81 Scheduled for September 14, 2005, Auction Inventory Revised, Application Proposing ''Non-Commercial Educational Broadcast Station'' Must Respond By May 13, 2005 Public Notice (''LPTV Revised Inventory Public Notice*''), released on April 13, 2005. The complete text of the *LPTV Revised Inventory Public Notice,* including attachments that describe the changes to the Auction No. 81 inventory, and related Commission documents, is available for public inspection and copying from 8 a.m. to 4:30 p.m. Monday through Thursday or from 8 a.m. to 11:30 p.m. on Friday at the FCC Reference Information Center, Portals II, 445 12th Street, SW., Room CY–A257, Washington, DC 20554. The *LPTV Revised Inventory Public Notice* and related Commission documents may also be purchased from the Commission's duplicating contractor, Best Copy and Printing, Inc. (''BCPI''), Portals II, 445 12th Street, SW., Room CY–B402, Washington, DC 20554, telephone (202) 488–5300, facsimile (202) 488–5563, or you may contact BCPI at its Web site: *http://www.BCPIWEB.com.* When ordering documents from BCPI, please provide the appropriate FCC document number (for example, DA 05–1048). The *LPTV Revised Inventory Public Notice* and related documents are also available on the Internet at the Commission's Web site: *http://wireless.fcc.gov/auctions/81/.*

### I. Bidders Claiming Status Under 47 U.S.C. 309(j)(2) Exemption for ''Noncommercial Educational Broadcast Stations'' Must Respond by May 13, 2005

1. Applications for construction permits for noncommercial educational broadcast stations (''NCE stations'') are exempt from competitive bidding by 47 U.S.C. 309(j)(2)(C). For purposes of Auction No. 81, this exemption applies to a proposal for a new LPTV, television translator or Class A television broadcast station that is owned and operated by a municipality and which transmits only noncommercial programs for educational purposes. *See* 47 U.S.C. 397(6)(B). In the *NCE Second Report and Order,* 68 FR 26220–26222, May 15, 2003, the Commission held that LPTV and television translator facilities qualify as NCE stations under 47 U.S.C. 397(6)(B), only if they are owned and operated by municipalities and transmit only NCE programs. Applications for such NCE stations are exempt from auction.

2. In the same order, the Commission also stated that proposals for NCE stations may be submitted for non-reserved spectrum in a filing window, subject to being returned as unacceptable for filing if there is any mutually exclusive application for a commercial station. Accordingly, the Commission will provide applicants in Auction No. 81 with an opportunity to designate their status as an NCE station applicant under the definition set forth in 47 U.S.C. 397(6)(B). Applicants must understand that if they make such a claim and one or more of the NCE applicant's engineering proposals is determined to be mutually exclusive with one or more engineering proposals filed by an applicant for a commercial station, the NCE station engineering proposal(s) will be returned as unacceptable for filing.

3. To claim status as an NCE applicant, an applicant for Auction No. 81 must submit an amendment to its short-form application (FCC Form 175) in the form of a written statement filed in an e-mail sent to *auction81@fcc.gov* or by facsimile to Kathryn Garland at (717) 338–2850. The written statement must declare the applicant's claim that it qualifies as a municipality under the

definition set forth in 47 U.S.C. 397(6)(B). Specifically, the applicant must state that it is: (1) Proposing to construct and operate a noncommercial educational station; (2) it is a municipality, and (3) it intends to transmit only noncommercial programs for educational purposes. Applicants seeking designation as an NCE station applicant must submit this specified information to the Commission no later than May 13, 2005.

**II. Dismissal of Engineering Proposals for Failure To Submit FRN**

4. The *LPTV Revised Inventory Public Notice* lists the engineering proposals that will no longer be included in Auction No. 81 as a result of the applicant's failure to submit the requested FCC Registration Number (FRN). The engineering proposals listed in Attachment B were dismissed on April 13, 2005 for failure to submit an FRN pursuant to authority delegated in 47 CFR 0.283 and 0.331. A listing of the dismissed engineering proposals is provided in Attachment B to the *LPTV Revised Inventory Public Notice.*

**III. Revised Inventory**

5. The *LPTV Revised Inventory Public Notice* corrects and replaces the list of available construction permits released as Attachment A to the *Auction No. 81 Comment Public Notice,* 70 FR 11975, March 10, 2005. Due to the dismissal of some engineering proposals for failure to submit an FRN, some engineering proposals became a singleton, an engineering proposal that is not mutually-exclusive with any other engineering proposal, and were removed from the auction inventory. The removal of engineering proposals in some cases resulted in the removal of entire mutually exclusive (MX) groups from the auction inventory. Upon reexamination, we also removed from the auction inventory some MX groups which consisted of ''daisy chain'' engineering proposals. In addition, we removed from the auction inventory some engineering proposals previously identified as singletons.

6. Participation in Auction No. 81 will be limited to those applicants and mutually-exclusive (MX) engineering proposals that are identified in the revised Attachment A. Qualified applicants will be eligible to bid only on those construction permits for which the applicant's engineering proposal is specified in the particular MX group as identified in the revised Attachment A to the *LPTV Revised Inventory Public Notice.*

**IV. Retention of MX Group 56 in Auction**

7. In response to the *Auction No. 81 Comment Public Notice,* a licensee requested that MX group 56 be removed from the auction. For the reasons explained in the *LPTV Revised Inventory Public Notice,* the Commission declines to remove MX group 56 from Auction No. 81.

Federal Communications Commission.

**Gary Michaels,**

*Deputy Chief, Auctions and Spectrum Access Division, WTB.*

[FR Doc. 05–8599 Filed 4–27–05; 8:45 am]

BILLING CODE 6712–01–P

## FEDERAL COMMUNICATIONS COMMISSION

### Sunshine Act Meeting Schedule Change; Open Commission Meeting Friday, April 29, 2005

April 25, 2005.

Please note that the date for the Federal Communications Commission open meeting is rescheduled from Thursday, April 28, 2005 to Friday, April 29, 2005.

The Federal Communications Commission will hold an open meeting on the subjects listed below on Friday, April 29, 2005, which is scheduled to commence at 9:30 a.m. in Room TW–C305, at 445 12th Street, SW., Washington, DC.

| Item No. | Bureau | Subject |
|---|---|---|
| 1 | International | *Title:* Mandatory Electronic Filing for International Telecommunications Services and Other International Filings (IB Docket No. 04–426).<br>*Summary:* Commission will consider a Report and Order concerning the Mandatory Electronic Filing for International Telecommunications Services. |
| 2 | Media | *Title:* Implementation of Section 210 of the Satellite Home Viewer Extension and Reauthorization Act of 2004 to Amend Section 338 of the Communications Act.<br>*Summary:* The Commission will consider a Notice of Proposed Rulemaking that initiates a proceeding to implement new satellite broadcast carriage requirements in the noncontiguous states. |
| 3 | Wireline Competition | *Title:* Implementation of the Telecommunications Act of 1996; Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information (CC Docket No. 96–115); Implementation of the Local Competition Provisions of the Telecommunications Act of 1996 (CC Docket No. 96–98); and Provision of Directory Listing Information under the Communications Act of 1934, as Amended (CC Docket No. 99–273).<br>*Summary:* The Commission will consider an Order addressing petitions for clarification and/or reconsideration of the Subscriber List Information (SLI)/Directory Assistance (DA) First Report and Order, and SLI/DA Order on Reconsideration and Notice. |
| 4 | Office of Engineering and Technology | *Title:* Technical Standards for Determining Eligibility for Satellite-Delivered Network Signals Pursuant to the Satellite Home Viewer Extension and Reauthorization Act.<br>*Summary:* The Commission will consider a Notice of Inquiry regarding standards that allow viewers that are unserved by a digital television broadcast station to receive network programming via satellite. |

The meeting site is fully accessible to people using wheelchairs or other mobility aids. Sign language interpreters, open captioning, and assistive listening devices will be provided on site. Request other reasonable accommodations for people with disabilities as early as possible. Last minute requests will be accepted, but may be impossible to fill. Send an e-mail to *fcc504@fcc.gov* or call the Consumer & Governmental Affairs Bureau at (202) 418–0530 (voice), (202) 418–0432 (tty).

Additional information concerning this meeting may be obtained from Audrey Spivack or David Fiske, Office of Media Relations, (202) 418–0500;

TTY 1–888–835–5322. Audio/Video coverage of the meeting will be broadcast live with open captioning over the Internet from the FCC's Audio/Video Events Web page at *http://www.fcc.gov/realaudio.*

For a fee this meeting can be viewed live over George Mason University's Capitol Connection. The Capitol Connection also will carry the meeting live via the Internet. To purchase these services call (703) 993–3100 or go to *http://www.capitolconnection.gmu.edu.*

Copies of materials adopted at this meeting can be purchased from the FCC's duplicating contractor, Best Copy and Printing, Inc. (202) 488–5300; Fax (202) 488–5563; TTY (202) 488–5562. These copies are available in paper format and alternative media, including large print/type; digital disk; and audio and video tape. Best Copy and Printing, Inc. may be reached by e-mail at *FCC@BCPIWEB.com.*

Federal Communications Commission.

**Marlene H. Dortch,**

*Secretary.*

[FR Doc. 05–8594 Filed 4–26–05; 1:25 pm]

BILLING CODE 6712–01–P

## FEDERAL DEPOSIT INSURANCE CORPORATION

### Agency Information Collection Activities: Renewal of an Information Collection; Comment Request

**AGENCY:** Federal Deposit Insurance Corporation (FDIC).

**ACTION:** Notice and request for comment.

**SUMMARY:** The FDIC, 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 the proposed renewal of an information collection, as required by the Paperwork Reduction Act of 1995 (44 U.S.C. chapter 35). Currently, the FDIC is soliciting comments concerning an information collection titled ''Prompt Corrective Action.''

**DATES:** Comments must be submitted on or before June 27, 2005.

**ADDRESSES:** Interested parties are invited to submit written comments to the FDIC. All comments should refer to ''Prompt Corrective Action, 3064–0115.'' Comments may be submitted by any of the following methods:

- *http://www.FDIC.gov/regulations/laws/federal/propose.html.*
- E-mail: *comments@FDIC.gov.* Include ''Prompt Corrective Action, 3064–0115'' in the subject line of the message.
- Mail: Leneta G. Gregorie (202–898–3719), Counsel, Room MB–3082, Federal Deposit Insurance Corporation, 550 17th Street, NW., Washington, DC 20429.
- Hand Delivery: Comments may be hand-delivered to the guard station at the rear of the 17th Street Building (located on F Street), on business days between 7 a.m. and 5 p.m.

A copy of the comments may also be submitted to the OMB desk officer for the FDIC: Mark Menchik, Office of Information and Regulatory Affairs, Office of Management and Budget, New Executive Office Building, Room 3208, Washington, DC 20503, or by electronic mail to *mmenchik@omb.eop.gov.*

**FOR FURTHER INFORMATION CONTACT:** Leneta G. Gregorie, (202) 898–3719, or at the address identified above.

**SUPPLEMENTARY INFORMATION:** Proposal to renew the following currently approved collection of information:

*Title:* Prompt Corrective Action.

*OMB Number:* 3064–0115.

*Frequency of Response:* On occasion.

*Affected Public:* All insured financial institutions.

*Estimated Number of Respondents:* 19.

*Estimated Number of Responses:* 19.

*Estimated Time per Response:* 4 hours.

*Estimated Total Annual Burden:* 76 hours.

*General Description of Collection:* The prompt corrective action provisions in section 38 of the Federal Deposit Insurance Act (12 U.S.C. 1831o) permits and, in some cases requires, the Federal Deposit Insurance Corporation (FDIC) and other Federal banking agencies to take certain supervisory actions when FDIC-insured institutions fall within one of five capital categories. They also restrict or prohibit certain activities and require the submission of a capital restoration plan when an insured institution becomes undercapitalized.

### Request for Comment

Comments are invited on: (a) Whether the collection of information is necessary for the proper performance of the FDIC's functions, including whether the information has practical utility; (b) the accuracy of the estimates of the burden of the information collection, including the validity of the methodology and assumptions used; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the information collection on respondents, including through the use of automated collection techniques or other forms of information technology.

At the end of the comment period, the comments and recommendations received will be analyzed to determine the extent to which the collection should be modified prior to submission to OMB for review and approval. Comments submitted in response to this notice also will be summarized or included in the FDIC's request to OMB for renewal of this collection. All comments will become a matter of public record.

Dated at Washington, DC this 25th day of April, 2005.

Federal Deposit Insurance Corporation

**Robert E. Feldman,**

*Executive Secretary.*

[FR Doc. 05–8520 Filed 4–27–05; 8:45 am]

BILLING CODE 6714–01–P

## FEDERAL ELECTION COMMISSION

### Sunshine Act Notices

**DATE AND TIME:** Tuesday, May 3, 2005 at 10 a.m.

**PLACE:** 999 E Street, NW., Washington, DC.

**STATUS:** This meeting will be closed to the public.

**ITEMS TO BE DISCUSSED:**

Compliance matters pursuant to 2 U.S.C. § 437(g).

Audits conducted pursuant to 2 U.S.C. § 437g, § 438(b), and Title 26, U.S.C.

Matters concerning participation in civil actions or proceedings or arbitration.

Internal personnel rules and procedures or matters affecting a particular employee.

**DATE AND TIME:** Thursday, May 5, 2005, at 10 a.m.

**PLACE:** 999 E Street, NW., Washington, DC (Ninth floor).

**STATUS:** This meeting will be open to the public.

**ITEMS TO BE DISCUSSED:**

Correction and Approval of Minutes.

Advisory Opinion 2005–04: Representative John Boehner and Friends of John Boehner by counsel, Jan Witold Baran.

Routine Administrative Matters.

**FOR FURTHER INFORMATION CONTACT:** Mr. Robert Biersack, Press Officer, Telephone: (202) 694–1220.

**Mary W. Dove,**

*Secretary of the Commission.*

[FR Doc. 05–8582 Filed 4–26–05; 11:18 am]

BILLING CODE 6715–01–M

## FEDERAL RESERVE SYSTEM

### Federal Open Market Committee; Domestic Policy Directive of March 22, 2005

In accordance with § 271.25 of its rules regarding availability of information (12 CFR part 271), there is set forth below the domestic policy directive issued by the Federal Open Market Committee at its meeting held on March 22, 2005.[1]

The Federal Open Market Committee seeks monetary and financial conditions that will foster price stability and promote sustainable growth in output. To further its long-run objectives, the Committee in the immediate future seeks conditions in reserve markets consistent with increasing the Federal funds rate to an average of around 23/4 percent.

The vote encompassed approval of the paragraph below for inclusion in the statement to be released shortly after the meeting:

''The Committee perceives that, with appropriate monetary policy action, the upside and downside risks to the attainment of both sustainable growth and price stability should be kept roughly equal. With underlying inflation expected to be contained, the Committee believes that policy accommodation can be removed at a pace that is likely to be measured. Nonetheless, the Committee will respond to changes in economic prospects as needed to fulfill its obligation to maintain price stability.''

By order of the Federal Open Market Committee, April 19, 2005.

**Vincent R. Reinhart,**

*Secretary, Federal Open Market Committee.*

[FR Doc. 05–8491 Filed 4–27–05; 8:45 am]

BILLING CODE 6210–01–P

[1] Copies of the Minutes of the Federal Open Market Committee Meeting on March 22, 2005, which includes the domestic policy directive issued at the meeting, are available upon request to the Board of Governors of the Federal Reserve System, Washington, DC 20551. The minutes are published in the Federal Reserve Bulletin and in the Board's annual report.

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Centers for Disease Control and Prevention

### Development of Influenza Surveillance Networks

*Announcement Type:* New.

*Funding Opportunity Number:* AA011.

*Catalog of Federal Domestic Assistance Number:* 93.283.

*Key Dates:*

*Letter of Intent Deadline:* May 31, 2005.

*Application Deadline:* June 27, 2005.

*Executive Summary:* An influenza pandemic has greater potential than any other naturally occurring infectious disease event to cause large and rapid global and domestic increases in deaths and serious illnesses. Preparedness is the key to substantially reducing the health, social, and economic impacts of an influenza pandemic and other public health emergencies. One component of preparedness involves understanding the impact that annual epidemics of influenza have on the population. These data regarding impact are critical to the development of prevention and control measures such as vaccination policies. Vaccination efforts are the cornerstone of influenza prevention and will be the primary means of mitigating the impact of an influenza pandemic.

The systematic collection of influenza surveillance data over time is necessary to monitor and track influenza virus and disease activity and is essential to understanding the impact influenza has on a country's population. Improving surveillance systems by developing influenza surveillance networks is critical for the rapid detection of new variants, including those with pandemic potential, to contribute to the global surveillance system. Global collaboration, under the coordination of the World Health Organization (WHO), is a key feature of influenza surveillance. WHO established an international laboratory-based surveillance network for influenza in 1948. The network currently consists of 112 National Influenza Center (NIC) laboratories in 83 countries, and four WHO Collaborating Centers for Reference and Research of Influenza (including one located at the Centers for Disease Control and Prevention). The primary purposes of the WHO network are to detect the emergence and spread of new antigenic variants of influenza, to use this information to update the formulation of influenza vaccine, and to provide as much warning as possible about the next pandemic. This system provides the foundation of worldwide influenza prevention and control.

Monitoring of influenza viruses and providing contributions to the global surveillance system will assure that data used in annual WHO vaccine recommendations are relevant to each country that participates. Increased participation in the global surveillance system for influenza viruses will enhance each country's ability to monitor severe respiratory illness, to develop vaccine policy, and to help build global and regional strategies for the prevention and control of influenza. Monitoring influenza disease activity is important to facilitate resource planning, communication, intervention, and investigation.

This announcement seeks to support foreign governments through their Ministries of Health or other responsible Ministries for human health in the development or improvement of epidemiologic and virologic influenza surveillance networks. These networks will focus on the systematic collection of virological and epidemiological information for influenza. This support is meant to enhance, and not to supplant, current influenza surveillance activities. Proposals should build upon infrastructure already in place. Preference will be given to countries where resources are currently limited and influenza surveillance is not well established due to lack of resources.

#### I. Funding Opportunity Description

*Authority:* This program is authorized under sections 301(a) and 307 of the Public Health Service Act, [42 U.S.C. sections 241(a), and 242l], as amended.

*Purpose:* The purpose of the program is to provide support and assistance to foreign governments for the development or improvement of influenza surveillance networks. These networks will focus on the systematic collection of virological and epidemiological information for influenza. Countries applying for support must have an active WHO NIC recognized by WHO. This program addresses the ''Healthy People 2010'' focus area(s) of Immunization and Infectious diseases.

The objectives of this program are to (1) establish or enhance an active influenza surveillance network that uses standardized data collection instruments, operational definitions, and laboratory diagnostic tests to enhance surveillance for influenza at three or more sites within the country; (2) use the experience gained to expand the surveillance system to include additional sites; (3) improve local laboratory diagnostic capabilities by supporting and enhancing those local laboratories that participate in influenza surveillance; (4) develop educational and training opportunities for local public health practitioners as part of broader efforts to improve public health infrastructure in the region; and (5) improve communications and data exchange between laboratories and epidemiologists in the global influenza surveillance network by expanding the

network and improving the reporting of data from surveillance sites, laboratories, and NICs.

Measurable outcomes of the program will be in alignment with the following performance goal(s) for the National Center for Infectious Diseases (NCID): Protect Americans from infectious diseases.

This announcement is only for non-research activities supported by CDC/ATSDR. If research is proposed, the application will not be reviewed. For the definition of research, please see the CDC Web site at the following Internet address: *http://www.cdc.gov/od/ads/opspoll1.htm.*

*Activities:*

Awardee activities for this program are as follows:

- Develop a nationwide system to collect virologic and epidemiologic data for influenza by establishing five or more sites with good geographic distribution throughout the country. Each site will consist of a local laboratory and one or more clinics or hospitals for data collection. Each site should:
  - Conduct virologic and epidemiologic surveillance for influenza by collecting information year round in countries or regions of countries with tropical and subtropical climates; and/or by collecting surveillance information during the period of respiratory illness circulation in countries or regions of countries with temperate climates.
  - Have laboratory capacity for performing influenza virus isolation and typing.
  - Collect information on influenza like illnesses and/or severe respiratory disease at each site by building on information that is already available. Possible sources of information include (1) recording influenza-like-illness visits to physicians or primary care clinics or hospitals based on a standard case definition, or (2) monitoring hospital admissions for severe respiratory illness and pneumonia based on a case definition. Patient information such as age, patient history and other relevant information should be collected.
  - Collect a subset of at least 10 (and preferably up to 25) specimens from the patient populations under surveillance with febrile, acute upper respiratory illness. These specimens should be collected weekly during the period of surveillance (based on climate) using a standard case definition (preferably WHO) and should be submitted to the local laboratory for the site.
  - During unusual outbreaks of influenza, such as outbreaks with unusual epidemiologic characteristics, or those related to infections by avian or other animal influenza viruses, collect epidemiologic information to characterize the outbreak and collect additional samples for viral isolation and submittal to the site laboratory. Report the outbreak to the NIC.
  - Prepare and provide regular weekly reports on the epidemiologic information that has been collected (influenza-like-illness and/or severe respiratory illness) to the local laboratory and to the NIC.
  - The laboratory will perform viral isolation for influenza viruses either in tissue culture or in eggs. Type positive isolates for influenza A and B, and if possible, subtype influenza viruses.
  - Store original clinical materials at –70 degrees until the beginning of the next influenza season.
  - Submit viral isolates to the NIC within the country on at least a monthly basis for more complete analysis.
- The WHO NIC within a country can be one of the surveillance sites and as such conduct all the activities listed above. If there are two or more NICs within a country each NIC could participate as a site, however NICs within a single country should work together and place emphasis on the addition of new surveillance sites. In addition, the NIC(s) should act as the focal point and authority within their country on influenza surveillance and be the main point of communication with WHO and WHO Collaborating Centers for the submittal of virus isolates and information into the global surveillance system. Each NIC also will be responsible for the following activities:
  - Performing preliminary antigenic and, if possible genetic, characterization on the virus isolates submitted from the laboratories in the surveillance sites (including those isolates grown at the NIC).
  - Send representative virus isolates to one of the four WHO Collaborating Centers for Influenza, including any low reacting viruses, as tested using the WHO reagent kit, each month during the period of surveillance and more frequently, if possible.
  - If any viruses are unsubtypable as tested using the WHO kit, alert WHO and send the virus isolate to one of the four WHO Collaborating Centers for Influenza immediately.
  - During the period of surveillance, provide weekly influenza surveillance information to WHO through FluNet.
  - Provide an annual national summary on influenza activity, virological information and other relevant information on influenza to WHO and the WHO Collaborating Center in Atlanta, GA.
  - Provide technical expertise and training to support the surveillance sites and laboratories in the national network.
- Foreign Governments applying for funding through this cooperative agreement should play a substantial role in the development and support of the influenza surveillance network.
  - Facilitate the sharing of influenza surveillance information with the WHO Global Influenza Surveillance network by facilitating the regular exchange of information and viruses with one of the four WHO Collaborating Centers.
  - Provide continued support for influenza activities within the country and develop a plan for increased participation in the global influenza surveillance network over a five-year period.
  - Consider developing a task force or working group for influenza to determine ways to improve national influenza surveillance, develop prevention and control measures such as vaccine policy and work on pandemic preparedness.
  - Facilitate communication between the veterinary and the human side of influenza surveillance. Develop systems for the sharing of information.

In a cooperative agreement, CDC staff is substantially involved in the program activities, above and beyond routine grant monitoring.

CDC Activities for this program are as follows:

- Provide technical assistance on techniques and reagents for the identification of influenza viruses. Annually provide the WHO reagent kit, which is produced and distributed by the WHO Collaborating Center for Influenza in Atlanta, GA.
- Provide epidemiological and laboratory training.
- Provide technical consultation on the development of country networks.
- Provide confirmation of antigenic analysis and more detailed characterization information on the influenza virus isolates submitted to CDC with written reports back to the NIC.
- Provide technical advice on the conduct of epidemiologic outbreak investigations.

## II. Award Information

*Type of Award:* Cooperative Agreement.

CDC involvement in this program is listed in the Activities Section above.

*Fiscal Year Funds:* 2005.

*Approximate Total Funding:* $1,000,000 (This amount is an estimate,

and is subject to availability of funds.)

Approximate Number of Awards: 5–10.

*Approximate Average Award:* $50,000 to 250,000.

*Floor of Award Range:* None.

*Ceiling of Award Range:* $250,000 (This ceiling is for the first 12-month budget period.)

*Anticipated Award Date:* August 1, 2005.

*Budget Period Length:* 12 months.

*Project Period Length:* 5 years.

Throughout the project period, CDC's commitment to continuation of awards will be conditioned on the availability of funds, evidence of satisfactory progress by the recipient (as documented in required reports), and the determination that continued funding is in the best interest of the Federal Government.

## III. Eligibility Information

### *III.1. Eligible Applicants*

Applications may be submitted by foreign governments through their Ministries of Health or other national government offices responsible for disease surveillance in humans. Only one application per country will be accepted.

Applicants in countries that were funded last year under CDC Program Announcement #04106 are not eligible to apply under this new Program Announcement.

### *III.2. Cost Sharing or Matching*

Matching funds are not required for this program. However, the support provided through this cooperative agreement is meant to enhance, and not supplant, current influenza surveillance activities.

### *III.3. Other*

If you request a funding amount greater than the ceiling of the award range, your application will be considered non-responsive, and will not be entered into the review process. You will be notified that your application did not meet the submission requirements.

*Special Requirements*

If your application is incomplete or non-responsive to the special requirements listed in this section, it will not be entered into the review process. You will be notified that your application did not meet submission requirements.

- Late applications will be considered non-responsive. See section ''IV.3. Submission Dates and Times'' for more information on deadlines.
- This program is not designed or intended to support research, therefore no research will be supported under this cooperative agreement. Any applications proposing research will be considered non-responsive.
- In order to apply and be eligible for this funding, your country must have at least one NIC of record at WHO. CDC will confirm with WHO the status/existence of NIC for each application received. Participation of NICs is a requirement because to meet the goal of this announcement, a significant number of the recipient activities require information and work to be conducted, reported and submitted through the WHO surveillance network.
- **Note:** Title 2 of the United States Code Section 1611 states that an organization described in Section 501(c)(4) of the Internal Revenue Code that engages in lobbying activities is not eligible to receive Federal funds constituting an award, grant, or loan.

## IV. Application and Submission Information

### *IV.1. Address To Request Application Package*

To apply for this funding opportunity use application form PHS 5161–1.

CDC strongly encourages you to submit your application electronically by utilizing the forms and instructions posted for this announcement on *http://www.Grants.gov.*

Application forms and instructions are also available on the CDC Web site, at the following Internet address: *http://www.cdc.gov/od/pgo/forminfo.htm.*

If you do not have access to the Internet, or if you have difficulty accessing the forms on-line, you may contact the CDC Procurement and Grants Office Technical Information Management Section (PGO-TIM) staff at: 770–488–2700. Application forms can be mailed to you.

### *IV.2. Content and Form of Submission*

*Letter of Intent (LOI):* Your LOI must be written in the following format:

- Maximum number of pages: 4
- Font size: 12-point unreduced
- Single spaced
- Paper size: 8.5 by 11 inches
- Page margin size: One inch
- Printed only on one side of page
- Written in English using plain language, avoid jargon

Your LOI must contain the following information:

- List this Program Announcement Number (AA011)
- Name of the government entity that is applying
- Name and contact information for the person who will be responsible for preparing and submitting the application
- Name of NIC(s) that will be involved

*Application:* You must submit a project narrative with your application forms. The narrative must be submitted in the following format:

- Maximum number of pages: 25. If your narrative exceeds the page limit, only the first pages which are within the page limit will be reviewed.
- Font size: 12 point unreduced
- Single spaced
- Paper size: 8.5 by 11 inches
- Page margin size: One inch
- Printed only on one side of page
- Held together only by rubber bands or metal clips; not bound in any other way.

Your narrative should address activities to be conducted over the entire project period, and must include the following items in the order listed:

- Background and Need: Describe the background and justify the need for the proposed project to enhance or expand influenza surveillance networks in the country. Describe the current infrastructure/influenza surveillance system and how it is used, describe the geographical area and demographics, and describe identified gaps or shortcomings of the current surveillance system.
- Capacity: Describe adequate resources and facilities (both technical and administrative) for enhancing or expanding influenza surveillance. This includes the capacity to conduct quality laboratory measurements and produce and distribute reports. Describe the qualifications and past experience and achievements of professional personnel in research and programs related to this project.
- Objectives and Technical Approach:
  - Goals—Describe the overall goals of enhancing or expanding your influenza surveillance network.
  - Objectives—Describe specific objectives of the proposed influenza surveillance network that are measurable and time-phased and are consistent with the objectives for this Cooperative Agreement program as provided in the Purpose section at the beginning of this Program Announcement.
  - Operational Plan—Present a detailed operational plan for initiating and conducting the influenza surveillance program. Be sure to address each of the specific Activities listed in the Activities section of this Program Announcement. Clearly identify specific assigned responsibilities for all key professional personnel. Identify appropriate surveillance sites with adequate geographic distribution for

network. Clearly describe the applicant's technical approach/methods for developing and conducting the proposed influenza surveillance network. Describe the existence of or plans to establish partnerships necessary to develop and conduct the proposed network, including particularly with each NIC in the country.

- Collaborations—Describe adequate and appropriate collaborations with other health agencies during the various phases required to enhance or expand your influenza surveillance network.

- Measures of Effectiveness and Evaluation Plan:
  - Measures: Provide specific measures of effectiveness that can be used to demonstrate accomplishment of the objectives of this cooperative agreement program. Be sure to address each of the five program objectives listed in the Purpose section of this Program Announcement. Measures must be objective and quantitative so that they can provide meaningful outcome evaluation.
  - Evaluation Plan: Provide a detailed, adequate and feasible plan for evaluating the results of the influenza surveillance network. This includes plans for evaluating the improvement of the influenza surveillance network as well as plans for evaluating other aspects of the collaboration (*e.g.*, training, sharing of data/information).
- Budget and justification (not included in page limit)

With staffing breakdown and justification, provide a line item budget and a narrative with justification for all requested costs. Be sure to include, if any, in-kind support or other contributions that will be provided by your country as part of the total project, but for which you are not requesting funding. Budgets should be consistent with the purpose, objectives and program activities and include:

- Line-item breakdown and justification for all personnel, *i.e.*, name, position title, annual salary, percentage of time and effort, and amount requested.
- For each contract: (1) Name of proposed contractor; (2) breakdown and justification for estimated costs; (3) description and scope of activities to be performed by contractor; (4) period of performance; (5) method of contractor selection (*e.g.*, sole-source or competitive solicitation); and (6) methods of accountability.

Additional information should be included in the application appendices. The appendices will not be counted toward the narrative page limit. This additional information includes:

- Curriculum Vitae and/or Resumes
- Organizational Charts
- Letters of Support from participating organizations and institutions.

You are required to have a Dun and Bradstreet Data Universal Numbering System (DUNS) number to apply for a grant or cooperative agreement from the Federal government. The DUNS number is a nine-digit identification number, which uniquely identifies business entities. Obtaining a DUNS number is easy and there is no charge. To obtain a DUNS number, access *http://www.dunandbradstreet.com* or call 1–866–705–5711.

For more information, see the CDC Web site at: *http://www.cdc.gov/od/pgo/funding/pubcommt.htm*.

Additional requirements that may require you to submit additional documentation with your application are listed in section ''VI.2. Administrative and National Policy Requirements.''

*IV.3. Submission Dates and Times*

*Letter of Intent (LOI) Deadline Date:* May 31, 2005.

CDC requests that you send a LOI if you intend to apply for this program. Although the LOI is not required, not binding, and does not enter into the review of your subsequent application, the LOI will be used to gauge the level of interest in this program and to allow CDC to plan the application review.

*Application Deadline Date:* June 27, 2005.

*Explanation of Deadlines:* Applications must be received in the CDC Procurement and Grants Office by 4 p.m. eastern time on the deadline date.

If you submit your application electronically with Grants.gov, your application will be electronically time/date stamped which will serve as receipt of submission. You will receive an e-mail notice of receipt when CDC receives the application.

If you submit your application by the United States Postal Service or commercial delivery service, you must ensure that the carrier will be able to guarantee delivery by the closing date and time. If CDC receives your submission after closing due to: (1) Carrier error, when the carrier accepted the package with a guarantee for delivery by the closing date and time, or (2) significant weather delays or natural disasters, you will be given the opportunity to submit documentation of the carriers guarantee. If the documentation verifies a carrier problem, CDC will consider the submission as having been received by the deadline.

Otherwise, CDC will not notify you upon receipt of your submission. If you have a question about the receipt of your LOI or application, first contact your courier. If you still have a question, contact the PGO-TIM staff at: 770–488–2700. Before calling, please wait two to three days after the submission deadline. This will allow time for submissions to be processed and logged.

This announcement is the definitive guide on LOI and application content, submission address, and deadline. It supersedes information provided in the application instructions. If your submission does not meet the deadline above, it will not be eligible for review, and will be discarded. You will be notified that you did not meet the submission requirements.

*IV.4. Intergovernmental Review of Applications*

Executive Order 12372 does not apply to this program.

*IV.5. Funding Restrictions*

Restrictions, which must be taken into account while writing your budget, are as follows:

- Funds may not be used for research.
- Reimbursement of pre-award costs is not allowed.
- Funds may be spent for reasonable program purposes, including personnel, travel, supplies, and services. Equipment may be purchased if deemed necessary to accomplish program objectives, however, prior approval by CDC officials must be requested in writing.
- The costs that are generally allowable in grants to domestic organizations are allowable to foreign institutions and international organizations, with the following exception: With the exception of the American University, Beirut and the World Health Organization, Indirect Costs will not be paid (either directly or through sub-award) to organizations located outside the territorial limits of the United States or to international organizations regardless of their location.
- The applicant may contract with other organizations under this program; however the applicant must perform a substantial portion of the activities (including program management and operations, and delivery of prevention services for which funds are required.)
- All requests for funds contained in the budget, shall be stated in U.S. dollars. Once an award is made, CDC will not compensate foreign grantees for

currency exchange fluctuations through the issuance of supplemental awards.

• You must obtain annual audit of these CDC funds (program-specific audit) by a U.S.-based audit firm with international branches and current licensure/authority in-country, and in accordance with International Accounting Standards or equivalent standard(s) approved in writing by CDC.

• A fiscal Recipient Capability Assessment may be required, prior to or post award, in order to review the applicant's business management and fiscal capabilities regarding the handling of U.S. Federal funds.

Guidance for completing your budget can be found on the CDC Web site, at the following Internet address: *http://www.cdc.gov/od/pgo/funding/budgetguide.htm.*

*IV.6. Other Submission Requirements*

*LOI Submission Address:* Submit your LOI electronically to *http://www.Grants.gov.* Fill out the required Grants.gov information and attach a word document with the necessary information from IV.2. ''Content and Form of Submission''.

OR,

Submit your LOI by express mail, delivery service, fax, or E-mail to: Ann Moen, CDC, National Center for Infectious Diseases, Mailstop G–16, 1600 Clifton Road, NE., Atlanta, GA 30333, Telephone: 404–639–4652, FAX: 404–639–2334, E-mail: *AMoen@cdc.gov.*

*Application Submission Address:* Submit your application electronically at: *http://www.Grants.gov.* You will be able to download a copy of the application package from *http://www.Grants.gov,* complete it offline, and then upload and submit the application via the Grants.gov site. E-mail submissions will not be accepted. If you are having technical difficulties in Grants.gov they can be reached by E-mail at *http://www.support@grants.gov* or by phone at 1–800–518–4726 (1–800–518–GRANTS). The Customer Support Center is open from 7 a.m. to 9 p.m. eastern time, Monday through Friday. CDC recommends that you submit your application to Grants.gov early enough to resolve any unanticipated difficulties prior to the deadline. You may also submit a back-up paper submission of your application. Any such paper submission must be received in accordance with the requirements for timely submission detailed in Section IV.3. of the grant announcement. The paper submission must be clearly marked: ''BACK–UP FOR ELECTRONIC SUBMISSION.'' The paper submission must conform with all requirements for non-electronic submissions. If both electronic and back-up paper submissions are received by the deadline, the electronic version will be considered the official submission. It is strongly recommended that you submit your grant application using Microsoft Office products (e.g., Microsoft Word, Microsoft Excel, etc.). If you do not have access to Microsoft Office products, you may submit a PDF file. Directions for creating PDF files can be found on the Grants.gov Web site. Use of file formats other than Microsoft Office or PDF may result in your file being unreadable by our staff.

OR,

Submit the original and two hard copies of your application by mail or express delivery service to: Technical Information Management—RFA AA011, CDC Procurement and Grants Office, 2920 Brandywine Road, Atlanta, GA 30341.

## V. Application Review Information

*V.1. Criteria*

Applicants are required to provide measures of effectiveness that will demonstrate the accomplishment of the various identified objectives of the cooperative agreement. Measures of effectiveness must relate to the performance goals stated in the ''Purpose'' section of this announcement. Measures must be objective and quantitative, and must measure the intended outcome. These measures of effectiveness must be submitted with the application and will be an element of evaluation.

Your application will be evaluated against the following criteria:

• Objectives and Technical Approach (50 points total)

○ Does the applicant describe specific objectives of the proposed program that are consistent with the purpose and goals of this announcement and which are measurable and time-phased? (10 points)

○ Does the applicant identify appropriate sites with adequate geographic distribution for the network? (10 points)

○ Does the applicant present a detailed operational plan for initiating and conducting the program, which clearly and appropriately addresses all recipient activities? Does the applicant clearly identify specific assigned responsibilities for all key professional personnel? Does the plan clearly describe the applicant's technical approach/methods for developing and conducting the proposed program and evaluation and does it appear feasible and adequate to accomplish the objectives? Does the applicant describe the existence of or plans to establish partnerships? (10 points)

○ Does the applicant describe adequate and appropriate collaborations with other health agencies during various phases of the project? (10 points)

○ Has the applicant provided a detailed, adequate and feasible plan for evaluating program results? This includes plans for evaluating the improvement of the influenza surveillance network as well as plans for evaluating other aspects of the collaboration (*e.g.*, training). (10 points)

• Capacity (35 points total)

○ Does the applicant describe adequate resources and facilities (both technical and administrative) for conducting the project? This includes the capacity to conduct quality laboratory measurements and produce and distribute reports? (20 points)

○ Does the applicant provide documentation that professional personnel involved in the project are qualified and have past experience and achievements in research and programs related to the program (as evidenced by curriculum vitae, publications, etc.)? (15 points)

• Background and Need (10 points)

Does the applicant adequately discuss the background for the proposed project and demonstrate a clear understanding of the purpose and objectives of this cooperative agreement program? Does the applicant illustrate and justify the need for the proposed project that is consistent with the purpose and objectives of this program?

• Measures of Effectiveness (5 points)

Does the applicant provide Measures of Effectiveness that will demonstrate the accomplishment of the various identified objectives of the cooperative agreement? Are the measures objective/quantitative and does it appear they will adequately measure the intended outcome?

• Budget and Justification (not scored):

Does the applicant propose a budget that is reasonable, clearly justifiable, and consistent with the intended use of cooperative agreement funds?

*V.2. Review and Selection Process*

Applications will be reviewed for completeness by the Procurement and Grants Office (PGO) staff, and for responsiveness by NCID. Incomplete applications and applications that are non-responsive to the eligibility criteria will not advance through the review process.

Applicants will be notified that their application did not meet submission requirements.

An objective review panel will evaluate complete and responsive applications according to the criteria listed in the ''V.1. Criteria'' section above. The panel will consist of CDC or other Federal employees from outside of NCID.

In addition, the following factors may affect the funding decision:

Funding preference will be given to countries where resources are currently limited and influenza surveillance is not well established due to lack of resources. This would include countries in the following geographic regions: Asia, Africa, Mexico, Central America and South America. Additional preference will be given to those countries directly affected by avian influenza.

CDC will provide justification for any decision to fund out of rank order.

**V.3. Anticipated Announcement and Award Dates**

August 1, 2005.

**VI. Award Administration Information**

*VI.1. Award Notices*

Successful applicants will receive a Notice of Award (NOA) from CDC PGO. The NOA shall be the only binding, authorizing document between the recipient and CDC. The NOA will be signed by an authorized Grants Management Officer, and mailed to the recipient fiscal officer identified in the application.

Unsuccessful applicants will receive notification of the results of the application review by mail.

*VI.2. Administrative and National Policy Requirements*

45 CFR Part 74 and Part 92

For more information on the Code of Federal Regulations, see the National Archives and Records Administration at the following Internet address: *http://www.access.gpo.gov/nara/cfr/cfr-table-search.html.*

An additional Certifications form from the PHS5161–1 application needs to be included in your Grants.gov electronic submission only. Refer to *http://www.cdc.gov/od/pgo/funding/PHS5161–1Certificates.pdf.* Once the form is filled out attach it to your Grants.gov submission as Other Attachments Form.

The following additional requirements apply to this project:

- AR–10 Smoke-Free Workplace Requirements
- AR–11 Healthy People 2010
- AR–12 Lobbying Restrictions
- AR–15 Proof of Non-Profit Status

Additional information on these requirements can be found on the CDC web site at the following Internet address: *http://www.cdc.gov/od/pgo/funding/ARs.htm.*

*VI.3. Reporting Requirements*

You must provide CDC with an original, plus two hard copies of the following reports:

1. Interim progress report, due no less than 90 days before the end of the budget period. The progress report will serve as your non-competing continuation application, and must contain the following elements:

a. Current Budget Period Activities Objectives.

b. Current Budget Period Financial Progress.

c. New Budget Period Program Proposed Activity Objectives.

d. Budget.

e. Measures of Effectiveness.

f. Additional Requested Information.

2. Financial status report and annual progress report, no more than 90 days after the end of the budget period.

3. Final financial and performance reports, no more than 90 days after the end of the project period.

These reports must be mailed to the Grants Management or Contract Specialist listed in the ''Agency Contacts'' section of this announcement.

**VII. Agency Contacts**

We encourage inquiries concerning this announcement. For general questions, contact: Technical Information Management Section, CDC Procurement and Grants Office, 2920 Brandywine Road, Atlanta, GA 30341, Telephone: 770–488–2700.

For program technical assistance, contact: Ann Moen, Project Officer, CDC, National Center for Infectious Diseases, Mailstop G–16, 1600 Clifton Road, NE., Atlanta, GA 30333, Telephone: 404–639–4652, e-mail: *AMoen@cdc.gov.*

For financial, grants management, or budget assistance, contact: Steward Nichols, Grants Management Specialist, CDC Procurement and Grants Office, 2920 Brandywine Road, Atlanta, GA 30341, Telephone: (770) 488–2788, e-mail: *shn8@cdc.gov.*

**VIII. Other Information**

This and other CDC funding opportunity announcements can be found on the CDC web site, Internet address: *http://www.cdc.gov.* Click on ''Funding'' then ''Grants and Cooperative Agreements.''

Dated: April 22, 2005.

**William P. Nichols,**

*Director, Procurement and Grants Office, Centers for Disease Control and Prevention.*

[FR Doc. 05–8506 Filed 4–27–05; 8:45 am]

BILLING CODE 4163–18–P

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## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Centers for Disease Control and Prevention

### Advisory Committee for Injury Prevention and Control, Subcommittees Science and Program Review; Subcommittee on Intimate Partner Violence and Sexual Assault

In accordance with section 10(a)(2) of the Federal Advisory Committee Act (Pub. L. 92–463), the Centers for Disease Control and Prevention (CDC) announces the following subcommittee and committee meetings.

*Name:* Science and Program Review Subcommittee (SPRS).

*Times and Dates:*

6:30 p.m.–9 p.m., June 6, 2005;
8 a.m.–5:30 p.m., June 7, 2005;
8 a.m.–10 a.m., June 8, 2005.

*Place:* Crowne Plaza Hotel Atlanta-Buckhead, 3377 Peachtree Road, NE., Atlanta, GA 30326.

*Status:*

*Open:* 6:30 p.m.–7 p.m., June 6, 2005.
*Closed:* 7 p.m.–8 p.m., June 6, 2005;
*Closed:* 8:30 a.m.–5:30 p.m., June 7, 2005.
*Open:* 8 a.m.–10 a.m., June 8, 2005.

*Purpose:* The SPRS provides advice on the needs, structure, progress and performance of programs of the National Center for Injury Prevention and Control (NCIPC), as well as second-level scientific and programmatic review for applications for research grants, cooperative agreements, and training grants related to injury control and violence prevention, and recommends approval of projects that merit further consideration for funding support. The SPRS also advises on priorities for research to be supported by contracts, grants, and cooperative agreements and provides concept review of program proposals and announcements.

*Matters To Be Discussed:* The Science and Program Review Subcommittee (SPRS) of the ACIPC will meet June 6–8 to provide a secondary review of, discuss, and evaluate grant applications and cooperative agreements received in response to 10 Request for Applications RFAs). In addition, the SPRS will vote on the results of site visits conducted in response to Program Announcement #02043 pertaining to Injury Control Research Center (ICRC) applications. Also, the review will cover five research earmarks. This portion of the meeting (7 p.m.–9 p.m., June 6, 2005, and 8 a.m.–5:30 p.m., June 7, 2005), will be closed to the public in accordance with provisions set forth in section 552b(c)(4) and (6), Title 5, U.S.C., and the Determination of the Director,

Management Analysis and Services Office, CDC, pursuant to Pub. L. 92–463.

Agenda items are subject to change as priorities dictate.

*Name:* Subcommittee on Intimate Partner Violence and Sexual Assault (SIPVSA).

*Time and Date:* 10 a.m.–11:30 a.m., June 8, 2005.

*Place:* Crowne Plaza Hotel Atlanta-Buckhead, 3377 Peachtree Road, NE., Atlanta, GA 30326.

*Status:* Open to the public, limited only by the space available.

*Purpose:* To advise and make recommendations to the full advisory committee and the Director, NCIPC, regarding feasible goals for prevention and control of domestic and sexual violence. The SIPVSA will make recommendations regarding strategies, objectives, and priorities in programs, policies and research.

*Matters To Be Discussed:* The SIPVSA will discuss strategies for examining models for integration of intimate partner violence and sexual assault prevention into broader public health infrastructure and strategies.

*Name:* Advisory Committee for Injury Prevention and Control.

*Time and Dates:*

1 p.m.–5:30 p.m., June 8, 2005;
8:30 a.m.–3:30 p.m., June 9, 2005.

*Place:* Crowne Plaza Hotel Atlanta-Buckhead, 3377 Peachtree Road, NE., Atlanta, GA 30326.

*Status:*

*Closed:* 1 p.m.–1:45 p.m., June 8, 2005.
*Open:* 1:45 p.m.–5:30 p.m., June 8, 2005;
*Open:* 8:30 a.m.–3:30 p.m., June 9, 2005.

*Purpose:* The Committee advises and makes recommendations to the Secretary, Health and Human Services, the Director, CDC, and the Director, NCIPC, regarding feasible goals for the prevention and control of injury. The Committee makes recommendations regarding policies, strategies, objectives, and priorities, and reviews progress toward injury prevention and control.

*Matters To Be Discussed:* Prior to the full committee meeting, there will be a brief meeting conducted by conference call of the Working Group on Injury Control and Infrastructure Enhancement, a group formed to report to the full committee identifying gaps and suggesting ways to enhance injury prevention efforts.

The working group will focus on defining injury infrastructure and developing a simple mechanism to assess current efforts underway throughout the injury field to enhance that infrastructure. Starting at 1 p.m., June 8, through 1:45 p.m., the full committee will vote on the results of secondary review. This portion of the meeting will be closed to the public in accordance with provisions set forth in section 552(b)(4) and (6), title 5 U.S.C., and the Determination of the Director, Management Analysis and Services Office, CDC, pursuant to Public Law 92–463. Following the closed session, the meeting will open to the public for an update on Center activities from the Director, NCIPC; reports from the Subcommittees and Working Group; state infrastructure development; and discussion on how NCIPC can support the recommendations of CDC's Futures Initiative.

Agenda items are subject to change as priorities dictate.

*For Further Information Contact:* Ms. Louise Galaska, Executive Secretary, ACIPC, NCIPC, CDC, 4770 Buford Highway, NE., M/S K02, Atlanta, Georgia 30341–3724, telephone (770) 488–4694.

The Director, Management Analysis and Services Office, has been delegated the authority to sign **Federal Register** notices pertaining to announcements of meetings and other committee management activities for both CDC and the Agency for Toxic Substances and Disease Registry.

Dated: April 21, 2005.

**B. Kathy Skipper,**

*Acting Director, Management Analysis and Services Office, Centers for Disease Control and Prevention.*

[FR Doc. 05–8499 Filed 4–27–05; 8:45 am]

BILLING CODE 4163–18–P

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Centers for Disease Control and Prevention

### National Center for Injury Prevention and Control Initial Review Group

In accordance with section 10(a)(2) of the Federal Advisory Committee Act (Pub. L. 92–463), the Centers for Disease Control and Prevention (CDC) announce the following meeting:

*Name:* National Center for Injury Prevention and Control (NCIPC) Initial Review Group (IRG).

*Times and Dates:*

1 p.m.–5:30 p.m., May 23, 2005;
8:30 a.m.–5:30 p.m., May 24, 2005;
8:30 a.m.–5:30 p.m., May 25, 2005.

*Place:* The Initial Review Group will originate at the Hilton Atlanta Airport and Towers, 1031 Virginia Avenue, Atlanta, Georgia 30354.

*Status:*

*Open:* 1 p.m.–1:30 p.m., May 23, 2005.
*Closed:* 1:30 p.m.–5:30 p.m., May 23, 2005;
*Closed:* 8:30 a.m.–5:30 p.m., May 24, 2005;
*Closed:* 8:30 a.m.–5:30 p.m., May 25, 2005.

*Purpose:* This group is charged with providing advice and guidance to the Secretary of Health and Human Services and the Director, CDC, concerning the scientific and technical merit of grant and cooperative agreement applications received from academic institutions and other public and private profit and nonprofit organizations, including State and local government agencies, to conduct specific injury research that focuses on prevention and control and supports Injury Control Research Centers (ICRCs).

*Matters To Be Discussed:* Agenda items include an overview of the injury program, discussion of the review process and panelists' responsibilities, and the review of and vote on applications. Beginning at 1:30 p.m., May 23, through 5:30 p.m., May 25, the Group will review individual research cooperative agreement in response to announcement: #05018, Cooperative Agreement Program for the National Academic Centers of Excellence. This meeting will be closed to the public in accordance with provisions set forth in section 552b(c)(4) and (6), Title 5 U.S.C., and the Determination of the Director, Management Analysis and Services Office, CDC, pursuant to Pub. L. 92–463.

Agenda items are subject to change as priorities dictate.

*For More Information Contact:* Gwendolyn H. Cattledge, Ph.D., M.S.E.H., Executive Secretary, NCIPC IRG, CDC, 4770 Buford Highway, NE., M/S K02, Atlanta, Georgia 30341–3724, telephone (770) 488–4655.

The Director, Management Analysis and Services Office has been delegated the authority to sign **Federal Register** notices pertaining to announcements of meetings and other committee management activities for both CDC and the Agency for Toxic Substances and Disease Registry.

Dated: April 21, 2005.

**B. Kathy Skipper,**

*Acting Director, Management Analysis and Services Office, Centers for Disease Control and Prevention.*

[FR Doc. 05–8500 Filed 4–27–05; 8:45 am]

BILLING CODE 4163–18–P

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Centers for Disease Control and Prevention

### National Center for Environmental Health/Agency for Toxic Substances and Disease Registry

The Board of Scientific Counselors (BSC), Centers for Disease Control and Prevention (CDC), National Center for Environmental Health/Agency for Toxic Substances and Disease Registry (NCEH/ATSDR).

In accordance with section 10(a)(2) of the Federal Advisory Committee Act (Pub. L. 92–463), the Centers for Disease Control and Prevention (CDC) and the National Center for Environmental Health/Agency for Toxic Substances Disease Registry (ATSDR) announce the following committee meeting:

*Name:* Board of Scientific Counselors, National Center for Environmental Health/Agency for Toxic Substances and Disease Registry.

*Times and Dates:* 8:30 a.m.–5 p.m., May 19, 2005. 8 a.m.–12:15 p.m., May 20, 2005.

*Place:* CDC facility, 1825 Century Boulevard, Atlanta, GA 30345.

*Status:* Open to the public for observation, limited only by the space available. The meeting room

accommodates approximately 100 people.

*Purpose:* The Secretary, and by delegation, the Director of the Centers for Disease Control and Prevention and the Administrator of the National Center for Environmental Health/Agency for Toxic Substances and Disease Registry, are authorized under section 301(42 U.S.C. 241) and section 311 (42 U.S.C. 243) of the Public Health Service Act, as amended, to (1) conduct, encourage, cooperate with, and assist other appropriate public authorities, scientific institutions, and scientists in the conduct of research, investigations, experiments, demonstrations, and studies relating to the causes, diagnosis, treatment, control, and prevention of physical and mental diseases and other impairments; (2) assist states and their political subdivisions in the prevention of infectious diseases and other preventable conditions and in the promotion of health and well being; and (3) train state and local personnel in health work. The Board of Scientific Counselors, NCEH/ATSDR provides advice and guidance to the Secretary, HHS; the Director, CDC and Administrator, ATSDR; and the Director, NCEH/ATSDR, regarding program goals, objectives, strategies, and Priorities in fulfillment of the agencies' mission to protect and promote people's health. The Board provides advice and guidance that will assist NCEH/ATSDR in ensuring scientific quality, timeliness, utility, and dissemination of results. The Board also provides guidance to help NCEH/ATSDR work more efficiently and effectively with its various constituents and to fulfill its mission in protecting America's health.

*Matters to be Discussed:* The agenda items for the meeting on May 19–20, 2004, will include but are not limited to an update on future initiatives for Environmental Health and Injury Prevention; presentation on Places Goals and Research Agenda; an update on the state of NCEH/ATSDR; review of the ATSDR Draft Dioxin Soil Policy Guideline; presentation on asbestos; discussion on the criteria for ''De-Listing'' chemicals from the CDC's National Report on Human Exposure to Environmental Chemicals; a discussion on the 3rd National Report on Human Exposure to Environmental Chemicals and upates by the subcommittees and workgroup.

Agenda items are tentative and subject to change.

*Contact Person for More Information:* Individuals interested in attending the meeting, please contact Sandra Malcom, Committee Management Specialist, NCEH/ATSDR, 1600 Clifton Road, Mail Stop E–28, Atlanta, GA 30303; telephone (404) 498–0003, Fax (404) 498–0059; e-mail: *smalcom@cdc.gov.* The deadline for notification of attendance is May 13, 2005.

The Director, Management Analysis and Services Office, has been delegated the authority to sign **Federal Register** notices pertaining to announcements of meetings and other committee management activities for both CDC and the National Center for Environmental Health/Agency for Toxic Substances and Disease Registry.

Dated: April 21, 2005.

**B. Kathy Skipper,**

*Acting Director, Management Analysis and Services Office, Centers for Disease Control and Prevention.*

[FR Doc. 05–8497 Filed 4–27–05; 8:45 am]

**BILLING CODE 4163–18–P**

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## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Food and Drug Administration

**[Docket No. 2005N–0143]**

### High Chemical Co. et al.; Proposal to Withdraw Approval of 13 New Drug Applications; Opportunity for a Hearing; Reissuance

**AGENCY:** Food and Drug Administration, HHS.

**ACTION:** Notice; reissuance.

**SUMMARY:** The Food and Drug Administration (FDA) is reissuing the notice announcing an opportunity to request a hearing on the agency's proposal to withdraw approval of 13 new drug applications (NDAs) from multiple sponsors. The basis for the proposal is that the sponsors have repeatedly failed to file required annual reports for these applications. In the **Federal Register** of January 28, 2005 (70 FR 4134), FDA published a notice announcing an opportunity for a hearing on the agency's proposal to withdraw approval of 13 NDAs from multiple sponsors. That notice published with an inadvertent error; in a document published elsewhere in this issue of the **Federal Register**, the agency is withdrawing that notice.

**DATES:** Submit written requests for a hearing by May 31, 2005; submit data and information in support of the hearing request by June 27, 2005.

**ADDRESSES:** Requests for a hearing, supporting data, and other comments are to be identified with Docket No. 2005N–0143 to be submitted to the Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852.

**FOR FURTHER INFORMATION CONTACT:** Florine P. Purdie Center for Drug Evaluation and Research (HFD–7), Food and Drug Administration, 5600 Fishers Lane, Rockville, MD 20857,301–594–2041.

**SUPPLEMENTARY INFORMATION:** FDA is reissuing the notice announcing an opportunity to request a hearing on the agency's proposal to withdraw approval of 13 new drug applications (NDAs) from multiple sponsors. The basis for the proposal is that the sponsors have repeatedly failed to file required annual reports for these applications. In the **Federal Register** of January 28, 2005 (70 FR 4134), FDA published a notice announcing an opportunity for a hearing on the agency's proposal to withdraw approval of 13 NDAs from multiple sponsors. That notice published with an inadvertent error; in a document published elsewhere in this issue of the **Federal Register**, the agency is withdrawing that notice.

The holders of approved applications to market new drugs for human use are required to submit annual reports to FDA concerning each of their approved applications in accordance with § 314.81 (21 CFR 314.81). The holders of the approved applications listed in the following table have failed to submit the required annual reports and have not responded to the agency's request by certified mail for submission of the reports.

| Application No. | Drug | Applicant |
|---|---|---|
| NDA 0–763 | Sterile Solution Procaine Injection 2% (Procaine Hydrochloride (HCl)) | High Chemical Co., 1760 N. Howard St., Philadelphia, PA 19122 |
| NDA 2–959 | Nicotinic Acid (Niacin) Tablets | The Blue Line Chemical Co., 302 South Broadway, St. Louis, MO 63102 |
| NDA 4–236 | Sherman (thiamine HCl) Elixir | Do. |
| NDA 4–368 | Ascorbic Acid Tablets | Do. |
| NDA 5–159 | D.S.D. (diethylstilbestrol dipropionate) | Do. |
| NDA 9–452 | Multifuge (piperazine citrate) Syrup | Do. |
| NDA 10–055 | Fire Gard Three-Alarm Burn Relief (Methylcellulose) | Gard Products, Inc., 2560 Tara Lane, Brunswick, GA 31520 |
| NDA 10–337 | Fling Antiperspirant Foot Powder | Bauer & Black, A Division of The Kendall Co., One Federal St., Boston, MA 02110 |
| NDA 10–541 | BY-NA-MID (Butylphenamide or B and Zinc Oxide or Stearate) Tincture, Ointment, Lotion, and Powder | Miles, Inc., Cutter Biological, P.O. Box 1986, Berkeley, CA 94701 |
| NDA 10–823 | BIKE Foot and Body Powder | Bauer & Black, A Division of The Kendall Co. |
| NDA 10–824 | BIKE Anti-Fungal Aerosol Spray | Do. |
| NDA 11–233 | TKO with Entrin Roll-On Liquid | Modern-Labs, Inc., Maple Rd., Gambrills, MD 21504 |
| NDA 19–432 | Spectamine (Iofetamine Hydrochloride I–123) Injection | IMP, Inc., 8050 El Rio, Houston, TX 77054 |

Therefore, under § 314.150(b)(1) (21 CFR 314.150(b)(1)) and § 314.200 (21 CFR 314.200), notice is given to the holders of the approved applications listed in the table and to all other interested persons that the Director of the Center for Drug Evaluation and Research proposes to issue an order under section 505(e) of the Federal Food, Drug, and Cosmetic Act (the act) (21 U.S.C. 355(e)) withdrawing approval of the applications and all amendments and supplements thereto on the ground that the applicants have failed to submit reports required under § 314.81.

In accordance with section 505 of the act and part 314 (21 CFR part 314), the applicants are hereby provided an opportunity to request a hearing to show why the applications listed previously should not be withdrawn.

An applicant who decides to seek a hearing shall file: (1) On or before May 31, 2005, a written notice of participation and request for a hearing, and (2) on or before June 27, 2005, the data, information, and analyses relied on to demonstrate that there is a genuine and substantial issue of fact that requires a hearing. Any other interested person may also submit comments on this notice. The procedures and requirements governing this notice of opportunity for a hearing, notice of participation and request for a hearing, information and analyses to justify a hearing, other comments, and a grant or denial of a hearing are contained in § 314.200 and in part 12 (21 CFR part 12).

The failure of an applicant to file a timely written notice of participation and request for a hearing, as required by § 314.200, constitutes an election by that applicant not to avail itself of the opportunity to request a hearing concerning the proposal to withdraw approval of the applications and constitutes a waiver of any contentions concerning the legal status of the drug products. FDA will then withdraw approval of the applications and the drug products may not thereafter lawfully be marketed, and FDA will begin appropriate regulatory action to remove the products from the market. Any new drug product marketed without an approved new drug application is subject to regulatory action at any time.

A request for a hearing may not rest upon mere allegations or denials, but must present specific facts showing that there is a genuine and substantial issue of fact that requires a hearing. Reports submitted to remedy the deficiencies must be complete in all respects in accordance with § 314.81. If the submission is not complete or if a request for a hearing is not made in the required format or with the required reports, the Commissioner of Food and Drugs will enter summary judgment against the person who requests the hearing, making findings and conclusions, and denying a hearing.

All submissions under this notice of opportunity for a hearing must be filed in four copies. Except for data and information prohibited from public disclosure under 21 U.S.C. 331(j) or 18 U.S.C. 1905, the submissions may be seen in the Division of Dockets Management (see **ADDRESSES**) between 9 a.m. and 4 p.m., Monday through Friday.

This notice is issued under the Federal Food, Drug, and Cosmetic Act (sec. 505 (21 U.S.C. 355)) and under authority delegated to the Director, Center for Drug Evaluation and Research, by the Commissioner.

Dated: April 5, 2005.

**Steven Galson,**

*Acting Director, Center for Drug Evaluation and Research.*

[FR Doc. 05–8469 Filed 4–27–05; 8:45 am]

**BILLING CODE 4160–01–S**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Food and Drug Administration

**[Docket No. 2005N–0010]**

### High Chemical Co. et al.; Proposal to Withdraw Approval of 13 New Drug Applications; Opportunity for a Hearing; Withdrawal

**AGENCY:** Food and Drug Administration, HHS.

**ACTION:** Notice; withdrawal.

**SUMMARY:** The Food and Drug Administration (FDA) is withdrawing a notice that published in the **Federal Register** on January 28, 2005 (70 FR 4134). This notice is being reissued elsewhere in this issue of the **Federal Register**

**DATES:** This notice is withdrawn on April 28, 2005.

**FOR FURTHER INFORMATION CONTACT:** Darlease Hyman, Regulations Policy Management Staff (HF–26), Food and Drug Administration, 5600 Fishers Lane, Rockville, MD 20857, 301–827–3480.

**SUPPLEMENTARY INFORMATION:** In the **Federal Register** of January 28, 2005 (70 FR 4134), FDA published a notice announcing an opportunity for a hearing on the agency's proposal to withdraw approval of 13 new drug applications from multiple sponsors. This notice published with an inadvertent error. Therefore, the agency is withdrawing the notice. Elsewhere in this issue of the **Federal Register**, FDA is reissuing the corrected notice for the convenience of the reader and to give sponsors the fully allotted time to respond.

Dated: April 5, 2005.

**Jeffrey Shuren,**

*Assistant Commissioner for Policy.*

[FR Doc. 05–8470 Filed 4–27–05; 8:45 am]

**BILLING CODE 4160–01–S**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Food and Drug Administration

**[Docket No. 2004D–0178]**

### Guidance for Industry and Food and Drug Administration Staff; Class II Special Controls Guidance Document: Dental Bone Grafting Material Devices; Availability

**AGENCY:** Food and Drug Administration, HHS.

**ACTION:** Notice.

**SUMMARY:** The Food and Drug Administration (FDA) is announcing the availability of the guidance entitled ''Class II Special Controls Guidance Document: Dental Bone Grafting Material Devices.'' This guidance document describes a means by which class II dental bone grafting material devices may comply with the requirement of special controls. Elsewhere in this issue of the **Federal Register**, FDA is publishing a final rule to reclassify tricalcium phosphate (TCP) granules for dental bone repair from class III (premarket approval) to class II (special controls), classify into class II (special controls) other bone grafting material for dental indications, and revise the classification name and identification of the device.

**DATES:** Submit written or electronic comments on this guidance at any time. General comments on agency guidance documents are welcome at any time.

**ADDRESSES:** Submit written requests for single copies on a 3.5″ diskette of the guidance document entitled ''Class II Special Controls Guidance Document: Dental Bone Grafting Material Devices'' to the Division of Small Manufacturers, International, and Consumer Assistance (HFZ–220), Center for Devices and Radiological Health, Food and Drug Administration, 1350 Piccard Dr., Rockville, MD 20850. Send one self-addressed adhesive label to assist that office in processing your request, or fax your request to 301–443–8818. See the **SUPPLEMENTARY INFORMATION** section for information on electronic access to the guidance.

Submit written comments concerning this guidance to the Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852. Submit electronic comments to *http://www.fda.gov/dockets/ecomments*. Identify comments with the docket number found in brackets in the heading of this document.

**FOR FURTHER INFORMATION CONTACT:** Michael E. Adjodha, Center for Devices and Radiological Health (HFZ–480), Food and Drug Administration, 9200 Corporate Blvd., Rockville, MD 20850, 301–827–5283, e-mail: *michael.adjodha@fda.hhs.gov*.

**SUPPLEMENTARY INFORMATION:**

#### I. Background

In the **Federal Register** of June 30, 2004 (69 FR 39485), FDA announced the availability of a draft of this special controls guidance document and invited interested persons to comment on it by September 28, 2004. In addition, in the same **Federal Register** (69 FR 39377), FDA proposed to reclassify tricalcium phosphate (TCP) granules for dental bone repair from class III to class II (special controls). Concurrently, FDA proposed to classify into class II (special controls) all other bone grafting material for dental indications, except those that contained a drug or biologic component; and to revise the classification name and identification of the device. In the proposed rule, FDA identified bone grafting material as a material such as hydroxyapatite, tricalcium phosphate, polylactic acids, or collagen, intended to fill, augment, or reconstruct periodontal or bony defects of the oral and maxillofacial region. FDA received one comment on the proposed rule and draft special controls guidance document. The comment is addressed in the final rule published elsewhere in this issue of the **Federal Register**.

The final rule published elsewhere in this issue of the **Federal Register** reclassifies tricalcium phosphate (TCP) granules for dental bone repair from class III (premarket approval) to class II (special controls) and also classifies other dental bone grafting materials that do not contain a drug that is a therapeutic biologic into class II (special controls). Bone grafting material devices that contain a drug that is a therapeutic biologic will remain in class III and continue to require premarket approval. The guidance document provides a means by which the dental bone grafting materials in class II may comply with the requirement of special controls for class II devices.

Following the effective date of the final rule, any firm submitting a 510(k) for the class II devices will need to address the issues covered in the special control guidance. However, the firm need only show that its device meets the recommendations of the guidance or in some other way provides equivalent assurances of safety and effectiveness.

#### II. Significance of Guidance

This guidance is being issued consistent with FDA's good guidance practices regulation (21 CFR 10.115). The guidance represents the agency's current thinking on class II dental bone grafting material devices. It does not create or confer any rights for or on any person and does not operate to bind FDA or the public. An alternative approach may be used if such approach satisfies the requirements of the applicable statute and regulations.

#### III. Electronic Access

To receive ''Class II Special Controls Guidance Document: Dental Bone Grafting Material Devices'' by fax, call the CDRH Facts-On-Demand system at

800–899–0381 or 301–827–0111 from a touch-tone telephone. Press 1 to enter the system. At the second voice prompt, press 1 to order a document. Enter the document number (1512) followed by the pound sign (#). Follow the remaining voice prompts to complete your request.

To receive a hard copy or electronic copy of ''Class II Special Controls Guidance Document: Dental Bone Grafting Material Devices,'' you may either send a fax request to 301–443–8818, or send an e-mail request to *gwa@cdrh.fda.gov*. Please use the document number (1512) to identify the guidance you are requesting.

Persons interested in obtaining a copy of the guidance may also do so by using the Internet. CDRH maintains an entry on the Internet for easy access to information, including text, graphics, and files that may be downloaded to a personal computer with Internet access. The CDRH Web site may be accessed at *http://www.fda.gov/cdrh*. A search capability for all CDRH guidance documents is available at *http://www.fda.gov/cdrh/guidance.html*. Guidance documents are also available on the Division of Dockets Management Internet site at *http://www.fda.gov/ohrms/dockets*.

## IV. Paperwork Reduction Act of 1995

This guidance contains information collection provisions that are subject to review by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (the PRA) (44 U.S.C. 3501–3520). The collections of information addressed in the guidance document have been approved by OMB in accordance with the PRA under the regulations governing premarket notification submissions (21 CFR part 807, subpart E, OMB control number 0910–0120). The labeling provisions addressed in the guidance have been approved by OMB under OMB control number 0910–0485.

## V. Comments

Interested persons may submit to the Division of Dockets Management (see **ADDRESSES**) written or electronic comments regarding this document. Submit a single copy of electronic comments or two paper copies of any mailed comments, except that individuals may submit one paper copy. Comments are to be identified with the docket number found in brackets in the heading of this document. Received comments may be seen in the Division of Dockets Management between 9 a.m. and 4 p.m., Monday through Friday.

Dated: April 4, 2005.

**Linda S. Kahan,**

*Deputy Director, Center for Devices and Radiological Health.*

[FR Doc. 05–8468 Filed 4–27–05; 8:45 am]

**BILLING CODE 4160–01–S**

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## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Food and Drug Administration

**[Docket No. 1999D–1540] (formerly Docket No. 99D–1540)**

### Guidance for Reviewers on Evaluating the Risks of Drug Exposure in Human Pregnancies; Availability

**AGENCY:** Food and Drug Administration, HHS.

**ACTION:** Notice.

**SUMMARY:** The Food and Drug Administration (FDA) is announcing the availability of a guidance for reviewers entitled ''Reviewer Guidance: Evaluating the Risks of Drug Exposure in Human Pregnancies.'' This guidance is intended to help FDA staff evaluate human fetal outcome data generated after medical product exposures during pregnancy. The goal of such evaluations is to assist in the development of product labeling that is useful to medical care providers when they care for patients who are pregnant or planning pregnancy. The review of human pregnancy drug exposure data and assessment of fetal risk (or lack of risk) requires consideration of human embryology and teratology, pharmacology, obstetrics, and epidemiology. Consequently, FDA staff also are encouraged to consult with experts in these fields, as appropriate.

The guidance announced in this document finalizes the draft guidance entitled ''Guidance for Reviewers: Evaluation of Human Pregnancy Outcome Data'' announced in the **Federal Register** of June 4, 1999.

**DATES:** Submit written comments or electronic comments on agency guidances at any time.

**ADDRESSES:** Submit written requests for single copies of this guidance to the Division of Drug Information (HFD–240), Center for Drug Evaluation and Research, Food and Drug Administration, 5600 Fishers Lane, Rockville, MD 20857, or the Office of Communication, Training, and Manufacturers Assistance (HFM–40), Center for Biologics Evaluation and Research (CBER), Food and Drug Administration, 1401 Rockville Pike, Rockville, MD 20852–1448. Send one self-addressed adhesive label to assist either office in processing your requests. The guidance may also be obtained by mail by calling the CBER Voice Information System at 1–800–835–4709 or 301–827–1800. Submit written comments on the guidance to the Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852. Submit electronic comments to *http://www.fda.gov/dockets/ecomments*. See the **SUPPLEMENTARY INFORMATION** section for electronic access to the guidance document.

**FOR FURTHER INFORMATION CONTACT:** Dianne L. Kennedy, Center for Drug Evaluation and Research (HFD–020), Food and Drug Administration, 5600 Fishers Lane, Rockville, MD 20857, 301–443–5162, e-mail: *kennedyd@cder.fda.gov*, or Toni M. Stifano, Center for Biologics Evaluation and Research (HFM–602), Food and Drug Administration, 1401 Rockville Pike, Rockville, MD 20852–1448, 301–827–6190, e-mail: *stifano@cber.fda.gov*.

**SUPPLEMENTARY INFORMATION:**

## I. Background

FDA is announcing the availability of a guidance for reviewers entitled ''Reviewer Guidance: Evaluating the Risks of Drug Exposure in Human Pregnancies.'' The guidance provides FDA staff with critical factors to consider when evaluating data on the effects of drug exposure during human pregnancies. It also describes the sources of human data on gestational drug exposures and available resources for more information. The guidance is intended to provide FDA reviewers with a standardized and scientific approach to the evaluation of the effects of human gestational drug exposures.

In the **Federal Register** of June 4, 1999 (64 FR 30040), FDA announced the availability of a draft version of the guidance entitled ''Guidance for Reviewers: Evaluation of Human Pregnancy Outcome Data.'' When the draft guidance was published, FDA requested comments on the document. Three public comments were received. The comments were supportive of the agency's efforts to provide this type of guidance. However, the comments also recommended revision/clarification of several sections, as well as provided a number of suggestions of a more technical nature. Additionally, comments regarding the draft guidance raised the following three broader concerns: (1) That it contained redundant information already presented in the guidance for industry entitled ''Establishing Pregnancy Exposure Registries'' (draft: 64 FR

30040, June 4, 1999; final: 67 FR 59528, September 23, 2002), (2) that it focused too much on general epidemiologic issues, and (3) that it overemphasized the utility of pregnancy registries without a balanced review of the strengths of other data sources for evaluating pregnancy outcome data.

Based on these comments and discussions with FDA's Pregnancy Labeling Subcommittee of the Advisory Committee for Reproductive Health Drugs on June 3, 1999 (64 FR 23340, April 30, 1999), and March 28 and 29, 2000 (65 FR 10811, February 29, 2000), and with other interested parties, the draft guidance has been revised and finalized. The name has been changed from ''Evaluating Pregnancy Outcome Data'' to ''Evaluating the Risks of Drug Exposure in Human Pregnancies'' to reflect more accurately the information contained in the guidance.

This guidance is being issued consistent with FDA's good guidance practice regulation (21 CFR 10.115). The guidance represents the agency's current thinking with regard to evaluating data on the effects of drug exposure during pregnancy. It does not create or confer any rights for or on any person and does not operate to bind FDA or the public. An alternative approach may be used if such approach satisfies the requirements of the applicable statutes and regulations.

## II. Comments

Interested persons may submit to the Division of Dockets Management (see **ADDRESSES**) written or electronic comments regarding this document. Submit a single copy of electronic comments or two paper copies of any mailed comments, except that individuals may submit one paper copy. Comments are to be identified with the docket number found in brackets in the heading of this document. Received comments may be seen in the Division of Dockets Management between 9 a.m. and 4 p.m., Monday through Friday.

## III. Electronic Access

Persons with access to the Internet may obtain the document at either *http://www.fda.gov/cder/guidance/index.htm*, *http://www.fda.gov/cber/guidelines.htm*, or *http://www.fda.gov/ohrms/dockets/default.htm*.

Dated: April 19, 2005.

**Jeffrey Shuren,**

*Assistant Commissioner for Policy.*

[FR Doc. 05–8466 Filed 4–27–05; 8:45 am]

**BILLING CODE 4160–01–S**

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## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Health Resources and Services Administration

### Agency Information Collection Activities: Submission for OMB Review; Comment Request

Periodically, the Health Resources and Services Administration (HRSA) publishes abstracts of information collection requests under review by the Office of Management and Budget (OMB), in compliance with the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35). To request a copy of the clearance requests submitted to OMB for review, call the HRSA Reports Clearance Office on (301) 443–1129.

The following request has been submitted to the Office of Management and Budget for review under the Paperwork Reduction Act of 1995:

**Proposed Project: The National Health Service Corps (NHSC) Recruitment and Retention Assistance Application (OMB No. 0915–0230)—Revision**

The National Health Service Corps (NHSC) of the Bureau of Health Professions (BHPr), HRSA, is committed to improving the health of the Nation's underserved by uniting communities in need with caring health professionals and by supporting communities' efforts to build better systems of care.

The Application for NHSC Recruitment and Retention Assistance submitted by sites or clinicians, requests information on the practice site, sponsoring agency, recruitment contact, staffing levels, service users, charges for services, employment policies, and fiscal management capabilities. Assistance in completing the application may be obtained through the appropriate State Primary Care Offices, State Primary Care Associations and NHSC Contractors. The information on the application is used for determining eligibility of sites and to verify the need for NHSC providers. Sites must apply once every three years.

Estimates of annualized reporting burden are as follows:

| Type of report | Number of respondents | Response per respondents | Hours per response | Total burden hours |
|---|---|---|---|---|
| Application | 2900 | 1 | .5 | 1450 |

Written comments and recommendations concerning the proposed information collection should be sent within 30 days of this notice to: John Kraemer, Desk Officer, Human Resources and Housing Branch, Office of Management and Budget, New Executive Office Building, Room 10235, Washington, DC 20503.

Dated: April 22, 2005.

**Tina M. Cheatham,**

*Director, Division of Policy Review and Coordination.*

[FR Doc. 05–8509 Filed 4–27–05; 8:45 am]

**BILLING CODE 4165–15–P**

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## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Health Resources and Services Administration

### Advisory Committee on Training in Primary Care Medicine and Dentistry; Notice of Meeting

In accordance with section 10(a)(2) of the Federal Advisory Committee Act (Pub. L. 92–463), notice is hereby given of the following meeting:

*Name:* Advisory Committee on Training in Primary Care Medicine and Dentistry.

*Date and Time:* May 19, 2005, 8:30 a.m.–4:30 p.m. and May 20, 2005, 8 a.m.–2 p.m.

*Place:* The Bethesda Marriott, 5151 Pooks Hill Road, Bethesda, Maryland 20814.

*Status:* The meeting will be open to the public.

*Purpose:* The Advisory Committee provides advice and recommendations on a broad range of issues dealing with programs and activities authorized under section 747 of the Public Health Service Act as amended by The Health Professions Education Partnership Act of 1998, Public Law 105–392. At this meeting the Advisory Committee will continue to work on its fifth report which will be submitted to Congress and to the Secretary of the Department of Health and Human Services in November 2005 and which focuses on measuring outcomes of Title VII, section 747 grant programs.

*Agenda:* The meeting on Thursday, May 19, will begin with opening comments from the Chair of the Advisory Committee. A plenary session will follow in which Advisory Committee members will discuss various sections of the fifth report. The Advisory Committee will divide into

workgroups to further refine the report. An opportunity will be provided for public comment.

On Friday, May 20, the Advisory Committee will meet in plenary session to finalize the fifth report and to select a topic for its next report which will be due to the Congress and to the Secretary of the Department of Health and Human Services in November 2006. An opportunity will be provided for public comment.

*For Further Information Contact:* Anyone interested in obtaining a roster of members or other relevant information should write or contact Jerilyn K. Glass, M.D., Ph.D., Division of Medicine and Dentistry, Bureau of Health Professions, Health Resources and Services Administration, Room 9A–27, Parklawn Building, 5600 Fishers Lane, Rockville, Maryland 20857, Telephone (301) 443–6785. The web address for information on the Advisory Committee is *http://bhpr.hrsa.gov/medicine-dentistry/actpcmd.*

Dated: April 20, 2005.

**Tina M. Cheatham,**

*Director, Division of Policy Review and Coordination.*

[FR Doc. 05–8508 Filed 4–27–05; 8:45 am]

BILLING CODE 4165–15–P

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Indian Health Service

### Health Promotion and Disease Prevention; Correction

**ACTION:** Notice; Correction.

**SUMMARY:** The Indian Health Service published a document in the **Federal Register** on April 14, 2005. The document contained one error.

**FOR FURTHER INFORMATION CONTACT:** Patricia Spottedhorse, Division of Grants Operation, Indian Health Service, 801 Thompson Avenue, Suite 120, Rockville, MD 20852, Telephone (301) 443–5204. (This is snot a toll-free number.)

**Correction**

In the **Federal Register** of April 14, 2005, in FR 05–7460, on page 19772, in the second column, Earliest Anticipated Start Date should be September 30, 2005.

Dated: April 21, 2005.

**Charles W. Grim,**

*Assistant Surgeon General, Director, Indian Health Service.*

[FR Doc. 05–8473 Filed 4–27–05; 8:45 am]

BILLING CODE 4165–16–M

## DEPARTMENT OF HOMELAND SECURITY

### Bureau of Customs and Border Protection

### Notice of Cancellation of Customs Broker License Due to Death of the License Holder

**AGENCY:** Bureau of Customs and Border Protection, U.S. Department of Homeland Security.

**ACTION:** General notice.

**SUMMARY:** Notice is hereby given that, pursuant to title 19 of the Code of Federal Regulations § 111.51(a), the following individual Customs broker licenses and any and all permits have been cancelled due to the death of the broker:

| Name | License No. | Port name |
|---|---|---|
| Emil F. Benja | 2274 | New York. |
| James T. Wanka. | 6585 | New York. |
| Paul W. Kelley | 13080 | New York. |
| Patricia E. Orantes. | 13630 | New York. |
| Harold I. Pepper. | 3584 | New York. |
| Herbert Broner | 5593 | New York. |

Dated: April 19, 2005.

**Jayson P. Ahern,**

*Assistant Commissioner, Office of Field Operations.*

[FR Doc. 05–8496 Filed 4–27–05; 8:45 am]

BILLING CODE 4820–02–P

## DEPARTMENT OF HOMELAND SECURITY

### Bureau of Customs and Border Protection

### Notice of Cancellation of Customs Broker License

**AGENCY:** Bureau of Customs and Border Protection, U.S. Department of Homeland Security.

**ACTION:** General notice.

**SUMMARY:** Pursuant to section 641 of the Tariff Act of 1930, as amended, (19 U.S.C. 1641) and the Customs Regulations (19 CFR 111.51), the following Customs broker licenses are cancelled without prejudice.

| Name | License No. | Issuing port |
|---|---|---|
| Continental Forwarding Co., Inc. | 13026 | Cleveland. |
| John D. Cioffi, Jr.. | 5248 | Cleveland. |
| Hoglund & Moyles, Inc. | 04940 | Chicago. |
| Edward Mittlestaedt, Inc. | 16583 | San Francisco. |
| NCB Freight Corp. | 22589 | Miami. |
| William H. Holmes. | 3311 | Los Angeles. |
| Norman Laufer. | 6424 | New York. |
| Lillian Heilpern | 3364 | New York. |
| Eugene W. Hammer. | 2862 | New York. |
| Florence DiCostanzo. | 3689 | New York. |
| Boniface DiProperzio. | 3884 | New York. |

Dated: April 19, 2005.

**Jayson P. Ahern,**

*Assistant Commissioner, Office of Field Operations.*

[FR Doc. 05–8494 Filed 4–27–05; 8:45 am]

BILLING CODE 4820–02–P

## DEPARTMENT OF HOMELAND SECURITY

### Bureau of Customs and Border Protection

### Notice of Cancellation of Customs Broker Permit

**AGENCY:** Bureau of Customs and Border Protection, U.S. Department of Homeland Security.

**ACTION:** General notice.

**SUMMARY:** Pursuant to section 641 of the Tariff Act of 1930, as amended, (19 U.S.C. 1641) and the Customs Regulations (19 CFR 111.51), the following Customs broker local permits are cancelled without prejudice.

| Name | Permit No. | Issuing port |
|---|---|---|
| Continental Forwarding Co., Inc. | 41–93–N11 | Cleveland. |
| Hoglund & Moyles, Inc. | 39–909 | Chicago. |
| Edward Mittlestaedt, Inc. | 16583 | San Francisco. |
| Elizabeth M. Lee. | 27–04–BLM | Los Angeles. |
| Cargo U.K ..... | 94–17–053 | Atlanta. |
| Thomas A. Burcet. | 17–04–043 | Atlanta. |
| Elle International, Inc. | 99–17–009 | Atlanta. |

Dated: April 19, 2005.

**Jayson P. Ahern,**

*Assistant Commissioner, Office of Field Operations.*

[FR Doc. 05–8495 Filed 4–27–05; 8:45 am]

**BILLING CODE 4820–02–P**

## DEPARTMENT OF THE INTERIOR

### Fish and Wildlife Service

### Information Collection Submitted to the Office of Management and Budget (OMB) for Renewal Under the Paperwork Reduction Act; 1018–0115; USFWS Training Records, Application for FWS Training Request

**AGENCY:** Fish and Wildlife Service, Interior.

**ACTION:** Notice; request for comments.

**SUMMARY:** We (Fish and Wildlife Service) have submitted to OMB a request to renew approval for information collection associated with our Training Application (FWS Form 3–2193). Applicants who wish to participate in training sponsored by the Fish and Wildlife Service National Conservation Training Center (NCTC) must complete a training application, which is available in both electronic (Internet) and hard copy versions.

**DATES:** You must submit comments on or before May 31, 2005.

**ADDRESSES:** Send your comments and suggestions on this information collection renewal to the Desk Officer for the Department of the Interior at OMB–OIRA at (202) 395–6566 (fax) or *OIRA_DOCKET@OMB.eop.gov* (e-mail). Please provide a copy of your comments to Hope Grey, Information Collection Clearance Officer, Fish and Wildlife Service, MS 222–ARLSQ, 4401 North Fairfax Drive, Arlington, VA 22203 (mail); (703) 358–2269 (fax); or *hope_grey@fws.gov* (e-mail).

**FOR FURTHER INFORMATION CONTACT:** To request a copy of the information collection requirements, explanatory information, or related form, contact Hope Grey at the addresses above or by phone at (703) 358–2482.

**SUPPLEMENTARY INFORMATION:** OMB regulations at 5 CFR 1320, which implement provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*), require that interested members of the public and affected agencies have an opportunity to comment on information collection and recordkeeping activities (see 5 CFR 1320.8(d)). Currently, we have approval from OMB to collect information related to FWS Form 3–2193 under OMB control number 1018–0115. This approval expires on April 30, 2005. We have submitted a request to OMB to renew approval for this information collection, and we are requesting a 3-year term of approval. 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. OMB has up to 60 days to approve or disapprove our information collection request, but may respond after 30 days. Therefore, to ensure that your comments receive consideration, send all comments and suggestions to OMB by the date listed in the **DATES** section.

The NCTC in Shepherdstown, West Virginia, provides natural resource and other professional training for Service employees, employees of other Federal agencies, and individuals with other affiliations. While most training is targeted for Service employees, NCTC offers slots to State agencies, university personnel, not-for-profit organizations, and members of the general public who request to be considered for training.

NCTC designed FWS Form 3–2193 (Training Application) as a quick and easy method for prospective students to request training. This collection has been in use for 3 years and is used in the daily workings of the NCTC. We encourage applicants to use FWS Form 3–2193 and to submit their requests electronically. NCTC uses data from the form to generate class rosters, class transcripts, and statistics, and as a budgeting tool for projecting training requirements. It is also used to track attendance, mandatory requirements, tuition, and invoicing for all NCTC sponsored courses both on- and off-site.

On January 21, 2005, we published in the **Federal Register** (70 FR 3221) a notice of our intent to request that OMB renew authority for this information collection. In that notice, we solicited public comments for 60 days, ending on March 22, 2005. We received one comment during this period. The comment was directed to the subject matter, validity, and necessity of the training and not at the need for the information collection. The commenter stated that training should be open to the public and believes that the training we provide is focused on guns, hunting, and violence proponents.

All training courses offered by the NCTC, with the exception of some bureau-specific courses, are open to members of the general public who have the required background experience or knowledge to allow their full understanding of the subject matter. Very few of our training courses have an emphasis on guns and hunting. Those courses that do touch on these subjects are presented in the context of refuge and wildlife management and law enforcement.

In September 2005, we conducted limited public outreach directed at various personnel who have completed FWS Form 3–2193 to request training at the NCTC. All respondents indicated that the information we collect is necessary and appropriate and that the reporting burden is not excessive. We have revised the currently approved form to: (1) Comply with Governmentwide policy regarding collection of Dun and Bradstreet numbers for agencies from which NCTC will need to collect funds, and (2) respond to the suggestions received during our outreach to provide more explanation for non-Federal employees.

*Title:* USFWS Training Records, Application for FWS Training Request.

*OMB Control Number:* 1018–0115.

*Form Number:* FWS Form 3–2193.

*Frequency:* When applying for training.

*Description of Respondents:* Persons who wish to participate in training given at or sponsored by the NCTC.

*Total Annual Burden Hours:* 60.33 hours.

*Total Annual Responses:* 724.

We invite your comments on (1) whether or not the collection of information is necessary for the proper performance of the functions of the agency, including whether or not the information will have practical utility; (2) the accuracy of the agency's estimate of the burden of the collection information; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on respondents.

Dated: April 14, 2005.

**Hope Grey,**

*Information Collection Clearance Officer, Fish and Wildlife Service.*

[FR Doc. 05–8481 Filed 4–27–05; 8:45 am]

**BILLING CODE 4310–55–P**

## DEPARTMENT OF THE INTERIOR

### Fish and Wildlife Service

### Draft Comprehensive Conservation Plan and Environmental Impact Statement for the Upper Mississippi River National Wildlife and Fish Refuge, Illinois, Iowa, Minnesota, and Wisconsin

**AGENCY:** Fish and Wildlife Service, Interior.

**ACTION:** Notice of availability.

**SUMMARY:** The U.S. Fish and Wildlife Service announces that the Draft Comprehensive Conservation Plan (CCP) and Environmental Impact Statement (EIS) is available for Upper Mississippi River National Wildlife and Fish Refuge.

The CCP was prepared pursuant to the National Wildlife Refuge System Administration Act of 1966, as amended by the National Wildlife Refuge System Improvement Act of 1997, and the National Environmental Policy Act of 1969. Goals and objectives in the CCP describe how the agency intends to manage the refuge over the next 15 years.

**DATES:** Comments on the Draft CCP/EIS must be received on or before August 31, 2005.

**ADDRESSES:** Copies of the Draft CCP are available on compact disk or hard copy. You may access and download a copy via the planning Web site: (*http://www.fws.gov/midwest/planning/uppermiss/index.html*) or you may obtain a copy by writing to the following address: U.S. Fish and Wildlife Service, Division of Conservation Planning, Bishop Henry Whipple Federal Building, 1 Federal Drive, Fort Snelling, Minnesota 55111.

All comments should be addressed to Upper Mississippi National Wildlife and Fish Refuge, Attention: CCP Comment, 51 East 4th Street, Room 101, Winona, Minnesota 55987, or direct e-mail to *r3planning@fws.gov.* Comments may also be submitted through the Service's regional Web site at: *http://www.fws.gov/midwest/planning/*.

**FOR FURTHER INFORMATION CONTACT:** Don Hultman at (507) 452–4232.

**SUPPLEMENTARY INFORMATION:** The Upper Mississippi River National Wildlife and Fish Refuge encompasses 240,000 acres along 261 miles of Mississippi River floodplain in Minnesota, Wisconsin, Iowa, and Illinois. The Refuge was established by Congress in 1924 to provide a refuge and breeding ground for migratory birds, fish, other wildlife, and plants. The Refuge is perhaps the most important corridor of habitat in the central United States due to its species diversity and abundance, and it is the most visited refuge in the United States with 3.7 million annual visitors.

The focus of the CCP over the next 15 years will be on safeguarding existing habitat; enhancing floodplain habitat in partnership with the U.S. Army Corps of Engineers and the states; increasing the abundance of fish and wildlife; improving wildlife-dependent recreation opportunities such as hunting, fishing, and wildlife observation; ensuring that traditional non-wildlife-dependent recreation remains compatible with the mission of the refuge system and the purposes of the refuge; and improving staffing and infrastructure capability.

The EIS evaluates four alternatives: (1) No action or current direction; (2) wildlife focus; (3) public use focus; and (4) wildlife and integrated public use focus (preferred). The alternatives differ mainly in the level of effort and resources given to fish and wildlife and habitat management and public use opportunities and programs. Under the preferred alternative all current recreational uses would continue, although the location, season of use, and means of use could change.

The National Wildlife Refuge System Administration Act of 1966, as amended by the National Wildlife Refuge System Improvement Act of 1997 (16 U.S.C. 668dd–668ee et seq) requires the Service to develop a CCP for each National Wildlife Refuge. The purpose in developing a CCP is to provide refuge managers with a 15-year strategy for achieving refuge purposes and contributing toward the mission of the National Wildlife Refuge System, consistent with sound principles of fish and wildlife management, conservation, legal mandates, and Service policies. In addition to outlining broad management direction for conserving wildlife and their habitats, the CCP identifies wildlife-dependent recreational opportunities available to the public, including opportunities for hunting, fishing, wildlife observation and photography, and environmental education and interpretation. We will review and update these CCPs at least every 15 years in accordance with the National Wildlife Refuge System Administration Act of 1966, as amended by the National Wildlife Refuge System Improvement Act of 1997, and the National Environmental Policy Act of 1969 (42 U.S.C. 4321–4370d).

Dated: March 7, 2005.

**Charles M. Wooley,**

*Acting Regional Director, U.S. Fish and Wildlife Service, Ft. Snelling, Minnesota.*

[FR Doc. 05–8498 Filed 4–27–05; 8:45 am]

BILLING CODE 4310–55–P

## DEPARTMENT OF THE INTERIOR

### Fish and Wildlife Service

### Receipt of an Application for an Incidental Take Permit for Construction of a Single-Family Home in the City of Palm Bay, Brevard County, FL

**AGENCY:** Fish and Wildlife Service, Interior.

**ACTION:** Notice.

**SUMMARY:** Dorothy V. Jacobs and Paul A. Jacobs (Applicants) request an incidental take permit (ITP) pursuant to section 10(a)(1)(B) of the Endangered Species Act of 1973 (U.S.C. 1531 *et seq.*), as amended (Act). The Applicants anticipate taking about 0.23 acre of Florida scrub-jay (*Aphelocoma coerulescens*) (scrub-jay) foraging, sheltering, and possibly nesting habitat incidental to lot preparation for the construction of a single-family home and supporting infrastructure in the City of Palm Bay, Brevard County, Florida (Project). The destruction of 0.23 acre of foraging, sheltering, and possibly nesting habitat is expected to result in the take of one family of scrub-jays.

The Applicants' Habitat Conservation Plan (HCP) describes the mitigation and minimization measures proposed to address the effects of the Project to the Florida scrub-jay. These measures are outlined in the **SUPPLEMENTARY INFORMATION** section below. We have determined that the Applicants' proposal, including the proposed mitigation and minimization measures, will individually and cumulatively have a minor or negligible effect on the species covered in the HCP. Therefore, the ITP is a ''low-effect'' project and would qualify as a categorical exclusion under the National Environmental Policy Act (NEPA), as provided by the Department of Interior Manual (516 DM2, Appendix 1 and 516 DM 6, Appendix 1). We announce the availability of the HCP for the incidental take application. Copies of the HCP may be obtained by making a request to the Regional Office (see **ADDRESSES**). Requests must be in writing to be processed. This notice is provided pursuant to Section 10 of the Endangered Species Act and NEPA regulations (40 CFR 1506.6).

**DATES:** Written comments on the ITP application and HCP should be sent to the Service's Regional Office (see **ADDRESSES**) and should be received on or before May 31, 2005.

**ADDRESSES:** Persons wishing to review the application and HCP may obtain a copy by writing the Service's Southeast

Regional Office, Atlanta, Georgia. Please reference permit number TE089995–0 in such requests. Documents will also be available for public inspection by appointment during normal business hours at the Regional Office, 1875 Century Boulevard, Suite 200, Atlanta, Georgia 30345 (Attn: Endangered Species Permits), or Field Supervisor, U.S. Fish and Wildlife Service, 6620 Southpoint Drive South, Suite 310, Jacksonville, Florida 32216.

**FOR FURTHER INFORMATION CONTACT:** Mr. David Dell, Regional HCP Coordinator, (see **ADDRESSES** above), telephone: 404/679–7313, facsimile: 404/679–7081; or Mr. Michael Jennings, Fish and Wildlife Biologist, Jacksonville Field Office, Jacksonville, Florida (see **ADDRESSES** above), telephone: 904/232–2580, ext. 113.

**SUPPLEMENTARY INFORMATION:** If you wish to comment, you may submit comments by any one of several methods. Please reference permit number TE089995–0 in such comments. You may mail comments to the Service's Regional Office (see **ADDRESSES**). You may also comment via the Internet to *david_dell@fws.gov*. Please submit comments over the Internet as an ASCII file avoiding the use of special characters and any form of encryption. Please also include your name and return address in your Internet message. If you do not receive a confirmation from us that we have received your Internet message, contact us directly at either telephone number listed below (see **FOR FURTHER INFORMATION CONTACT**). Finally, you may hand deliver comments to either Service office listed below (see **ADDRESSES**). Our practice is to make comments, including names and home addresses of respondents, available for public review during regular business hours. Individual respondents may request that we withhold their home address from the administrative record. We will honor such requests to the extent allowable by law. There may also be other circumstances in which we would withhold from the administrative record a respondent's identity, as allowable by law. If you wish us to withhold your name and address, you must state this prominently at the beginning of your comments. We will not, however, consider anonymous comments. We will make all submissions from organizations or businesses, and from individuals identifying themselves as representatives or officials of organizations or businesses, available for public inspection in their entirety.

The Florida scrub-jay (scrub-jay) is geographically isolated from other species of scrub-jays found in Mexico and the western United States. The scrub-jay is found exclusively in peninsular Florida and is restricted to xeric uplands (predominately in oak-dominated scrub). Increasing urban and agricultural development have resulted in habitat loss and fragmentation which has adversely affected the distribution and numbers of scrub-jays. The total estimated population is between 7,000 and 11,000 individuals.

The decline in the number and distribution of scrub-jays in east-central Florida has been exacerbated by tremendous urban growth in the past 50 years. Much of the historic commercial and residential development has occurred on the dry soils which previously supported scrub-jay habitat. Based on existing soils data, much of the historic and current scrub-jay habitat of coastal east-central Florida occurs proximal to the current shoreline and larger river basins. Much of this area of Florida was settled early because few wetlands restricted urban and agricultural development. Due to the effects of urban and agricultural development over the past 100 years, much of the remaining scrub-jay habitat is now relatively small and isolated. What remains is largely degraded due to the exclusion of fire which is needed to maintain xeric uplands in conditions suitable for scrub-jays.

The Applicants' residential construction will take place within section 5, Township 29 South, Range 37 East, Palm Bay, Brevard County, Florida on Lot 31, Block 316, Port Malabar Unit 9. Lot 31 is within 438 feet of locations where scrub-jays were sighted during 2001–2002 surveys for this species. Scrub-jays using the subject residential lot and adjacent properties are part of a larger complex of scrub-jays located in a matrix of urban and natural settings in areas of Brevard and northern Indian River counties. Within the City of Palm Bay, 20 families of scrub-jays persist in habitat fragmented by residential development. Scrub-jays in urban areas are particularly vulnerable and typically do not successfully produce young that survive to adulthood. Persistent urban growth in this area will likely result in further reductions in the amount of suitable habitat for scrub-jays. Increasing urban pressures are also likely to result in the continued degradation of scrub-jay habitat as fire exclusion slowly results in vegetative overgrowth. Thus, over the long-term, scrub-jays within the City of Palm Bay are unlikely to persist, and conservation efforts for this species should target acquisition and management of large parcels of land outside the direct influence of urbanization.

The subject residential parcel lies within a ''high density'' urban setting, and the corresponding territory size of the resident scrub-jays has been estimated to range from 5.2 to 10.8 acres based on average territory sizes of scrub-jay in other urban areas. Data collected from 12 scrub-jay families within the city limits of Palm Bay during the 2000 and 2001 nesting seasons provided information about survival and reproductive success of scrub-jays, but did not attempt to estimate territory sizes. This information indicated that territory boundaries tended to shift from year to year, making calculations of territory size difficult. Similarly, point data do not reliably indicate occupied habitat over time since birds in urban settings tend to move within and between years. Thus, using known territory boundaries and point data to delineate occupied habitat likely underestimates areas occupied by scrub-jays.

To assess whether the Applicants' parcel was within occupied scrub-jay habitat, we calculated the maximum average ''shift'' in territories locations between 2000 and 2001. Based on these estimates, we calculated a maximum average shift of 438 feet between years. We subsequently used the 438 feet as a buffer to surround known territory boundaries and point locations for scrub-jays. We reasoned that 438 feet represented a biologically-based buffer, within which scrub-jays were likely to occur. Application of the 438-foot buffer to known territories and point locations provides a quantitative method to delineate occupied scrub-jay habitat in highly urbanized areas within the city limits of Palm Bay.

The Applicants' residential lot falls within the 438-foot buffer established for known scrub-jay territories and/or point data. Although the Applicants' property lacks substantial woody vegetation typically required for scrub-jay nesting and sheltering habitat, it does provide suitable foraging habitat. Accordingly, loss of this habitat due to residential construction will result in the destruction of scrub-jay foraging habitat.

The Applicants propose to conduct construction activities outside of the nesting season. Other on-site minimization measures are not practicable as the footprint of the home, infrastructure and landscaping on the 0.23-acre lot will utilize all the available land area. On-site minimization may not be a biologically viable alternative due to increasing negative demographic effects caused by urbanization.

The Applicants propose to mitigate for the loss of 0.23 acre of scrub-jay habitat by contributing $3,082 to the Florida Scrub-jay Conservation Fund administered by the National Fish and Wildlife Foundation. Funds in this account are ear-marked for use in the conservation and recovery of scrub-jays and may include habitat acquisition, restoration, and/or management. The $3,082 is sufficient to acquire and perpetually manage 0.46 acre of suitable occupied scrub-jay habitat based on a replacement ratio of two mitigation acres per one impact acre. The cost is based on previous acquisitions of mitigation lands in southern Brevard County at an average $5,700 per acre, plus a $1,000 per acre management endowment necessary to ensure future management of acquired scrub-jay habitat.

We have determined that the HCP is a low-effect plan that is categorically excluded from further NEPA analysis, and does not require the preparation of an EA or EIS. This preliminary information may be revised due to public comment received in response to this notice. Low-effect HCPs are those involving: (1) Minor or negligible effects on federally listed or candidate species and their habitats, and (2) minor or negligible effects on other environmental values or resources. The Applicants' HCP qualifies for the following reasons:

1. Approval of the HCP would result in minor or negligible effects on the Florida scrub-jay population as a whole. We do not anticipate significant direct or cumulative effects to the Florida scrub-jay population as a result of the construction project.

2. Approval of the HCP would not have adverse effects on known unique geographic, historic or cultural sites, or involve unique or unknown environmental risks.

3. Approval of the HCP would not result in any significant adverse effects on public health or safety.

4. The project does not require compliance with Executive Order 11988 (Floodplain Management), Executive Order 11990 (Protection of Wetlands), or the Fish and Wildlife Coordination Act, nor does it threaten to violate a Federal, State, local or tribal law or requirement imposed for the protection of the environment.

5. Approval of the Plan would not establish a precedent for future action or represent a decision in principle about future actions with potentially significant environmental effects.

We have determined that approval of the Plan qualifies as a categorical exclusion under the NEPA, as provided by the Department of the Interior Manual (516 DM 2, Appendix 1 and 516 DM 6, Appendix 1). Therefore, no further NEPA documentation will be prepared.

We will evaluate the HCP and comments submitted thereon to determine whether the application meets the requirements of section 10(a) of the Act. If it is determined that those requirements are met, the ITP will be issued for the incidental take of the Florida scrub-jay. We will also evaluate whether issuance of the section 10(a)(1)(B) ITP complies with section 7 of the Act by conducting an intra-Service section 7 consultation. The results of this consultation, in combination with the above findings, will be used in the final analysis to determine whether or not to issue the ITP.

Dated: April 7, 2005.

**Jacquelyn B. Parrish,**

*Acting Regional Director, Southeast Region.*

[FR Doc. 05–8501 Filed 4–27–05; 8:45 am]

BILLING CODE 4310–55–P

## DEPARTMENT OF THE INTERIOR

### Bureau of Land Management

**[OR–110–5882–PO–MD75; HAG05–0107]**

### Notice of Meetings

**AGENCY:** Medford District, Bureau of Land Management, DOI.

**ACTION:** Notice of meetings.

**SUMMARY:** The Medford District Resource Advisory Committee will meet in Medford to gain a common understanding of the process related to Pub. L. 106–393, tour project sites, and discuss proposed fiscal year 2006 projects. Agenda topics include background and history of the Secure Rural Schools and Community Self-Determination Act, election of a Chairperson and Vice Chairperson, and development of a common vision; on-site inspections of 2005 projects and proposed 2006 projects; and presentations and discussions regarding proposed 2006 Title II projects.

**DATES:** See **SUPPLEMENTARY INFORMATION** section for meeting dates.

**ADDRESSES:** The field trips will start from, and the meetings will be held at, the Medford District Office, located at 3040 Biddle Road, Medford, Oregon.

**FOR FURTHER INFORMATION CONTACT:** Karen Gillespie, Medford District Office (541–618–2424).

**SUPPLEMENTARY INFORMATION:**

The field trip dates are:

1. July 14, 2005, 8:30 a.m. to 4 p.m.
2. July 28, 2005, 8:30 a.m. to 4 p.m.

The meeting dates are:

1. June 9, 2005, 8:30 a.m. to 2:30 p.m.
2. August 11, 2005, 8:30 a.m. to 4 p.m.
3. August 18, 2005, 8:30 a.m. to 4 p.m.

A public comment period will be held from 2 p.m. to 2:15 p.m. on June 9, 2005, and from 2 p.m. to 2:30 p.m. on August 11, 2005 and August 18, 2005.

(Authority: 43 CFR subpart 1784/ Advisory Committees)

**Mary L. Smelcer,**

*Acting District Manager, Medford.*

[FR Doc. 05–8503 Filed 4–27–05; 8:45 am]

BILLING CODE 4310–33–P

## DEPARTMENT OF JUSTICE

### Civil Division

### Agency Information Collection Activities: Proposed Collection; Comments Requested

**ACTION:** 60-Day notice of information collection under review: Claim for Damage, Injury, or Death

The Department of Justice (DOJ), Civil Division, has submitted the following information collection request to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995. The proposed information collection is published to obtain comments from the public and affected agencies. Comments are encouraged and will be accepted for ''sixty days'' until June 27, 2005. This process is conducted in accordance with 5 CFR 1320.10.

If you have comments especially on the estimated public burden or associated response time, suggestions, or need a copy of the proposed information collection instrument with instructions or additional information, please contact Director, Torts Branch, Civil Division, U.S. Department of Justice, Washington, DC 20530.

Written comments and suggestions from the public and affected agencies concerning the proposed collection of information are encouraged. Your comments should address one or more of the following four points:

—Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

—Evaluate the accuracy of the agencies estimate of the burden of the proposed collection of information,

including the validity of the methodology and assumptions used;

—Enhance the quality, utility, and clarity of the information to be collected; and

—Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.*, permitting electronic submission of responses.

Overview of this information collection:

(1) *Type of Information Collection:* Extension of a currently approved collection.

(2) *Title of the Form/Collection:* Claim for Damage, Injury, or Death.

(3) *Agency form number, if any, and the applicable component of the Department sponsoring the collection:* Form Number: CIV SF 95. Civil Division, U.S. Department of Justice.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract:* Primary: Individuals or households. Other: Business or other for-profit, Not-for-profit institutions, and State, Local, or Tribal Governments. Abstract: This form is utilized by those persons making a claim against the United States Government under the Federal Tort Claims Act.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond/reply:* It is estimated that there will be 300,000 respondents who will each require 6 hours to respond.

(6) *An estimate of the total public burden (in hours) associated with the collection:* The total estimated annual burden hours to complete the certification form is 1,800,000 hours.

If additional information is required contact: Ms. Brenda E. Dyer, Department Clearance Officer, United States Department of Justice, Justice Management Division, Policy and Planning Staff, Patrick Henry Building, Suite 1600, 601 D Street NW., Washington, DC 20530.

Dated: April 22, 2005.

**Brenda E. Dyer,**

*Department Clearance Officer, Department of Justice.*

[FR Doc. 05–8472 Filed 4–27–05; 8:45 am]

**BILLING CODE 4410–12–P**

## DEPARTMENT OF JUSTICE

### Notice of Lodging of Consent Decree Under the Clean Water Act

Consistent with to 28 CFR 50.7, notice is hereby given that on April 19,m 2005, a proposed consent decree (''decree'') in *United States* v. *AK Steel Corporation*, Civil Action No. 1:05CV1004, was lodged with the United States District Court for the Northern District of Ohio Eastern Division.

In this action, the United States seeks civil penalties and injunctive relief against AK Steel Corporation (''AK Steel'') for violations under Section 309(b) of the Clean Water Act, 33 U.S.C. 1319(b), at its Mansfield Works facility in Mansfield, Richland County, Ohio. The proposed decree provides that AK Steel will pay a civil penalty of $187,500 by electronic funds transfer.

The Department of Justice will receive for a period of thirty (30) days from the date of this publication comments relating to the decree. Comments should be addressed to the Assistant Attorney General, Environment and Natural Resources Division, PO Box 7611, Ben Franklin Station, U.S. Department of Justice, Washington, DC 20044–7611, and should refer to *United States* v. *AK Steel Corporation*, D.J. Ref. 90–7–1–07677.

The decree may be examined at the Office of the United States Attorney, 2 South Main Street, #208, Akron, OH 44308, and at the U.S. Environmental Protection Agency—Region 5, 77 West Jackson Boulevard, Chicago, IL 60604–3590. During the public comment period, the decree may also be examined on the following Department of Justice Web site, *http://www.usdoj.gov/enrd/open.html*. A copy of the decree may also be obtained by mail from the Consent Decree Library, PO Box 7611, Ben Franklin Station, U.S. Department of Justice, Washington, DC 20044–7611 or by faxing or e-mailing a request to Tonia Fleetwood (*tonia.fleetwood@usdoj.gov*), fax no. (202) 514–0097, phone confirmation number (202) 514–1547. In requesting a copy from the Consent Decree Library, please enclose a check in the amount of $4.75 (25 cents per page reproduction cost) payable to the U.S. Treasury.

**William Brighton,**

*Assistant Chief, Environmental Enforcement Section, Environment and Natural Resources Division.*

[FR Doc. 05–8479 Filed 4–27–05; 8:45 am]

**BILLING CODE 4410–15–M**

## DEPARTMENT OF JUSTICE

### Notice of Lodging of Consent Decree Under the Comprehensive Environmental Response, Compensation and Liability Act (''CERCLA'')

Consistent with section122(i) of CERCLA, 42 U.S.C. 9622(i), and 28 CFR 50.7, a Partial Consent Decree with Koch Sulfur Products Company LLC was lodged with the United States District Court for the Middle District of Georgia on April 20, 2005, in the matter of *United States* v. *American Cyanamid, et al.,* No. 1:02–CV–109–1 (M.D. Ga.) (Docket No. 160). In that action, the United States seeks to recover from various Defendants, pursuant to sections 107 and 113(b)(2) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended, (''CERCLA''), 42 U.S.C. 9607 and 9613(g)(2), the costs incurred and to be incurred by the United States in responding to the release and/or threatened release of hazardous substances at and from the Stoller Chemical Company/Pelham Site (''Site'') in Pelham, Mitchell County, Georgia. Under the proposed Partial Consent Decree, Koch Sulfur Products Company LLC will pay $911,170 to the Hazardous Substances Superfund in reimbursement of the costs incurred by the United States at the Site. The Department of Justice will receive for a period of thirty (30) days from the date of this publication comments relating to the Consent Decree. Comments should be addressed to the Assistant Attorney General, Environmental and Natural Resources Division, P.O. Box 7611, U.S. Department of Justice, Washington, DC 20044–7611, and should refer to *United States* v. *American Cyanamid, et al.,* (M.D. Ga.) (Partial Consent Decree with Koch Sulfur Products Company LLC, DOJ Ref. No. 90–11–3–07602). The Consent Decree may be examined at the Office of the United States Attorney, Middle District of Georgia, Cherry St. Galleria, 4th Floor, 433 Cherry St., Macon, GA 31201, ((478) 752–3511), and at EPA Region 4, Atlanta Federal Center, 61 Forsyth Street, SW., Atlanta, Georgia 30303 (contact Bonnie Sawyer, Esq. ((404) 562–9539). During the public comment period, the Consent Decree may also be examined on the following Department of Justice Web site, *http://www.usdoj.gov/enrd/open.html.* A copy of the Partial Consent Decree may also be obtained by mail from the Consent Decree Library, P.O. Box 7611, U.S. Department of Justice, Washington, DC 20044–7611 or by faxing or e-mailing a request to Tonia Fleetwood

(*tonia.fleetwood@usdoj.gov*), fax no. (202) 514–0097, phone confirmation number (202) 514–1547. In requesting a copy from the Consent Decree Library, please refer to *United States* v. *American Cyanamid, et al.,* (M.D. Ga.) (Partial Consent Decree with Koch Sulfur Products Company LLC, DOJ Ref. No. 90–11–3–07602), and enclose a check in the amount of $5.75 (25 cents per page reproduction cost) payable to the U.S. Treasury.

**Ellen Mahan,**

*Assistant Section Chief, Environmental Enforcement Section, Environment and Natural Resources Division.*

[FR Doc. 05–8476 Filed 4–27–05; 8:45 am]

BILLING CODE 4410–15–M

## DEPARTMENT OF JUSTICE

### Notice of Lodging of Consent Decree Pursuant to the Clean Air Act

In accordance with Departmental policy, 28 CFR 50.7, notice is hereby given that a proposed consent decree in *United States* v. *Golden Triangle Energy,* Civil Action No. 05–6032–CV–SJ–SOW, was lodged on April 11, 2005, with the United States District Court for the Western District of Missouri. This consent decree requires the defendants to pay a civil penalty of $30,000 and to perform injunctive relief in the form of installation of control technology to address Clean Air Act violations for the failure to obtain permits and install best achievable control technology (BACT) as required by the regulations for the Prevention of Significant Deterioration (PSD) at the defendant's ethanol plant. The Department of Justice will receive, for a period of thirty (30) days from the date of this publication, comments relating to the proposed consent decree. Comments should be addressed to the Assistant Attorney General, Environmental and Natural Resources Division, PO Box 7611, U.S. Department of Justice, Washington, DC 20044–7611, and should refer to *United States* v. *Golden Triangle Energy,* DOJ Ref. 90–5–2–1–08118.

The proposed consent decree may be examined at the office of the United States Attorney, Charles Evans Whittaker Courthouse, 400 East Ninth Street, Kansas City, Missouri 64106, and at U.S. EPA Region 7, 901 N. 5th Street, Kansas City, Kansas 66101. During the comment period, the consent decree may be examined on the following Department of Justice Web site, *http://www.usdoj.gov/enrd/open.html.* Copies of the consent decree also may be obtained by mail from the Consent Decree Library, PO Box 7611, U.S. Department of Justice, Washington, DC 20044–7611 or by faxing or e-mailing a request to Tonia Fleetwood *tonia.fleetwood@usdoj.gov*), fax no. (202) 514–0097, phone confirmation number (202) 514–1547. In requesting a copy, please enclose a check in the amount of $12.75 for *United States* v. *Golden Triangle Energy,* (25 cents per page reproduction cost) payable to the U.S. Treasury.

**Robert Maher,**

*Assistant Section Chief, Environmental Enforcement Section.*

[FR Doc. 05–8477 Filed 4–27–05; 8:45 am]

BILLING CODE 4410–15–M

## DEPARTMENT OF JUSTICE

### Notice of Lodging of Consent Decree Under the Clean Air Act

Under 28 CFR 50.7, notice is hereby given that on April 8, 2005, a proposed consent decree in *United States* v. *Mobil Exploration and Producing U.S. Inc.,* Case No. 2:05–CV–319, was lodged with the United States District Court for the District of Utah.

In this action, the United States sought injunctive relief and civil penalties under Section 113 of the Clean Air Act (''CAA'') against Mobile at its McElmo Creek Unit near Aneth, Utah, for operating equipment that emits pollutants without permit authorization, emitting sulfur dioxide and volatile organic compound emissions in excess of its permit limits, failing to properly operate a thermocouple to monitor the pilot light on its flare, failing to comply with leak detection and repair requirements, and failing to provide notice to EPA of a demolition of a structure containing asbestos. The consent decree requires Mobil to: (1) Install a new flare and implement measures to minimize flaring incidents, (2) implement a supplemental environmental project to provide diagnostic medical equipment to the Utah Navajo Health Systems, Inc., which serves local residents, and (3) pay a civil penalty of $350,000.

The Department of Justice will receive for a period of thirty (30) days from the date of this publication comments relating to the consent decree. Comments should be addressed to the Assistant Attorney General, Environment and Natural Resources Division, P.O. Box 7611, U.S. Department of Justice, Washington, DC 20044–7611 with a copy to Robert Mullaney, U.S. Department of Justice, 301 Howard Street, Suite 1050, San Francisco, CA 94105, and should refer to *United States* v. *Mobil Exploration and Producing U.S. Inc.,* D.J. Ref. #90–5–2–1–2237.

The consent decree may be examined at the Office of the United States Attorney, 185 South State Street, Suite 400, Salt Lake City, Utah, and at U.S. EPA Region 9, Office of Regional Counsel, 75 Hawthorne Street, San Francisco, California. During the public comment period, the consent decree may also be examined on the following Department of Justice Web site: *http://www.usdoj.gov/enrd/open.html.* A copy of the consent decree may also be obtained by mail from the Consent Decree Library, PO Box 7611, U.S. Department of Justice, Washington, DC 20044–7611 or by faxing or e-mailing a request to Tonia Fleetwood (*tonia.fleetwood@usdoj.gov*), fax no. (202) 514–0097, phone confirmation number (202) 514–1547. In requesting a copy from the Consent Decree Library, please enclose a check in the amount of $34.25 (25 cents per page reproduction cost) payable to the U.S. Treasury.

**Ellen M. Mahan,**

*Assistant Chief, Environmental Enforcement Section, Environment and Natural Resources Division.*

[FR Doc. 05–8474 Filed 4–27–05; 8:45 am]

BILLING CODE 4410–15–M

## DEPARTMENT OF JUSTICE

### Notice of Lodging of Consent Decree Under the Clean Air Act

Under 28 CFR 50.7, notice is hereby given that on April 19, 2005, a proposed consent decree in *United States* v. *Saint-Gobain Containers, Inc.,* Case No. 1:05–CV–00516–REC–SMS, was lodged with the United States District Court for the Eastern District of California.

In this action, the United States sought injunctive relief and civil penalties under Section 113 of the Clean Air Act (''CAA'') against Saint Gobain Containers, Inc. (''SGCI'') at its container glass manufacturing facility in Madera, California, for failure to apply best available control technology to control oxides of nitrogen (''$NO_X$'') emissions when it modified a furnace at its facility, failure to install a continuous emissions monitoring system, failure to source test its furnaces, and improper compliance certifications. The consent decree requires SGCI to: (1) Install a new oxygen-fuel furnace and associated control equipment to reduce $NO_X$, sulfur dioxide (''$SO_X$''), and particulate emissions, (2) implement a supplemental environmental project to reduce $SO_X$ and particulate emissions from an existing furnace and to donate

emission reduction credits, and (3) pay a civil penalty of $929,000.

The Department of Justice will receive for a period of thirty (30) days from the date of this publication comments relating to the consent decree. Comments should be addressed to the Assistant Attorney General, Environment and Natural Resources Division, P.O. Box 7611, U.S. Department of Justice, Washington, DC 20044–7611, with a copy to Robert Mullaney, U.S. Department of Justice, 301 Howard Street, Suite 1050, San Francisco, CA 94105, and should refer to *United States* v. *Saint-Gobain Containers, Inc.,* D.J. Ref. #90–5–2–1–06982.

The consent decree may be examined at the Office of the United States Attorney, 1130 ''O'' Street, Room 3654, Fresno, California, and at U.S. EPA Region 9, Office of Regional Counsel, 75 Hawthorne Street, San Francisco, California. During the public comment period, the consent decree may also be examined on the following Department of Justice Web site: *http://www.usdoj.gov/enrd/open.html.* A copy of the consent decree may also be obtained by mail from the Consent Decree Library, P.O. Box 7611, U.S. Department of Justice, Washington, DC 20044–7611, or by faxing or e-mailing a request to Tonia Fleetwood (*tonia.fleetwood@usdoj.gov*), fax no. (202) 514–0097, phone confirmation number (202) 514–1547. In requesting a copy from the Consent Decree Library, please enclose a check in the amount of $12 (25 cents per page reproduction cost) payable to the U.S. Treasury.

**Ellen M. Mahan,**

*Assistant Chief, Environmental Enforcement Section, Environment and Natural Resources Division.*

[FR Doc. 05–8475 Filed 4–27–05; 8:45 am]

**BILLING CODE 4410–15–M**

## DEPARTMENT OF JUSTICE

### Notice of Lodging of Consent Decree Under Comprehensive Environmental Response, Compensation and Liability Act

In accordance with Departmental policy, 28 CFR 50.7, notice is hereby given that on April 6, 2005, a proposed Consent Decree in *United States* v. *Sequa Corporation and John H. Thompson (E.D.Pa.),* C.A. No. 2:05–cv–01580–TON, was lodged with the United States District Court for the Eastern District of Pennsylvania.

In this action, the United States sought response costs incurred and to be incurred by the Environmental Protection Agency (''EPA''), pursuant to section 107 of the Comprehensive Environmental Response, Compensation and Liability Act, as amended (''CERCLA''), 42 U.S.C. 9607, in connection the Dublin TCE Site, located in Bucks County, Pennsylvania. Further, the United States sought an order, pursuant to section 106 of CERCLA, requiring defendants to implement remedial measures to address groundwater contamination at the Site.

Under the Consent Decree, defendants will implement the remedial measures required under the terms of the Consent Decree to address groundwater contamination. The Consent Decree provides, *inter alia,* that defendants will initially address groundwater contamination at the Site by implementing a technology known as in-situ chemical oxidation (''ISCO''), which is described in the Consent Decree and an attachment thereto. Defendants will implement other specified remedial measures, if EPA determines after a period of implementation that the ISCO has failed or will fail. In addition, defendants will pay EPA's unreimbursed past response costs in the amount of $252,254 and will pay future costs incurred by EPA in connection with the Site.

The Department of Justice will receive, for a period of 30 days from the date of this publication, comments relating to the proposed Consent Decree. Comments should be addressed to the Acting Assistant Attorney General for the Environment and Natural Resources Division, PO Box 7611, U.S. Department of Justice, Washington, DC 20044–7611, and should refer to *United States* v. *Sequa Corporation and John H. Thompson,* DOJ Ref. No. 90–11–2–780/1.

The proposed Consent Decree may be examined at the Office of the United States Attorney, 615 Chestnut Street, Suite 1250, Philadelphia, PA 19106; and U.S. EPA Region 3, 1650 Arch Street, Philadelphia, Pennsylvania 19103. During the public comment period, the proposed Consent Decree may also be examined on the following Department of Justice Web site, *http://www.usdoj.gov/enrd/open.html.* A copy of the proposed Consent Decree may be obtained by mail from the Consent Decree Library, PO Box 7611, U.S. Department of Justice, Washington, DC 20044–7611 or by faxing or e-mailing a request to Tonia Fleetwood (*tonia.fleetwood@usdoj.gov*), fax number (202) 514–0097, phone confirmation number (202) 514–1547. In requesting a copy of the Consent Decree only from the Consent Decree Library, please enclose a check in the amount of $22.50, or enclose a check in the amount of $53.00 for the Consent Decree and the Attachments thereto (.25 cents per page reproduction costs), payable to the U.S. Treasury.

**Robert D. Brook,**

*Assistant Section Chief, Environmental Enforcement Section, Environment and Natural Resources Division.*

[FR Doc. 05–8478 Filed 4–27–05; 8:45 am]

**BILLING CODE 4410–15–M**

## DEPARTMENT OF LABOR

### Employment and Training Administration

### Notice of a Change in Status of an Extended Benefit (EB) Period for Alaska

This notice announces a change in benefit period eligibility under the EB Program for Alaska.

**Summary**

The following change has occurred since the publication of the last notice regarding the State's EB status:

- March 6, 2005. Alaska triggered ''on'' EB. Alaska's 13-week insured unemployment rate for the week ending February 19, 2005, rose above the 6.0 percent threshold necessary to be triggered ''on'' to EB effective for the week beginning March 6, 2005.

**Information for Claimants**

The duration of benefits payable in the EB Program, and the terms and conditions on which they are payable, are governed by the Federal-State Extended Unemployment Compensation Act of 1970, as amended, and the operating instructions issued to the states by the U.S. Department of Labor. In the case of a state beginning an EB period, the State Workforce Agency will furnish a written notice of potential entitlement to each individual who has exhausted all rights to regular benefits and is potentially eligible for EB (20 CFR 615.13(c)(1)).

Persons who believe they may be entitled to EB, or who wish to inquire about their rights under the program, should contact the nearest State Workforce Agency.

Signed at Washington, DC, on April 22, 2005.

**Emily Stover DeRocco,**

*Assistant Secretary of Labor for Employment and Training.*

[FR Doc. E5–2040 Filed 4–27–05; 8:45 am]

**BILLING CODE 4510–30–P**

## MILLENNIUM CHALLENGE CORPORATION

**[MCC FR 05–05]**

## Notice of Entering Into a Compact With the Government of Madagascar

**AGENCY:** Millennium Challenge Corporation.

**ACTION:** Notice.

**SUMMARY:** In accordance with Section 610(b)(2) of the Millennium Challenge Act of 2003 (Pub. L. 108–199, Division D), the Millennium Challenge Corporation is publishing a detailed summary and text of the Millennium Challenge Compact between the Government of the Republic of Madagascar and the United States of America acting through the Millennium Challenge Corporation. Representatives of the United States Government and the Republic of Madagascar executed the Compact documents on April 18, 2005.

Dated: April 25, 2005.

**John C. Mantini,**

*Acting General Counsel, Millennium Challenge Corporation.*

### Summary of the Millennium Challenge Compact With the Republic of Madagascar

Poverty in Madagascar is overwhelmingly rural. Rice yields have consistently been among the world's lowest over the last forty years and fertilizer use is one-twelfth the African average. In this setting, the most effective vehicle to reduce poverty is for the rural poor to invest in their land, employ proven technology to enhance productivity, improve farming methods, and sell to new markets. Consequently, the Government of the Republic of Madagascar (''GoM'') asked MCC to support a major effort to attack two of its root causes of poverty: a poorly-functioning financial system that fails to serve the rural poor and a weak land-titling system that fails to provide legally-recognized collateral to support credit and investments in poor rural areas. Further, the Malagasy believe that reforming the weak land-titling system will increase trust in the government and encourage further reform. Finally, improved property rights in land will also help reduce the incentive to engage in environmentally destructive practices, such as slash-and-burn farming, that threaten this uniquely diverse eco-system.

The Program will address rural poverty on two geographic levels: certain activities will be implemented on a national basis and other activities shall be implemented in five high potential agricultural Zones, one of which has already been identified.

The Land Tenure Project of this Compact supports formalizing the titling and surveying systems, modernizing the national land registry, and decentralizing services to rural citizens. The Finance Project includes measures to make financial services available to rural areas, improve credit skills training, and create a streamlined national payments system that is expected to bring delays in check settlement down from 45 to 3 days. The Agricultural Business Investment Project will help support farmers and entrepreneurs identify new markets and improve their production and marketing practices.

*Program Activities, Costs and Performance*

| Financial Plan Summary | Cost ($ thousands) |
|---|---|
| 1. Land Tenure | 37,803 |
| 2. Finance | 35,888 |
| 3. Agricultural Business Investment Opportunities | 17,683 |
| 4. Monitoring and Evaluation | 3,375 |
| 5. Fiscal and Procurement Management and Audits | 7,871 |
| 6. Program Administration | 7,153 |
| Total Estimated MCC Contribution | 109,773 |

A. Land Tenure Project ($37.8 Million Over Four Years)

The informal and uncertain land ownership prevalent today means that poor families are reluctant to invest in improving the land they farm and have difficulty transferring property outside of people they know. In addition, much of the rural poor lack personal assets to invest themselves, even if they are willing to do so, and inadequately recorded land assets cannot be used as loan collateral. Consequently, producers cannot access credit to purchase supplies to expand production and reach domestic or export markets.

The existing Madagascar land registration system is an expensive and slow paper system with little penetration in rural areas. GoM has processed 1,500 titles per year over the past fifteen years. In 2002, there were 200,000 requests for land titles. Less than 7% of the country's land is titled. Based on current capacity, the backlog of registration requests could take over one hundred years to process.

In addition, the land tenure problem is the primary barrier to increased rural investment and limits agricultural productivity growth. Unregistered, untitled land cannot be used as collateral against loans to generate revenue. Recognizing this, GoM has already established a National Land Policy Framework (PNF).

Activities under this Project include:

- Supporting the PNF by developing new land laws and guiding implementation;
- Creating a land database using satellite imaging and improving the ability of the National Land Service Administration to restore damaged titles and surveys and issue new titles and certificates;
- Establishing local land management offices and training officials in land titling;
- Introducing standardized land registration into the project Zones; and
- Refining techniques for information gathering and dissemination on land tenure issues.

The Land Tenure Project aims to by its completion significantly reduce the time and cost of carrying out property transactions within the Madagascar land registration system and it is expected to issue titles or certificates covering approximately 250,000 hectares.

B. Finance Project ($35.9 Million Over Four Years)

Of twelve African countries with populations between 10 and 20 million, Madagascar has the lowest density of banking accounts with only 208,000 (relative to a population of nearly 17 million), total formal banking system credit representing only 4% of GDP and microfinance available to only 5% of households. The country's archaic internal payments system continues to be a drag on economic development. Ground transport is still used to move documents and cash. Bank deposits are generally non-interest bearing and loaned out to finance large enterprises and the government deficit. Until 2004, most companies were not required to produce audited financial statements and there are currently only 70 certified accountants in the country.

Without a centralized reporting system or widespread use of consistent financial reporting standards, lenders cannot verify the creditworthiness of applicants, thus, making lending decisions very risky. Local banks specializing in small loans are almost non-existent. Routine transfers between banks can take up to 45 days, making banking difficult if not impossible for the rural poor. The financial sector activities are designed to reduce risk in the country's financial system which will contribute to the increasing availability of financial services in rural areas.

Activities under this Project include:

• Improving financial system efficiency by modernizing banking laws and laws regulating financial instruments and markets;

• Mobilizing rural savings by making new treasury instruments available to savings institutions, entrepreneurs, and households;

• Making National Savings Bank savings products available in rural areas and establishing Micro Finance Institutions (MFIs) credit lines;

• Improving credit skills training and accounting standards to improve the creditworthiness of borrowers; and

• Modernizing the interbank payment system to reduce risk and bring delays in settlement down from 45 days to 3 days.

At completion, the Financial Sector Reform Project should result in a more efficient banking system with a larger number of households having access to formal loan and savings products.

C. Agricultural Business Investment Project ($17.7 Million Over Four Years)

The agricultural business investment activities are designed to build local and regional capacity to identify and access profitable agribusiness market opportunities which will increase investments and, thereby, incomes in rural areas. This Project will identify Madagascar's best investment opportunities. In addition, there will be a large rural information campaign and training programs in agribusiness technology and management and marketing skills.

Activities under this Project include:

• Creating and operating five Agricultural Business Centers (ABCs) in the five Zones to train rural farmers and entrepreneurs in good business practices and identifying the Zones;

• Establishing a National Coordinating Center (NCC) to link the five ABCs with Malagasy government agencies;

• Identifying investment opportunities by researching local, regional and international markets and communicating these to local farmers and entrepreneurs; and

• Teaching technical and business management and marketing skills in the five Zones.

The Agricultural Business Investment Project is designed to complement the land titling and financial reform activities by providing the knowledge needed to improve the productivity of farmers and entrepreneurs. The Project will identify the five targeted Zones in which the Program activities will be undertaken. It should also significantly improve production technologies and the market access capacity of the beneficiaries.

D. Measuring Outcome and Impact ($3.4 Million)

The objective of the Program is to reduce poverty in Madagascar through increasing investment in rural areas. The three Program components will be evaluated based on their contribution to three principal indicators:

• Increase in household income in each of the Zones;

• Increase in land productivity in each of the Zones (*e.g.*, agricultural output per hectare); and

• Increase investment in each of the Zones.

These indicators, together with others at the individual Project activity level (described in the table below), will be used to measure the impact of the Program and implementation progress in accordance with the guidelines set forth in the Monitoring and Evaluation Plan.

MCC and Madagascar have agreed to a series of benchmark indicators to measure progress on the Compact. MCC is also providing initial funding under Section 609(g) of the Millennium Challenge Act to initiate baseline data collection before the Compact enters into force. The use of such funds will provide baselines for the three indicators and would have independent capacity-building value to the Malagasy National Institute for Statistics.

The tables below summarize certain of the anticipated interim measurements and estimated targets for each Project.

| Land tenure project activities | Measures | Estimated targets |
|---|---|---|
| ■ Support the Development of the Malagasy National Land Policy Framework<br>■ Improve the Ability of the National Land Service Administration to Provide Land Services<br>■ Decentralization of Land Services<br>■ Land Regularization in Target Zones<br>■ Information Gathering, Analysis and Dissemination | ■ Submission and passage of new legislation that recognizes improved land tenure procedures, documents (certificates) and techniques<br>■ Percentage of land documents inventoried, restored, and/or digitized<br>■ Percent of land in pilot sites in the Zones that is securely demarcated and registered<br>■ Average time and cost required to carry out property transactions at national and local levels | ■ Land legislation that recognizes improved land tenure procedures adopted by Month 15.<br>■ 100% of approximately 800,000 documents inventoried, 300,000 damaged land documents restored and 400,000 of the existing documents digitized.<br>■ 100% of approximately 250,000 hectares demarcated. |

| Finance project activities | Measures | Estimated targets |
|---|---|---|
| ■ Promote Legal and Regulatory Reform<br>■ Reform Sovereign Debt Management and Issuance<br>■ Strengthen the National Savings Bank<br>■ Provide New Instruments for Agribusiness Credit<br>■ Modernize National Interbanks Payments Systems<br>■ Improve Credit Skills Training, Increase Credit Information and Analysis | ■ Submission, passage, and implementation of new legislation that permit a multi-tiered financial system as recommended by outside experts and relevant commissions<br>■ Number of holders of smaller denomination treasury bills<br>■ Volume of treasury bill holdings<br>■ Number of treasury bills held outside of Antananarivo<br>■ Check clearing delay<br>■ Volume of funds in the payment system<br>■ Volume of microfinance institution (MFI) lending in the targeted zones<br>■ MFI portfolio-at-risk delinquency rate<br>■ Reporting of credit and payment information to a central database | ■ Legislation permitting a multi-tiered financial system submitted by Month 5.<br>■ Check clearing delay reduced form 45 days to 3 days.<br>■ Growth rate of volume of funds in the payment system to exceed GDP growth rate.<br>■ MFI portfolio-at-risk delinquency rate reaches and remains steady at 4–6%.<br>■ $5 million increase in MFI lending in the Zones. |

| Agriculture business investment project activities | Measures | Estimated targets |
|---|---|---|
| ■ Create and Operate Five ABCs<br>■ Create NCC and Coordinate Activities with GoM Ministries and ABCs and Identify the Zones<br>■ Identify the Investment Opportunities<br>■ Build Management Capacity in the Zones | ■ Zones identified and cost-effective investment strategies developed<br>■ Number of farms and enterprises employing technical assistance received<br>■ Number of farms/enterprises receiving/soliciting information on business opportunities | ■ Five Zones identified and cost-effective investment strategies developed by Month 12.<br>■ One agribusiness investment strategy developed for each zone.<br>■ Value of change in marketing and production techniques exceeds costs. |

E. Fiscal and Procurement Management and Audits ($7.9 Million)

Financial administration, procurement and financial and performance audits are budgeted at $7.9 million over four years.

Funds control for the MCA Program will be managed by a separate fiscal agent identified using a competitive process. A modified version of Madagascar's procurement law—which was written with technical assistance from international donors—will govern procurements in the Compact. Disbursements will be made periodically based on performance, projected cash requirements, and compliance with provisions in the Compact and related documents.

The Program will be supplemented by a fiscal accountability plan, setting forth principles on funds control, accounting, financial reporting, auditing, and disbursement.

F. Program Management ($7.2 Million)

Program management, which includes personnel, office space, equipment, and general administrative costs, is budgeted at approximately $7.2 million over four years.

The management and control structure is consistent with a priority identified by GoM in the PRSP: a commitment to public-private partnership in the management of key public enterprises. MCA-Madagascar will include representatives of GoM, the private sector, NGOs and intended beneficiaries. They will recruit key managers from both the public and private sectors. A simplified version of this structure is presented below.

MCA Madagascar will be headed by a Steering Committee which will act like a Board of Directors for MCA-Madagascar and be composed of the Chief of Staff of the President; the Secretaries General of each of the following Ministries: Agriculture, Livestock and Fisheries; Economy, Finance and Budget; Industry, Commerce and Private Sector Development; and three non-government members (*e.g.,* civil society or private sector representatives) who will be members of an Advisory Council.

The Steering Committee will appoint a management team, composed of a Managing Director, a Manager of Administration and Finance, a Manager of Monitoring and Evaluation, a Manager of Procurement, and three Project Managers with responsibility for each of the three project areas. MCC intends to place one, or possibly two, MCC field representative(s) in Madagascar to monitor and provide support to MCA-Madagascar (including full observer and information rights with respect to the Steering Committee). However, MCA-Madagascar will have the primary role for Program implementation and management.

The Advisory Council will be an independent body made up of beneficiary representatives (including civil society and private sector representatives) who will have a regular opportunity to provide the Steering Committee and MCA-Madagascar management with their views or recommendations on the performance and progress of implementation.

Other Highlights

*Consultative Process:* In developing the concepts for the activities covered in this Compact, GoM engaged in a consultative process solely focused on MCC. An introductory national workshop was organized on September 16, 2004 (consisting of more than 350 participants, including President Ravolomanana) to describe the MCA and discuss obstacles to economic growth and poverty reduction.

GoM then organized six regional consultative workshops, each consisting of 50 to 150 representatives of the business community, non-governmental organizations, civil society and donors in Antsiranana, Antsirabe, Mahajanga, Toliary, Fianarantsoa, and Toamasina and one national workshop in Antananarivo. During this period, GoM also ran radio and TV broadcasts on the MCA, soliciting on-air input, and published newspaper advertisements that announced meetings and called for submission of proposal ideas.

There is broad agreement among the Malagasy and donors that the activities suggested in the Malagasy Compact proposal are priorities for addressing poverty reduction through economic growth.

*Sustainability:* The Program activities are largely focused on promoting investment opportunities through unleashing the rural private sector. Sustainability will result from rural producers taking advantage of the increased access to financial resources and information. A number of Program activities will be reinforced by a system of graduated user fees for services, including land titling, registration, credit reporting, banking services, and technical assistance provided by the ABCs.

*Environment:* Madagascar is home to some 10,000 endemic plant species, 316 endemic reptile species and 109 endemic bird species. It is also home to 71 primates found only there. This unique eco-system is threatened by the prevalence of slash and burn agriculture. Instituting secure land tenure will confer an incentive on landowners to make investments that preserve and enhance the productivity of the land's natural capital rather than practice destructive farming techniques. The Agricultural Business Investment Project will encompass sustainable agriculture principles to design interventions sensitive to the environment.

*Donor Coordination:* The Program complements and supplements efforts by other donors in each of the areas being addressed. Increasing rural incomes is the focus of the Malagasy national development strategy and numerous donors are supporting the achievement of this goal. The EU, World Bank, IFAD, FAO and AFD are all active in supporting various elements of the PNF. Similarly, World Bank, UNDP, AFD, ILO and USAID have funded activities to build capacity of micro-finance institutions. Finally, IFC and USAID efforts will be complemented by the Agricultural Business Investment Project.

*Summary and Conclusion*

Madagascar has undertaken structural reforms, created a more favorable environment for private investment and taken steps to integrate into the world economy. These policies have improved macroeconomic stability and sustained economic growth. The greatest challenge, however, is to ensure that growth translates into improvements in the lives of the poor. Growth needs to be brought to rural areas: Getting the agriculture sector to grow and diversify, linking farmers to markets. Farmers must move beyond subsistence agriculture and start producing for export and for local processing if macroeconomic stability is to be translated into poverty reduction.

The basic premise of the Millennium Challenge Corporation is that establishing the right conditions is essential for economic growth and foreign aid effectiveness. The Madagascar Program establishes the proper conditions: land ownership, access to capital, and utilizing production and management know-how to reduce poverty.

This Program will have a positive economic impact on Madagascar: increased land security will result in more productive and environmentally friendly agricultural practices as well as improve access to credit in rural areas; financial sector reform includes measures to make financial services available to rural areas, improve credit skills training, and create a streamlined national payments system; and, agribusiness investment activities will support farmers and entrepreneurs as they move away from subsistence agriculture to more modern, market-based production.

BILLING CODE 9210–01–U

# MILLENNIUM CHALLENGE COMPACT

BETWEEN

THE UNITED STATES OF AMERICA
ACTING THROUGH
THE MILLENNIUM CHALLENGE CORPORATION

AND

THE GOVERNMENT OF THE REPUBLIC OF MADAGASCAR

**Millennium Challenge Compact**

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## MILLENNIUM CHALLENGE COMPACT

This MILLENNIUM CHALLENGE COMPACT (the "***Compact***") is made by and between the United States of America, acting through the Millennium Challenge Corporation, a United States Government corporation ("***MCC***"), and the Government of the Republic of Madagascar (the "***Government***") (referred to herein individually as a "***Party***" and collectively, the "***Parties***").

## RECITALS

WHEREAS, MCC, acting through its Board of Directors, has selected the Republic of Madagascar as eligible to present to MCC a proposal for the use of 2004 and 2005 Millennium Challenge Account ("***MCA***") assistance to help facilitate poverty reduction through economic growth in Madagascar;

WHEREAS, the Government has carried out a consultative process with the country's private sector and civil society to outline the country's priorities for the use of MCA assistance and developed a proposal, which was submitted to MCC on October 4, 2004 (the "***Proposal***");

WHEREAS, the Proposal focused on, among other things, improving the environment for private sector investment through legal and policy reform as well as development of financial infrastructure, increasing land security and providing knowledge of market opportunities and requirements in rural areas;

WHEREAS, MCC has evaluated the Proposal and related documents to determine whether the Proposal is consistent with core MCA principles and includes proposed activities and projects that will advance the progress of Madagascar towards achieving economic growth and poverty reduction; and

WHEREAS, based on MCC's evaluation of the Proposal and related documents and subsequent discussions and negotiations between the Parties, the Government and MCC determined to enter into this Compact to implement a program using MCC Funding (defined below) to advance Madagascar's progress towards economic growth and poverty reduction (the "***Program***");

NOW, THEREFORE, in consideration of the foregoing and the mutual covenants and agreements set forth herein, the Parties hereby agree as follows:

## ARTICLE I.
## PURPOSE AND TERM

Section 1.1 Objectives. The overall objective of this Compact is to increase investment in rural Madagascar (the "***Program Objective***"), which is key to advancing the goal of economic growth and poverty reduction in Madagascar (the "***Compact Goal***"). The following project-level objectives (each, a "***Project Objective***" and together the "***Project Objectives***") have been identified to advance the Program Objective, each of which is described in more detail in Annex I attached hereto:

(a) Increase land titling and land security (the "***Land Tenure Objective***");

(b) Increase competition in the financial sector (the "***Finance Objective***"); and

(c) Improve agricultural production technologies and market capacity in rural areas (the "***Agricultural Business Investment Objective***").

(The Program Objective and the individual Project Objectives are referred to herein collectively as the "***Objectives***" and each individually as an "***Objective***"). The Government expects to achieve, and shall use its best efforts to ensure the achievement of, these Objectives during the Compact Term (defined below).

Section 1.2 Projects. The Annexes attached hereto describe the specific projects and the policy reforms and other activities related thereto (each, a "***Project***") that the Government will carry out, or cause to be carried out, in furtherance of this Compact to achieve the Objectives.

Section 1.3 Entry into Force; Compact Term. This Compact shall enter into force on the date of the last letter in an exchange of letters between the Principal Representatives (defined below) of each Party confirming that each Party has completed its domestic requirements for entry into force of this Compact and that all conditions set forth in Section 4.1 have been satisfied by the Government. This Compact shall remain in force for four years from the date of the entry into force of this Compact, unless earlier terminated in accordance with Section 5.4 (the "***Compact Term***").

## ARTICLE II.
## FUNDING AND RESOURCES

Section 2.1 MCC Funding.

(a) MCC's Contribution. MCC hereby grants to the Government, subject to the terms and conditions of this Compact, an amount not to exceed one hundred nine million seven hundred and seventy three thousand United States Dollars (USD $109,773,000) ("***MCC Funding***") during the Compact Term to enable the Government to implement the Program and achieve the Objectives.

(i) The allocation of the MCC Funding within the Program and among and within the Projects shall be as generally described in Annex II or as otherwise agreed upon by the Parties from time to time.

(ii) If at any time MCC determines that a condition precedent to an MCC Disbursement (defined below) has not been satisfied, MCC may, upon written notice to the Government, reduce the total amount of MCC Funding by an amount equal to the amount estimated in the Budget (defined in Annex I) for the Program activity for which such condition precedent has not been met. Upon the expiration or termination of this Compact, (A) any amounts of MCC Funding not disbursed by MCC to the Government shall be automatically released from any obligation in connection with this Compact and (B) any amounts of MCC Funding disbursed by MCC to the Government as provided in Section 2.1(b)(i), but not re-disbursed as provided in Section 2.1(b)(ii) or otherwise incurred as permitted pursuant to Section 5.4(e) prior to the expiration of the Compact, shall be returned to MCC in accordance with Section 2.5(a)(ii).

(b) Disbursements.

(i) Disbursements of MCC Funding. MCC shall from time to time make disbursements of MCC Funding (each such disbursement, an "***MCC Disbursement***") in accordance with the procedures and requirements set forth in Annex I, the Disbursement Agreement (defined in Annex I) or as otherwise provided in any other relevant Supplemental Agreement (defined below).

(ii) Re-Disbursements of MCC Funding. The release of MCC Funding from the account(s) into which the MCC Disbursement was made (or the Local Account to which the MCC Disbursement was transferred in accordance with Section 2.1(d)) (each such release, a "***Re-Disbursement***"), shall be made in accordance with the procedures and requirements set forth in Annex I, the Disbursement Agreement or as otherwise provided in any other relevant Supplemental Agreement.

(c) Interest. Unless the Parties agree otherwise in writing, any interest or other earnings on MCC Funding that accrue or earn (collectively, "***Accrued Interest***") shall be held in the account(s) into which the MCC Disbursement was made (or the Local Account to which the MCC Disbursement was transferred in accordance with Section 2.1(d)) and earned in accordance with the requirements for the earning and treatment of Accrued Interest as specified in Annex I or any relevant Supplemental Agreement. On a quarterly basis and upon the termination or expiration of this Compact, the Government shall return, or ensure the return of, all Accrued Interest to any United States Government account designated by MCC.

(d) Conversion; Exchange Rate. The Government shall ensure that all MCC Funding in the account(s) into which MCC Disbursements are made is held in the currency of the United States of America ("***United States Dollars***") prior to Re-Disbursement; *provided*, that a certain portion of MCC Funding may be transferred to a Local Account and may be held in such Local Account in the currency of Madagascar prior to Re-Disbursement in accordance with the requirements of Annex I. To the extent that any amount of MCC Funding held in United States Dollars must be converted into the currency of Madagascar for any purpose, including for any

Re-Disbursement or any transfer of MCC Funding into a Local Account, the Government shall ensure that such amount is converted consistent with Annex I and the requirements of the Disbursement Agreement or any other Supplemental Agreement between the Parties. The Government shall ensure that any MCC Funding that is converted into the currency of Madagascar is converted at the rate and in the manner set forth in Annex I.

(e) Guidance. From time to time, MCC may provide guidance to the Government through Implementation Letters (defined in Section 3.5(a)) on the frequency, form and content of requests for MCC Disbursements and Re-Disbursements or any other matter relating to MCC Funding. The Government shall apply such guidance in implementing this Compact.

Section 2.2 Government Resources.

(a) The Government shall provide or cause to be provided such Government funds and other resources, and shall take or cause to be taken such actions, including obtaining all necessary approvals and consents, as are specified in this Compact or in any Supplemental Agreement to which the Government is a party or as are otherwise necessary and appropriate to effectively carry out the Government Responsibilities (defined below) or other responsibilities or obligations of the Government under or in furtherance of this Compact during the Compact Term and through the completion of any post-Compact Term activities, audits or other responsibilities.

(b) If at any time during the Compact Term, the Government materially reduces the allocation in its national budget or any other Government budget of the normal and expected resources that the Government would have otherwise received or budgeted, from external or domestic sources, for the activities contemplated herein, the Government shall notify MCC in writing within fifteen (15) days of such reduction, such notification to contain information regarding the amount of the reduction, the affected activities, and an explanation for the reduction. In the event that MCC determines upon review of the executed national annual budget that such a material reallocation or reduction of resources has occurred, MCC shall notify the Government and, following such notification, the Government shall provide a written explanation for such reallocation or reduction.

(c) The Government shall use its best efforts to ensure that all MCC Funding is fully reflected and accounted for in the annual budget of the Republic of Madagascar on a multi-year basis.

Section 2.3 Limitations on the Use or Treatment of MCC Funding.

(a) Abortions and Involuntary Sterilizations. The Government shall ensure that MCC Funding shall not be used to undertake, finance or otherwise support any activity that is subject to prohibitions on use of funds contained in (i) paragraphs (1) through (3) of section 104(f) of the Foreign Assistance Act of 1961 (22 U.S.C. 2151b(f)(1)-(3)), a United States statute, which prohibitions shall apply to the same extent and in the same manner as such prohibitions apply to funds made available to carry out Part I of such Act; or (ii) any provision of law comparable to the eleventh and fourteenth provisos under the heading "Child Survival and Health Programs Fund" of division E of Public Law 108-7 (117 Stat. 162), a United States statute.

(b) United States Job Loss or Displacement of Production. The Government shall ensure that MCC Funding shall not be used to undertake, finance or otherwise support any activity that is likely to cause a substantial loss of United States jobs or a substantial displacement of United States production, including:

(i) Providing financial incentives to relocate a substantial number of United States jobs or cause a substantial displacement of production outside the United States;

(ii) Supporting investment promotion missions or other travel to the United States with the intention of inducing United States firms to relocate a substantial number of United States jobs or a substantial amount of production outside the United States;

(iii) Conducting feasibility studies, research services, studies, travel to or from the United States, or providing insurance or technical and management assistance, with the intention of inducing United States firms to relocate a substantial number of United States jobs or cause a substantial displacement of production outside the United States;

(iv) Advertising in the United States to encourage United States firms to relocate a substantial number of United States jobs or cause a substantial displacement of production outside the United States;

(v) Training workers for firms that intend to relocate a substantial number of United States jobs or cause a substantial displacement of production outside the United States;

(vi) Supporting a United States office of an organization that offers incentives for United States firms to relocate a substantial number of United States jobs or cause a substantial displacement of production outside the United States; or

(vii) Providing general budget support for an organization that engages in any activity prohibited above.

(c) Military Assistance and Training. The Government shall ensure that MCC Funding shall not be used to undertake, finance or otherwise support the purchase or use of goods or services for military purposes, including military training, or to provide any assistance to the military, police, militia, national guard or other quasi-military organization or unit.

(d) Prohibition of Assistance Relating to Environmental, Health or Safety Hazards. The Government shall ensure that MCC Funding shall not be used to undertake, finance or otherwise support any activity that is likely to cause a significant environmental, health, or safety hazard. Unless MCC and the Government agree otherwise in writing, the Government shall ensure that activities undertaken or financed in whole or in part (directly or indirectly) by MCC Funding comply with environmental guidelines delivered by MCC to the Government or posted by MCC on its website or otherwise publicly made available, as such guidelines may be amended from time to time (the "***Environmental Guidelines***"), including any definition of "likely to cause a significant environmental, health, or safety hazard" as may be set forth in such Environmental Guidelines.

(e) Taxation.

(i) Taxes. The Government shall ensure that the Program, any Program Assets (defined below), MCC Funding and Accrued Interest, shall be free from any taxes imposed under laws currently or hereafter in effect in the Republic of Madagascar during the Compact Term. This exemption shall apply to any use of any Program Asset, MCC Funding and Accrued Interest, including any Exempt Uses (defined below), and to any work performed under or activities undertaken in furtherance of this Compact by any person or entity (including contractors and grantees) financed by MCC Funding, and shall apply to all taxes, tariffs, duties, and other levies (each a "***Tax***" and collectively, "***Taxes***"), including:

(1) to the extent attributable to MCC Funding, income taxes and other taxes on profit or businesses imposed on organizations or entities, other than nationals of Madagascar, receiving MCC Funding, including taxes on the acquisition, ownership, rental, disposition or other use of real or personal property, taxes on investment or deposit requirements and currency controls in Madagascar, or any other tax, duty, charge or fee of whatever nature, except fees for specific services rendered; for purposes of this Section 2.3(e), the term "national" refers to organizations established under the laws of Madagascar, other than MCA-Madagascar (defined in Annex I) or any other entity established solely for purposes of managing or overseeing the implementation of the Program or any wholly-owned subsidiaries, divisions, or Affiliates of entities not registered or established under the laws of Madagascar;

(2) customs duties, tariffs, import and export taxes, or other levies on the importation, use and re-exportation of goods, services, or the personal belongings and effects, including personally-owned automobiles, for Program use or the personal use of individuals who are neither citizens nor permanent residents of Madagascar and who are present in Madagascar for purposes of carrying out the Program or their family members, including all charges based on the value of such imported goods;

(3) taxes on the income or personal property of all individuals who are neither citizens nor permanent residents of Madagascar, including income and social security taxes of all types and all taxes on the personal property owned by such individuals, to the extent such income or property are attributable to MCC Funding; and

(4) taxes or duties levied on the purchase of goods or services financed by MCC Funding, including sales taxes, tourism taxes, value-added taxes (VAT), or other similar charges.

(ii) For purposes of this Compact, (A) an "***Affiliate***" of a party is a person or entity that controls, is controlled by, or is under the same control as the party in question, whether by ownership or by voting, financial or other power or means of influence and (B) a "***Government Affiliate***" is an Affiliate, ministry, bureau, department, agency, government corporation or any other entity chartered or established by the Government. References to any Affiliate or Government Affiliate herein shall include any of their respective directors, officers, employees, affiliates, contractors, representatives, and agents.

(iii) This Section 2.3(e) shall apply, but is not limited to (A) any transaction, service, activity, contract, grant or other implementing agreement financed in whole or in part by MCC Funding; (B) any supplies, equipment, materials, property or other goods (referred to herein collectively as "goods") or funds introduced into, acquired in, used or disposed of in, or imported into or exported from, the Republic of Madagascar by MCC, or by any person or entity (including contractors and grantees) as part of, or in conjunction with, MCC Funding or the Program; (C) any contractor, grantee, or other organization carrying out activities financed in whole or in part by MCC Funding; (D) any employee of such organizations; and (E) any individual contractor or grantee carrying out activities financed in whole or in part by MCC Funding (the uses set forth in clauses (A) through (E) are collectively referred to herein as "***Exempt Uses***").

(iv) If a Tax has been levied and paid contrary to the requirements of this Section 2.3(e), the Government shall refund promptly to MCC to an account designated by MCC or to others as MCC may direct the amount of such Tax in the currency of Madagascar, within fifteen (15) days after the Government is notified, whether by MCC or otherwise, of such levy and tax payment; *provided, however*, the Government shall apply national funds to satisfy its obligations under this Section 2.3(e)(iv) and no MCC Funding, Accrued Interest, or any assets, goods, or property (real, tangible, or intangible) purchased or financed in whole or in part (directly or indirectly) by MCC Funding ("***Program Assets***") may be applied by the Government in satisfaction of its obligations under this Section 2.3(e)(iv).

(f) Alteration. The Government shall ensure that neither MCC Funding nor Accrued Interest shall be subject to any impoundment, rescission, sequestration or any provision of law now or hereafter in effect in the Republic of Madagascar that would have the effect of requiring or allowing any impoundment, rescission or sequestration of any MCC Funding.

(g) Liens or Encumbrances. The Government shall ensure that no MCC Funding, Accrued Interest, nor Program Assets shall be subject to any lien, attachment, enforcement of judgment, pledge, or encumbrance of any kind, except with the prior approval of MCC in accordance with Section 3(c) of Annex I, and in the event of any lien, attachment, enforcement of judgment, pledge or encumbrance not so approved, the Government shall seek the release of such lien, attachment, enforcement of judgment, pledge or encumbrance and shall pay any amounts owed to obtain such release; *provided, however*, the Government shall apply national funds to satisfy its obligations under this Section 2.3(g) and no MCC Funding, Accrued Interest, nor Program Assets may be applied by the Government in satisfaction of its obligations under this Section 2.3(g).

(h) Other Limitations. The Government shall ensure that the use or treatment of MCC Funding shall be subject to such other limitations (i) as required by the applicable law of the United States of America now or hereafter in effect during the Compact Term, (ii) as advisable under or required by applicable United States Government policies now or hereafter in effect during the Compact Term, or (iii) to which the Parties may otherwise agree in writing.

(i) Utilization of Goods, Services and Works. The Government shall ensure that any Program Assets, services, facilities or works financed in whole or in part (directly or indirectly)

by MCC Funding, unless otherwise agreed by the Parties in writing, shall be used solely in furtherance of this Compact.

(j) Notification of Applicable Laws and Policies. MCC shall notify the Government of any applicable United States law or policy affecting the use or treatment of MCC Funding, whether or not specifically identified in this Section 2.3, and shall provide to the Government a copy of the text of any such applicable law and a written explanation of any such applicable policy.

Section 2.4 Incorporation; Notice; Clarification.

(a) The Government shall include, or ensure the inclusion of, all of the requirements set forth in Section 2.3 in all Supplemental Agreements to which MCC is not a party and shall use its best efforts to ensure that no such Supplemental Agreement is implemented in violation of the prohibitions set forth in Section 2.3.

(b) The Government shall ensure notification of all of the requirements set forth in Section 2.3 to any Government Affiliate or Permitted Designee (defined below) involved in any activities in furtherance of this Compact or any third party who receives at least USD$50,000 in the aggregate of MCC Funding (other than employees of MCA-Madagascar) during the Compact Term or such other amount as the Parties may agree in writing, whether directly from MCC, indirectly through Re-Disbursements, or otherwise (each, a "***Provider***" and together, the "***Providers***"), and all relevant officers, directors, employees, agents, representatives, contractors, grantees, subcontractors and sub-grantees of the Government or any Provider.

(c) In the event the Government or any Provider requires clarification from MCC as to whether an activity contemplated to be undertaken in furtherance of this Compact violates or may violate any provision of Section 2.3, the Government shall notify, or ensure that such Provider notifies, MCC in writing and provide in such notification a detailed description of the activity in question. In such event, the Government shall not proceed, and shall use its best efforts to ensure that no relevant Provider proceeds, with such activity, and the Government shall ensure that no Re-Disbursements shall be made for such activity, until MCC advises the Government or such Provider in writing that the activity is permissible.

Section 2.5 Refunds; Violation.

(a) Notwithstanding the availability to MCC, or exercise by MCC of, any other remedies, including under international law, this Compact, or any Supplemental Agreement:

(i) If any amount of MCC Funding or Accrued Interest, or any Program Asset, is used for any purpose prohibited under this Article II or otherwise in violation of any of the terms and conditions of this Compact or any Supplemental Agreement between the Parties, MCC may require the Government to repay promptly to MCC to an account designated by MCC or to others as MCC may direct the amount of such misused MCC Funding or Accrued Interest, or the cash equivalent of the value of any misused Program Asset, in United States Dollars, plus any interest that accrued or would have accrued thereon, within fifteen (15) days after the Government is notified, whether by MCC or otherwise, of such prohibited use; *provided, however*, the Government shall apply national funds to satisfy its obligations under this Section

2.5(a)(i) and no MCC Funding, Accrued Interest, nor Program Assets may be applied by the Government in satisfaction of its obligations under this Section 2.5(a)(i); and

(ii) If all or any portion of this Compact is terminated or suspended and upon the expiration of the Compact, the Government shall, subject to the requirement of Sections 5.4(e) and 5.4(f), refund, or ensure the refund, to MCC to such account(s) designated by MCC the amount of any MCC Funding, plus any Accrued Interest, promptly, but in no event later than thirty (30) days after the Government receives MCC's request for such refund; *provided*, that if this Compact is terminated or suspended in part, MCC may request a refund for only the amount of funds, plus any Accrued Interest, then allocated to the terminated or suspended portion; *provided, further*, that any refund of MCC Funding or Accrued Interest shall be to such account(s) as designated by MCC.

(b) Notwithstanding any other provision in this Compact or any other agreement to the contrary, MCC's right under this Section 2.5 for a refund shall continue during the Compact Term and for a period of (i) five (5) years thereafter or (ii) one (1) year after MCC receives actual knowledge of such violation, whichever is later.

(c) If MCC determines that any activity or failure to act violates, or may violate, any Section in this Article II, MCC may refuse any further MCC Disbursements for or conditioned upon such activity, and may take any action to prevent any Re-Disbursement related to such activity.

## ARTICLE III.
## IMPLEMENTATION

Section 3.1 Implementation Framework. This Compact shall be implemented by the Parties in accordance with this Article III and as further specified in the Annexes and in relevant Supplemental Agreements.

Section 3.2 Government Responsibilities.

(a) The Government shall have principal responsibility for oversight and management of the implementation of the Program (i) in accordance with the terms and conditions specified in this Compact and relevant Supplemental Agreements, (ii) in accordance with all applicable laws of Madagascar, and (iii) in at least a timely and cost-effective manner and in conformity with sound technical, financial and management practices (collectively, the "***Government Responsibilities***"). Unless otherwise expressly provided, any reference to the Government Responsibilities or any other responsibilities or obligations of the Government herein shall be deemed to apply to any Government Affiliate and any of their respective employees, contractors, agents or representatives.

(b) The Government shall ensure that no person or entity shall participate in the selection, award, administration or implementation of a contract, grant or other benefit or transaction financed in whole or in part (directly or indirectly) by MCC Funding, in which (i) the entity, the person, members of the person's immediate family or household or his or her business

partners, or organizations controlled by or substantially involving such person or entity, has or have a financial interest or (ii) the person is negotiating or has any arrangement concerning prospective employment, unless such person or entity has first disclosed in writing to the Government the conflict of interest and, following such disclosure, the Parties agreed in writing to proceed notwithstanding such conflict. The Government shall ensure that no person or entity involved in the selection, award, administration or implementation of any contract, grant or other benefit or transaction financed in whole or in part (directly or indirectly) by MCC Funding shall solicit or accept or offer a third party or seek or be promised directly or indirectly for itself or for another person or entity any gift, gratuity, favor or benefit, other than items of de minimis value and otherwise consistent with such guidance as MCC may provide from time to time.

(c) The Government shall not designate any person or entity, including any Government Affiliate, to implement, in whole or in part, this Compact or any Supplemental Agreement between the Parties or to exercise any rights of the Government under this Compact, except as expressly provided herein or with the prior written consent of MCC; *provided, however*, the Government may designate MCA-Madagascar or, with the prior written consent of MCC, such other mutually acceptable persons or entities, to implement some or all of the Government Responsibilities or any other responsibilities or obligations of the Government or to exercise any rights of the Government under this Compact or any Supplemental Agreement between the Parties (referred to herein collectively as "***Designated Rights and Responsibilities***"), in accordance with the terms and conditions set forth in this Compact or such Supplemental Agreement (each, a "***Permitted Designee***"). Notwithstanding any provision herein or any other agreement to the contrary, no aforementioned designation shall relieve the Government of such Designated Rights and Responsibilities, for which the Government shall retain ultimate responsibility. In the event that the Government designates any person or entity, including any Government Affiliate, to implement any portion of the Government Responsibilities or other responsibilities or obligations of the Government, or to exercise any rights of the Government under this Compact, in accordance with this Section 3.2(c), then the Government shall cause such person or entity to (i) perform such Designated Rights and Responsibilities in the same manner and to the full extent to which the Government is obligated to perform such Designated Rights and Responsibilities and (ii) certify to MCC in writing that it will so perform such Designated Rights and Responsibilities and will not assign, delegate, or contract (or otherwise transfer) any of such Designated Rights and Responsibilities to any person or entity without the prior written consent of MCC.

(d) The Government shall, upon a request from MCC, execute, or ensure the execution of, an assignment to MCC of any cause of action which may accrue to the benefit of the Government, a Government Affiliate or any Permitted Designee in connection with or arising out of any activities financed in whole or in part (directly or indirectly) by MCC Funding.

Section 3.3 Government Deliveries. The Government shall proceed, and cause others to proceed, in a timely manner to deliver to MCC all Government deliveries required by this Compact or any Supplemental Agreement between the Parties, in form and substance as set forth in this Compact or any such Supplemental Agreement.

Section 3.4 Government Assurances. The Government hereby provides the following assurances to MCC that as of the date this Compact is signed:

(a) The information contained in the Proposal and any agreement, report, statement, communication, document or otherwise delivered or otherwise communicated to MCC by or on behalf of the Government on or after the date of the submission of the Proposal (i) are true, accurate and complete in all material respects and (ii) do not omit any fact known to the Government that if disclosed would (A) alter in any material respect the information delivered, (B) likely have a material adverse effect on the Government's ability to effectively implement, or ensure the effective implementation of, the Program or any Project or to otherwise carry out its responsibilities or obligations under or in furtherance of this Compact, or (C) have likely adversely affected MCC's determination to enter into this Compact or any Supplemental Agreement between the Parties.

(b) Unless otherwise disclosed in writing to MCC, the MCC Funding made available hereunder is in addition to the normal and expected resources that the Government usually receives or budgets for such activities from external or domestic sources.

(c) This Compact does not conflict and will not conflict with any international agreement or obligation to which the Government is a party or by which it is bound.

(d) No payments have been (i) received by any official of the Government or any other government body in connection with the procurement of goods or services to be undertaken or financed in whole or in part (directly or indirectly) by MCC Funding, except fees, taxes, or similar payments legally established in Madagascar or (ii) made to any third party, in connection with this Compact, in violation of the United States Foreign Corrupt Practices Act of 1977, as amended (15 USC 78a *et seq.*).

Section 3.5 Implementation Letters; Supplemental Agreements.

(a) MCC may, from time to time, issue one or more letters to furnish additional information or guidance to assist the Government in the implementation of this Compact (each, an "***Implementation Letter***"). The Government shall apply such guidance in implementing this Compact.

(b) The details of any funding, implementing and other arrangements in furtherance of this Compact may be memorialized in one or more agreements between (A) the Government and MCC, (B) MCC and/or the Government and any third party, including any of the Providers or (C) any third parties where neither MCC nor the Government is a party, before, on or after the entry into force of this Compact (each, a "***Supplemental Agreement***"). The Government shall deliver, or cause to be delivered, to MCC within five (5) days of its execution a copy of any Supplemental Agreement to which MCC is not a party.

Section 3.6 Procurement; Awards of Assistance.

(a) The Parties shall agree, no later than the entry into force of this Compact, on guidelines for the procurement of goods, services and works by the Government or any Provider in furtherance of this Compact (the "***Procurement Guidelines***"), such agreement to be reflected in a Supplemental Agreement containing the Procurement Guidelines (the "***Procurement Agreement***"). The Government shall ensure the adoption of such Procurement Guidelines by

any Permitted Designee, and furnish MCC evidence of such adoption, no later than the time specified in the Disbursement Agreement.

(b) The Government shall follow, and shall use its best efforts to ensure that all Providers follow, the Procurement Guidelines in procuring goods, services and works and in awarding contracts, grants and other agreements in furtherance of this Compact, which shall include the following requirements:

(i) Open, fair and competitive procedures are used in a transparent manner to solicit, award and administer contracts, grants, and other agreements and to procure goods, services and works;

(ii) Solicitations for goods, services, and works shall be based upon a clear and accurate description of the goods, services or works to be acquired;

(iii) Contracts shall be awarded only to qualified and capable contractors that have the capability and willingness to perform the contracts in accordance with the terms and conditions of the applicable contracts and on a cost effective and timely basis; and

(iv) No more than a commercially reasonable price, as determined, for example, by a comparison of price quotations and market prices, shall be paid to procure goods, services, and works.

(c) The Government shall maintain, and shall use its best efforts to ensure that all Providers maintain, records regarding the receipt and use of goods and services acquired in furtherance of this Compact, the nature and extent of solicitations of prospective suppliers of goods and services acquired in furtherance of this Compact, and the basis of award of contracts, grants and other agreements in furtherance of this Compact.

(d) The Government shall use its best efforts to ensure that information, including solicitations, regarding procurement, grant and other agreement actions financed in whole or in part (directly or indirectly) by MCC Funding shall be made publicly available in the manner outlined in the Procurement Guidelines or in any other manner agreed upon by the Parties in writing.

(e) No goods, services or works may be financed in whole or in part (directly or indirectly) by MCC Funding which are procured pursuant to orders or contracts firmly placed or entered into prior to the entry into force of this Compact, except as the Parties may otherwise agree in writing.

(f) The Government shall include, or ensure the inclusion of, the requirements of this Section 3.6 into all Supplemental Agreements between the Government or any Government Affiliate or Permitted Designee or any of their respective directors, officers, employees, Affiliates, contractors, representatives or agents, on the one hand, and a Provider, on the other hand.

Section 3.7 Policy Performance; Policy Reforms. In addition to the specific policy and legal reform commitments identified in Annex I and the Schedules thereto, the Government shall seek

to maintain and improve its level of performance under the policy criteria identified in section 607 of the Millennium Challenge Act of 2003, as amended (the "***Act***"), and the MCA selection criteria and methodology published by MCC pursuant to section 607 of the Act from time to time ("***MCA Eligibility Criteria***").

Section 3.8 Records and Information; Access; Audits; Reviews.

(a) Reports and Information. The Government shall furnish to MCC, and shall use its best efforts to ensure that all Providers and any other third party receiving MCC Funding, as appropriate, furnish to the Government, any records and other information required to be maintained under this Section 3.8 and such other information, documents and reports as may be necessary or appropriate for the Government to effectively carry out its obligations under this Compact, including under Section 3.12.

(b) Government Books and Records. The Government shall maintain, and shall use its best efforts to ensure that all Providers maintain, accounting books, records, documents and other evidence relating to this Compact adequate to show, without limitation, the use of all MCC Funding, including all costs incurred by the Government and the Providers in furtherance of this Compact, the receipt and use of goods and services acquired in furtherance of this Compact by the Government and the Providers, agreed-upon cost sharing requirements, the nature and extent of solicitations of prospective suppliers of goods and services acquired by the Government and the Providers in furtherance of this Compact, the basis of award of Government and other contracts and orders in furtherance of this Compact, the overall progress of the implementation of the Program, and any documents required by this Compact or any Supplemental Agreement between the Parties or reasonably requested by MCC upon reasonable notice ("***Compact Records***"). The Government shall maintain, and shall use its best efforts to ensure that all Covered Providers (defined in Section 3.8(e)(iv)) maintain, Compact Records in accordance with generally accepted accounting principles prevailing in the United States, or at the Government's option and with the prior written approval by MCC, other accounting principles, such as those (1) prescribed by the International Accounting Standards Committee (an affiliate of the International Federation of Accountants) or (2) then prevailing in Madagascar. Compact Records shall be maintained for at least five (5) years after the end of the Compact Term or for such longer period, if any, required to resolve any litigation, claims or audit findings or any statutory requirements.

(c) Application to Providers. The Government shall include, or ensure the inclusion of, the requirements of paragraphs (a), (b), (c), (d), (e)(iii), (e)(vi), and (e)(viii) of this Section 3.8 into all Supplemental Agreements between the Government or any Government Affiliate or any Permitted Designee or any of their respective directors, officers, employees, Affiliates, contractors, representatives or agents, on the one hand, and a Covered Provider that is not a non-profit organization domiciled in the United States, on the other hand. The Government shall include, or ensure the inclusion of, at a minimum, the requirements of paragraphs (a), (b), (d), and (e)(viii) of this Section 3.8 into all Supplemental Agreements between the Government or any Government Affiliate or Permitted Designee or any of their respective directors, officers, employees, Affiliates, contractors, representatives or agents, on the one hand, and a Provider that does not meet the definition of a Covered Provider, on the other hand. The Government shall include, or ensure the inclusion of, at a minimum, the requirements of paragraphs (a), (b), and (d)

of this Section 3.8 into all Supplemental Agreements between the Government or any Government Affiliate or any Permitted Designee or any of their respective directors, officers, employees, Affiliates, contractors, representatives or agents, on the one hand, and a Covered Provider that is a non-profit organization domiciled in the United States, on the other hand.

(d) Access. The Government shall permit, or cause to be permitted, authorized representatives of MCC, the Inspector General (defined below), the United States Government Accountability Office, any auditor responsible for an audit contemplated herein or otherwise conducted in furtherance of this Compact, and any agents or representatives engaged by MCC or a Permitted Designee to conduct any assessment, review or evaluation of the Program, at all reasonable times the opportunity to audit, review, evaluate or inspect activities financed in whole or in part (directly or indirectly) by MCC Funding or undertaken in connection with the Program, the utilization of goods and services purchased or financed in whole or in part (directly or indirectly) by MCC Funding, and Compact Records, including of the Government or any Provider, relating to activities financed or undertaken in furtherance of, or otherwise relating to, this Compact, and shall use its best efforts to ensure access by MCC, the Inspector General, the United States Government Accountability Office or relevant auditor, reviewer or evaluator or their respective representatives or agents to all relevant directors, officers, employees, Affiliates, contractors, representatives and agents of the Government or any Provider.

(e) Audits.

(i) Government Audits. The Government shall, on at least an annual basis and as the Parties may otherwise agree in writing, conduct, or cause to be conducted, financial audits of all MCC Disbursements and Re-Disbursements during the year since the entry into force of this Compact or since the prior anniversary of the entry into force of this Compact in accordance with the following terms, except as the Parties may otherwise agree in writing. As requested by MCC in writing, the Government shall use, or cause to be used, or select, or cause to be selected, an auditor named on the approved list of auditors in accordance with the "*Guidelines for Financial Audits Contracted by Foreign Recipients*" issued by the Inspector General of the United States Agency for International Development (the "***Inspector General***"), and as approved by MCC, to conduct such annual audits. Such audits shall be performed in accordance with such Guidelines and be subject to quality assurance oversight by the Inspector General in accordance with such Guidelines. An audit shall be completed no later than 90 days after the first anniversary of the entry into force of this Compact and no later than 90 days after each anniversary of the entry into force of this Compact thereafter, or such other period as the Parties may otherwise agree in writing.

(ii) Audits of U.S. Entities. The Government shall ensure that Supplemental Agreements between the Government or any Provider, on the one hand, and a United States nonprofit organization, on the other hand, state that the United States organization is subject to the applicable audit requirements contained in OMB Circular A-133, notwithstanding any other provision of this Compact to the contrary. The Government shall ensure that Supplemental Agreements between the Government or any Provider, on the one hand, and a United States for-profit Covered Provider, on the other hand, state that the United States organization is subject to audit by the cognizant United States Government agency, unless the Government and MCC agree otherwise in writing.

(iii) Audit Plan. The Government shall submit, or cause to be submitted, to MCC, in form and substance satisfactory to MCC, a plan for the audit of the expenditures of any Covered Providers, which audit plan the Government shall adopt, or cause to be adopted, no later than sixty (60) days prior to the end of the first anniversary of the entry into force of this Compact or prior to the end of the first period to be audited.

(iv) Covered Provider. A "***Covered Provider***" is (A) any non-United States Provider that receives (other than pursuant to a direct contract or agreement with MCC) USD $300,000 or more in such Provider's fiscal year in MCC Funding or any other non-U.S. Party that receives, directly or indirectly, USD $300,000 or more of MCC Funding from any Provider in such other party's fiscal year or (B) any United States Provider that receives (other than pursuant to a direct contract or agreement with MCC) USD $500,000 or more in such Provider's fiscal year in MCC Funding or any other United States party that receives, directly or indirectly, USD $500,000 or more of MCC Funding from any Provider in such Provider's fiscal year.

(v) Corrective Actions. The Government shall use its best efforts to ensure that Covered Providers take, where necessary, appropriate and timely corrective actions in response to audits, consider whether a Covered Provider's audit necessitates adjustment of its own records, and require each such Covered Provider to permit independent auditors to have access to its records and financial statements as necessary.

(vi) Audit Reports. The Government shall furnish, or use its best efforts to cause to be furnished, to MCC an audit report in a form satisfactory to MCC for each audit required by this Section 3.8, other than audits arranged for by MCC, no later than 90 days after the end of the period under audit, or such other time as may be agreed by the Parties from time to time.

(vii) Other Providers. For Providers who receive MCC Funding under this Compact pursuant to direct contracts or agreements with MCC, MCC shall include appropriate audit requirements in such contracts or agreements and shall, on behalf of the Government, unless otherwise agreed by the Parties, conduct the follow-up activities with regard to the audit reports furnished pursuant to such requirements.

(viii) Audit by MCC. MCC retains the right to perform, or cause to be performed, the audits required under this Section 3.8 by utilizing MCC Funding or other resources available to MCC for this purpose, and to audit, conduct a financial review, or otherwise ensure accountability of any Provider or any other third party receiving MCC Funding, regardless of the requirements of this Section 3.8.

(f) Reviews or Evaluations. The Government shall conduct, or cause to be conducted, such performance reviews, data quality reviews, or program evaluations during the Compact Term in accordance with the M&E Plan (defined in Annex I) or as otherwise agreed in writing by the Parties.

(g) Cost of Audits, Reviews or Evaluations. MCC Funding may be used to finance the costs of any Audits, reviews or evaluations required under this Compact, including as

reflected on Exhibit A to Annex II, and in no event shall the Government be responsible for the costs of any such Audits, reviews or evaluations.

Section 3.9 Insurance. The Government shall insure or cause to be insured all Program Assets and obtain such other appropriate insurance to cover against risks or liabilities associated with the operations of the Program. The Government shall be responsible for the cost of such insurance, except as otherwise agreed by the Parties and expressly covered in the Budget (as defined in Annex I). MCC shall be named as additional insureds on any such insurance, to the extent permissible under applicable laws, and any payments received by the Government under such insurance shall be used to replace or repair any loss of Program Assets, and otherwise shall be deposited in an account as designated by MCC.

Section 3.10 Domestic Requirements. The Government shall proceed in a timely manner to seek any required ratification of this Compact or similar domestic requirement, which process the Government shall initiate promptly after the conclusion of this Compact. Notwithstanding anything to the contrary in this Compact, this Section 3.10 shall provisionally apply prior to the entry into force of this Compact.

Section 3.11 No Conflict. The Government shall undertake not to enter into any agreement in conflict with this Compact or any Supplemental Agreement during the Compact Term.

Section 3.12 Reports. The Government shall provide to MCC within thirty (30) days of any written request by MCC, or as otherwise agreed in writing by the Parties, the following information:

(a) The name of each entity to which MCC Funding has been provided;

(b) The amount of assistance provided to such entity;

(c) A description of the Program and each Project funded in furtherance of this Compact, including:

(i) A statement of whether the Program or any Project was solicited or unsolicited; and

(ii) A detailed description of the objectives and measures for results of the Program or Project;

(d) The progress made by Madagascar toward achieving the Compact Goal and Objectives;

(e) A description of the extent to which MCC Funding has been effective in helping Madagascar to achieve the Compact Goal and Objectives;

(f) A description of the coordination of MCC Funding with other United States foreign assistance and other related trade policies;

(g) A description of the coordination of MCC Funding with assistance provided by other donor countries;

(h) Any report, document or filing that the Government, any Government Affiliate or any Permitted Designee submits to any government body in connection with this Compact;

(i) Any report or document required to be delivered to MCC under the Environmental Guidelines, the Audit Plan, or any component of the Implementation Plan; and

(j) Any other report, document or information requested by MCC or required by this Compact or any Supplemental Agreement between the Parties.

Section 3.13 Publicity; Information and Marking. The Government shall give appropriate publicity to this Compact as a program to which the United States, through MCC, has contributed, including by posting this Compact, and any amendments thereto, on the MCA-Madagascar Website (defined in Annex I), identifying Program activity sites, and marking Program Assets; *provided*, any announcement, press release or statement regarding MCC or the fact that MCC is financing the Program or any other publicity materials referencing MCC, including the publicity described in this Section 3.13, shall be subject to prior approval by MCC and shall be consistent with any instructions provided by MCC from time to time in relevant Implementation Letters. MCC shall post this Compact on its website. Upon the termination or expiration of this Compact, MCC may request the removal of, and the Government shall, upon such request, remove, or cause the removal of, any such markings and any references to MCC in any publicity materials or on the MCA-Madagascar Website.

## ARTICLE IV.

## DELIVERIES; CONDITIONS PRECEDENT

Section 4.1 Government Deliveries and Other Conditions Prior to the Entry into Force. As condition precedent to the entry into force of this Compact, the Government shall satisfy, or ensure the satisfaction of, the conditions set forth in this Section 4.1.

(a) Government Deliveries. The Government shall deliver, or ensure the delivery, to MCC, in form and substance satisfactory to MCC, the following documents:

(i) A written statement of the name of the person holding or acting in the Government office specified in Section 5.2 and of any Additional Representative (defined below), together with a specimen signature for each person specified in such statement and an incumbency certificate for each such person;

(ii) An executed copy of the Disbursement Agreement, which agreement shall be in full force and effect as of the entry into force of this Compact, without any modification, amendment, alteration or suspension of any kind;

(iii) Executed copies of one or more term sheets by and between MCC and the Government that set forth the material and principal terms and conditions of each of the

Supplemental Agreements identified in Exhibit A attached hereto (the "***Supplemental Agreement Term Sheets***"); and

(iv) An executed copy of the Procurement Agreement, which agreement shall be in full force and effect as of the entry into force of this Compact, without any modification, amendment, alteration or suspension of any kind.

(b) Government Assurances. The Government shall certify to MCC in writing that all of the Government assurances contained in Section 3.4 were true, correct and complete when made and that the assurances in paragraphs (a) through (d) of Section 3.4 are true, accurate and complete in all material respects as of the entry into force of this Compact.

(c) No Material Breach or Adverse Change. The Government shall certify in writing to MCC that that there has been: (i) no material breach or default of any assurance, covenant or other obligation under any Supplemental Agreement between the Parties executed on or before the entry into force of this Compact; (ii) no material adverse change in the legal formation document or status of MCA-Madagascar; (iii) no modification, amendment, alteration, rescission, termination or suspension of any Supplemental Agreement delivered pursuant to Section 4.1(a); and (iv) no event has occurred that had or reasonably could be expected to have a material adverse change in or material adverse effect on: (A) the business, ministries, departments, property, operations, management, or condition, financial or otherwise, of the Government or any Government Affiliate or Permitted Designee, as it relates to this Compact; (B) the ability of the Government or any Government Affiliate or Permitted Designee to perform any of its obligations in furtherance of this Compact or exercise any of its rights under this Compact; or (C) the validity or enforceability of this Compact or any Supplemental Agreement to which any of them is a party.

Section 4.2 Conditions Precedent to MCC Disbursements or Re-Disbursements. Prior to, and as condition precedent to, any MCC Disbursement or Re-Disbursement, the Government shall satisfy, or ensure the satisfaction of, any applicable conditions precedent in the Disbursement Agreement.

## ARTICLE V.

## FINAL CLAUSES

Section 5.1 Communications. Unless otherwise expressly stated in this Compact or otherwise agreed in writing by the Parties, any notice, certificate, request, report, document or other communication required, permitted, or submitted by either Party to the other under this Compact shall be: (a) in writing, (b) in English, and (c) deemed duly given: (i) upon personal delivery to the Party to be notified; (ii) when sent by confirmed facsimile or electronic mail, if sent during normal business hours of the recipient Party, if not, then on the next business day; or (iii) one (1) business day after deposit with an internationally recognized overnight courier, specifying next day delivery, with written verification of receipt to the Party to be notified at the address indicated below, or at such other address as such Party may designate:

To MCC:

Millennium Challenge Corporation
Attention: Vice President for Country Relations
(with a copy to the Vice President and General Counsel)
1000 Wilson Boulevard - Suite 1400
Arlington, VA 22209
United States of America
Facsimile: (202) 521-3700
Email: VPCountryRelations@mcc.gov (Vice President for Country Relations);
VPGeneralCounsel@mcc.gov (Vice President and General Counsel)

To the Government:

Presidence de la Republique de Madagascar
Attention: Chief of Staff of the Presidency
BP 955
Antananarivo 101
Madagascar,
Facsimile: 261 20 22 628 50
E-mail: Henran@wanadoo.mg

Notwithstanding the foregoing, any audit report delivered pursuant to Section 3.8, if delivered by facsimile or electronic mail, shall be followed by an original in overnight express mail. This Section 5.1 shall not apply to the exchange of letters contemplated in Section 1.3 or any amendments under Section 5.3.

Section 5.2 Representatives. Unless otherwise agreed in writing by the Parties, for all purposes relevant to this Compact, the Government shall be represented by the individual holding the position of, or acting as, Chief of Staff of the Presidency of the Republic of Madagascar, and MCC shall be represented by the individual holding the position of, or acting as, Vice President for Country Relations (each, a "***Principal Representative***"), each of whom, by written notice, may designate one or more additional representatives (each, an "***Additional Representative***") for all purposes other than signing amendments to this Compact. The names of the Principal Representative and any Additional Representative of each of the Parties shall be provided, with specimen signatures, to the other Party, and the Parties may accept as duly authorized any instrument signed by such representatives relating to the implementation of this Compact, until receipt of written notice of revocation of their authority. A Party may change its Principal Representative to a new representative of equivalent or higher rank upon written notice to the other Party, which notice shall include the specimen signature of the new Principal Representative.

Section 5.3 Amendments. The Parties may amend this Compact only by a written agreement signed by the Principal Representatives of the Parties.

Section 5.4 Termination; Suspension.

(a) Subject to Section 2.5 and paragraphs (e) through (h) of this Section 5.4, either Party may terminate this Compact in its entirety by giving the other Party thirty (30) days' written notice.

(b) Notwithstanding any other provision of this Compact, including Section 2.1, or any Supplemental Agreement between the Parties, MCC may suspend or terminate MCC Funding, in whole or in part, and any obligation or sub-obligation related thereto, upon giving the Government written notice, if MCC determines that:

(i) Any use or proposed use of MCC Funding or Program Assets or continued implementation of the Compact would be in violation of applicable law or U.S. Government policy, whether now or hereafter in effect;

(ii) The Government, any Provider, or any other third party receiving MCC Funding or using Program Assets is engaged in activities that are contrary to the national security interests of the United States;

(iii) The Government has committed an act or an event has occurred that would render the Republic of Madagascar ineligible to receive United States economic assistance under Part I of the Foreign Assistance Act of 1961, as amended (22 U.S.C 2151 *et seq.*), by reason of the application of any provision of the Foreign Assistance Act of 1961 or any other provision of law;

(iv) The Government has engaged in a pattern of actions or omissions inconsistent with the MCA Eligibility Criteria, or there has occurred a significant decline in the performance of the Republic of Madagascar on one or more of the eligibility indicators contained therein;

(v) The Government or any Provider, in MCC's sole opinion, has materially breached one or more of its assurances or any other covenants, obligations or responsibilities under this Compact or any Supplemental Agreement;

(vi) An audit, report or any other document or other evidence reveals that actual expenditures for the Program or any Project Activity were greater than the projected expenditure for such activities identified in the applicable Budget;

(vii) If the Government (A) materially reduces the allocation in its national budget or any other Government budget of the normal and expected resources that the Government would have otherwise received or budgeted, from external or domestic sources, for the activities contemplated herein or (B) fails to contribute or provide the amount, level, type and quality of resources required to effectively carry out the Government Responsibilities or any other responsibilities or obligations of the Government under or in furtherance of this Compact;

(viii) If the Government, any Provider, or any other third party receiving MCC Funding or using Program Assets, or any of their respective directors, officers, employees,

Affiliates, contractors, representatives or agents, is found to have been convicted of a narcotics offense or to have been engaged in drug trafficking;

(ix) Any MCC Funding or Program Assets are applied, directly or indirectly, to the provision of resources and support to, individuals and organizations associated with terrorism, sex trafficking or prostitution;

(x) An event or condition of any character has occurred that, in MCC's sole opinion: (A) materially and adversely affects, or is likely to materially and adversely affect, the ability of the Government or any other party to effectively implement, or ensure the effective implementation of, the Program or any Project or to otherwise carry out its responsibilities or obligations under or in furtherance of this Compact or any Supplemental Agreement or to perform its obligations under or in furtherance of this Compact or any Supplemental Agreement or to exercise its rights thereunder; (B) makes it improbable that the Objectives will be achieved during the Compact Term; or (C) materially and adversely affects the Program Assets or any Permitted Account;

(xi) The Government or any Permitted Designee or Provider has taken any action or omission or engaged in any activity in violation of, or inconsistent with, the requirements of this Compact or any Supplemental Agreement to which the Government or any Permitted Designee or Provider is a party; or

(xii) There has occurred, in MCC's sole opinion, a failure to meet a condition precedent or series of conditions precedent to MCC Disbursement as set out in and in accordance with any Supplemental Agreement between the Parties.

(c) MCC may reinstate any suspended or terminated MCC Funding under this Compact or any Supplemental Agreement if MCC determines, in its sole discretion, that the Government or other relevant party has demonstrated a commitment to correcting each condition for which MCC Funding was suspended or terminated.

(d) The authority to suspend or terminate this Compact or any MCC Funding under this Section 5.4 includes the authority to suspend or terminate any obligations or sub-obligations relating to MCC Funding under any Supplemental Agreement without any liability to MCC whatsoever.

(e) All MCC Funding shall terminate upon expiration or termination of the Compact Term; *provided, however*, reasonable expenditures for goods and services that are properly incurred under or in furtherance of this Compact before expiration or termination of the Compact Term may be paid from MCC Funding, provided that the request for such payment is properly submitted within sixty (60) days after such expiration or termination.

(f) Except for payments which the Parties are committed to make under noncancelable commitments entered into with third parties before such suspension or termination, the suspension or termination of this Compact or any Supplemental Agreement, in whole or in part, shall suspend, for the period of the suspension, or terminate, or ensure the suspension or termination of, as applicable, any obligation or sub-obligation of the Parties to provide financial or other resources under this Compact or any Supplemental Agreement, or to the suspended or terminated

portion of this Compact or such Supplemental Agreement, as applicable. In the event of such suspension or termination, the Government shall use its best efforts to suspend or terminate, or ensure the suspension or termination of, as applicable, all such noncancelable commitments related to the suspended or terminated MCC Funding. Any portion of this Compact or any such Supplemental Agreement that is not suspended or terminated shall remain in full force and effect.

(g) Upon the full or partial suspension or termination of this Compact or any MCC Funding, MCC may, at its expense, direct that title to Program Assets be transferred to MCC if such Program Assets are in a deliverable state; *provided*, for any Program Asset(s) partially purchased or financed (directly or indirectly) by MCC Funding, the Government shall reimburse to a U.S. Government account designated by MCC the cash equivalent of the portion of the value of such Program Asset(s).

(h) Prior to the expiration of this Compact or upon the termination of this Compact, the Parties shall consult in good faith with a view to reaching an agreement in writing on (i) the post-Compact Term treatment of MCA-Madagascar, (ii) the process for ensuring the refunds of MCC Disbursements that have not yet been released from the account into which the MCC Disbursement was made (or the Local Account to which the MCC Disbursement was transferred in accordance with Section 2.1(d)) through a valid Re-Disbursement nor otherwise committed in accordance with Section 5.4(e), or (iii) any other matter related to the winding up of the Program and this Compact.

Section 5.5 Privileges and Immunities. MCC is an agency of the Government of the United States of America and its personnel assigned to the Republic of Madagascar will be notified pursuant to the Vienna Convention on Diplomatic Relations as members of the mission of the Embassy of the United States of America. The Government shall ensure that any employees of MCC, including individuals detailed to or contracted by MCC, and the members of the families of such employees, while such employees are performing duties in the Republic of Madagascar, shall enjoy at least the privileges and immunities that are enjoyed by a member of the United States Foreign Service, or the family of a member of the United States Foreign Service, as appropriate, of comparable rank and salary of such employee, if such employees or the members of the families of such employee are not a national of or permanently resident in the Republic of Madagascar.

Section 5.6 Attachments. Any annex, schedule, exhibit, table, appendix or other attachment expressly attached hereto (collectively, the "***Attachments***") is incorporated herein by reference and shall constitute an integral part of this Compact.

Section 5.7 Inconsistencies.

(a) Conflicts or inconsistencies between any parts of this Compact shall be resolved by applying the following descending order of precedence:

(i) Articles I through V

(ii) Any Attachments

(b) In the event of any conflict or inconsistency between this Compact and any Supplemental Agreement between the Parties, the terms of this Compact shall prevail. In the event of any conflict or inconsistency between any Supplemental Agreement between the Parties and any other Supplemental Agreement, the terms of the Supplemental Agreement between the Parties shall prevail. In the event of any conflict or inconsistency between Supplemental Agreements between any parties, the terms of a more recently executed Supplemental Agreement between such parties shall take precedence over a previously executed Supplemental Agreement between such parties. In the event of any inconsistency between a Supplemental Agreement between the Parties and any component of the Implementation Plan (defined in Annex I), the terms of the relevant Supplemental Agreement shall prevail.

Section 5.8 Indemnification. The Government shall indemnify and hold MCC and any MCC officer, director, employee, Affiliate, contractor, agent or representative (each of MCC and any such persons, an "***MCC Indemnified Party***") harmless from and against, and shall compensate, reimburse and pay such MCC Indemnified Party for, any liability or other damages which (i) are directly or indirectly suffered or incurred by such MCC Indemnified Party, or to which any MCC Indemnified Party may otherwise become subject, regardless of whether or not such damages relate to any third-party claim, and (ii) arise from or as a result of the gross negligence or willful misconduct of the Government, any Government Affiliate, or any Permitted Designee, directly or indirectly connected with, any activities (including acts or omissions) undertaken in furtherance of this Compact; *provided, however,* the Government shall apply national funds to satisfy its obligations under this Section 5.8 and no MCC Funding, Accrued Interest, or Program Asset may be applied by the Government in satisfaction of its obligations under this Section 5.8.

Section 5.9 Headings. The Section and Subsection headings used in this Compact are included for convenience only and are not to be considered in construing or interpreting this Compact.

Section 5.10 Interpretation; Definitions. Any reference to the term "including" in this Compact shall be deemed to mean "including without limitation" except as expressly provided otherwise. Any reference to activities undertaken "in furtherance of this Compact" or similar language shall include activities undertaken by the Government, any Provider or any other third party receiving MCC Funding involved in carrying out the purposes of this Compact or any Supplemental Agreement, including their officers, directors, employees, Affiliates, contractors, agents and representatives, whether pursuant to the terms of this Compact, any Supplemental Agreement or otherwise. References to "day" or "days" shall be calendar days unless provided otherwise. The term "U.S. Government" shall mean any branch, agency, bureau, government corporation, government chartered entity or other body of the Federal government of the United States.

Section 5.11 Signatures. Other than a signature to this Compact or an amendment to this Compact pursuant to Section 5.3, a signature delivered by facsimile or electronic mail in accordance with Section 5.1 shall be deemed an original signature, and the Parties hereby waive any objection to such signature or to the validity of the underlying document, certificate, notice, instrument or agreement on the basis of the signature's legal effect, validity or enforceability solely because it is in facsimile or electronic form. Such signature shall be accepted by the receiving Party as an original signature and shall be binding on the Party delivering such signature.

Section 5.12 Designation. MCC may designate any Affiliate, agent, or representative to implement, in whole or in part, its obligations, and exercise any of its rights, under this Compact or any Supplemental Agreement between the Parties.

Section 5.13 Survival. Any Government Responsibilities, covenants, or obligations or other responsibilities to be performed by the Government after the Compact Term shall survive the termination or expiration of this Compact and expire in accordance with their respective terms. Notwithstanding the termination or expiration of this Compact, the following provisions shall remain in force: Sections 2.2, 2.3, 2.5, 3.2, 3.3, 3.4, 3.5, 3.8, 3.9 (for one year), 3.12, 3.13, 5.1, 5.2, 5.4(d), 5.4(e) (for sixty days), 5.4(f), 5.4(g), 5.4(h), 5.5, 5.6, 5.7, 5.8, 5.9, 5.10, 5.11, 5.12, this Section 5.13, 5.14, and 5.15.

Section 5.14 Consultation. Either Party may, at any time, request consultations relating to the interpretation or implementation of this Compact or any Supplemental Agreement between the Parties. Such consultations shall begin at the earliest possible date. The request for consultations shall designate a representative for the requesting Party with the authority to enter consultations and the other Party shall endeavor to designate a representative of equal or comparable rank. If such representatives are unable to resolve the matter within 20 days from the commencement of the consultations then each Party shall forward the consultation to the Principal Representative or such other representative of comparable or higher rank. The consultations shall last no longer than 45 days from date of commencement. If the matter is not resolved within such time period, either Party may terminate this Compact pursuant to Section 5.4(a). The Parties shall enter any such consultations guided by the principle of achieving the Compact Goal in a timely and cost-effective manner.

Section 5.15 MCC Status. MCC is a United States government corporation acting on behalf of the United States Government in the implementation of this Compact. As such, MCC has no liability under this Compact, is immune from any action or proceeding arising under or relating to this Compact and the Government hereby waives and releases all claims related to any such liability. In matters arising under or relating to this Compact, MCC is not subject to the jurisdiction of the courts or other body of Madagascar.

**Signature page begins on the next page.**

**IN WITNESS WHEREOF,** the undersigned, duly authorized by their respective governments, have signed this Compact this 18th day of April, 2005 and this Compact shall enter into force in accordance with Section 1.3.

Done at Washington, D.C. in the English language.

FOR MILLENNIUM CHALLENGE CORPORATION, ON BEHALF OF THE UNITED STATES OF AMERICA

/ s /

Name: Paul V. Applegarth
Title: Chief Executive Officer

FOR THE GOVERNMENT OF THE REPUBLIC OF MADAGASCAR

/ s /

Name: Benjamin Andriamparany Radavidson
Title: Minister of Economy, Finance and Budget

Signature Page to Millennium Challenge Compact by and between the United States of America, acting through the Millennium Challenge Corporation, and the Government of the Republic of Madagascar

## EXHIBIT A

## LIST OF CERTAIN SUPPLEMENTAL AGREEMENTS

1. Governance Agreement
2. Form of Fiscal Agent Agreement
3. Form of Implementing Entity Agreement
4. Form of Bank Agreement

## ANNEX I

## PROGRAM DESCRIPTION

This Annex I to the Compact (the "***Program Annex***") generally describes the Program that MCC Funding will support in Madagascar during the Compact Term and the results to be achieved from the investment of MCC Funding. Prior to any MCC Disbursement or Re-Disbursement, including for the Projects described herein, the Parties shall enter into a Supplemental Agreement that (i) further specifies the terms and conditions of such MCC Disbursements and Re-Disbursements, (ii) is in a form and substance mutually satisfactory to the Parties, and (iii) is signed by the Principal Representative of each Party (the "***Disbursement Agreement***").

Except as specifically provided herein, the Parties may amend this Program Annex only by written agreement signed by the Principal Representative of each Party. Each capitalized term in this Program Annex shall have the same meaning given such term elsewhere in this Compact. Unless otherwise expressly stated, each Section reference herein is to the relevant Section of the main body of the Compact.

### 1. Background; Consultative Process.

The Madagascar national poverty reduction strategy paper ("***PRSP***") focuses on increasing rural incomes. Eighty percent of Madagascar's poor live in rural areas and the PRSP shows that the majority of these people did not benefit from the macroeconomic growth achieved during the 1997-2001 period when welfare gains failed to spread to rural areas. The latest Joint Staff Assessment of the Malagasy PRSP supports the three guiding principles that underpin the PRSP aimed at stimulating growth and investment: (i) a commitment to major investment in public transport infrastructure in order to integrate farmers into the market economy through a better road network, (ii) a commitment to public-private partnership in the management of key public enterprises, and (iii) a commitment to improving the environment for private investment through reforms in, *inter alia*, land titling and land security laws.

Given the predominantly rural basis of poverty in Madagascar, a rural-focused approach to economic growth will be of paramount importance to any successful effort to reduce poverty. The IMF/IDA endorse the poverty reduction strategy, which they conclude is "correctly built around raising agricultural productivity and attracting agro-business investments to high potential zones."

In developing the concepts for the Proposal, the Government engaged in a consultative process that reached out through workshops and subsequent sessions to the business community (banks, business associations, chambers of commerce, farmers associations, microfinance institutions, industrial enterprises), non-governmental organizations, civil society, and donors. The Government first organized an introductory national workshop (consisting of more than 350 participants and including the presence of President Ravalomanana) to describe the MCA and discuss obstacles to economic growth and poverty reduction. The feedback from this national consultation workshop served as the basis for the Government's first draft proposal. The Government subsequently organized six regional consultative workshops consisting of 50 to 150

participants each (in Antsiranana, Antisrabe, Mahajanga, Toliary, Fianarantsoa, and Toamasina) and one national workshop (in Antananarivo), during which participants offered their insights on obstacles to economic growth and poverty reduction in Madagascar. The Government also ran radio and TV broadcasts on the MCA, at times soliciting on-air input, and also published newspaper advertisements that announced meetings and called for submission of proposal ideas. Following this consultation period, the Government revised its first draft proposal into the Proposal. In order to solicit on-going feedback on the Proposal, the Government set up an "e-mail submission box" and posted the Proposal on the Ministry of Finance website.

The Proposal also reflects the ideas and strategies expressed in the PRSP. In that regard, the PRSP process is relevant to understanding the extent of national consultation on the issues underlying the Proposal. The PRSP consultative process was similar to the MCA consultative process in many respects, such as by including regional workshops and participation by representatives from the private sector, civil society, donors, and other groups. The PRSP process also incorporated consultations along sectoral or thematic lines, which were absent from the MCA process. Participation in the PRSP regional and sectoral/thematic workshops was (on average) as follows: private sector and civil society (46%); public sector (35%); donors (10%). Representatives of the business community, civil society, international non-governmental organizations and donors all received invitations to consultative process sessions and all groups participated. Farmers associations and microfinance institutions were also key participants, which helped highlight concerns of the rural poor (80% of Madagascar's population live in rural areas; 73% of rural inhabitants live under the poverty line).

Based on the PRSP and the consultations described above, the Government developed and submitted the Proposal to MCC. The Proposal focused, among other things, on raising agricultural productivity and increasing agro-investment in five targeted high potential zones. The three primary components of the Proposal – which focus on what are widely accepted as deep-rooted factors affecting economic growth and poverty reduction on a national level – enjoy broad support and enthusiasm from the business community, local and international non-governmental organizations, civil society, and other donors.

Following MCC's review of the Proposal and discussions and negotiations of the Parties, the Parties have identified certain mutually acceptable components of the Proposal and other components developed through the discussions of the Parties that together shall constitute the Program. The Program is fully consistent with, and directly supports, the following priority area identified by the Government in the PRSP: improving the environment for private sector investment through legal and policy reform as well as development of financial infrastructure, increasing land security and providing knowledge of market opportunities and requirements in rural areas. Furthermore, the proposed implementation framework for this Compact, as described in Section 3 of this Program Annex, is consistent with another priority area identified by the Government in the PRSP: a commitment to public-private partnership in the management of key public enterprises, as it will include representatives of the Government and the beneficiaries in the decision-making body and will recruit from both public and private sector for the key management positions.

**2. Overview.**

(a) **Program Objectives.** The Program involves a series of specific and complementary interventions that the Parties expect will achieve the Land Tenure Objective, the Finance Objective and the Agricultural Business Investment Objective and advance the progress of Madagascar towards the Compact Goal, particularly in five discrete geographic and high-potential pilot areas (each, a "***Zone***").

(b) **Projects.** The Parties have identified, for each Objective, Projects that they intend for the Government to implement, or cause to be implemented, using MCC Funding, each of which is described in the Schedules to this Program Annex. The Schedules to this Program Annex identify the activities that will be undertaken in furtherance of each Project (each, a "***Project Activity***"). Notwithstanding anything to the contrary in this Compact, the Parties may agree to modify, amend, terminate or suspend these Projects or create a new project by written agreement signed by the Principal Representative of each Party without amending this Compact; *provided, however*, any such modification or amendment of a Project or creation of a new project is (i) consistent with the Objectives; (ii) does not cause the amount of MCC Funding to exceed the aggregate amount specified in Section 2.1(a) of this Compact; (iii) does not cause the Government's responsibilities or contribution of resources to be less than specified in Section 2.2 of this Compact or elsewhere in this Compact; and (iv) does not extend the Compact Term. The Program will be conducted on two geographic levels: certain Project activities shall be implemented on a national basis and other Project activities shall be implemented solely within the five targeted Zones (three Zones shall be as identified through the Agricultural Business Investment Project and two Zones shall be selected by the Government in accordance with criteria mutually agreed upon by the Parties).

(c) **Beneficiaries.** The intended beneficiaries of each Project are described in the respective Schedule to this Program Annex to the extent identified as of the date hereof. Since all of the Zones will likely not be identified until after the entry into force of this Compact, the Parties are unable to state with more specificity as of the date hereof, or on a disaggregated basis, the intended beneficiaries of the Program or the Projects. As the Zones are identified, the Government shall provide to MCC information on the population of such Zones, disaggregated by gender, income level and age. After the Zones have been selected, the Parties shall agree upon the description of the intended beneficiaries and the Parties will make publicly available a more detailed description of the intended beneficiaries of the Program, including publishing such description on the website operated by MCA-Madagascar (the "***MCA-Madagascar Website***"). The Government shall ensure that MCA-Madagascar presents to the Advisory Council (described below) (i) a detailed description of the intended beneficiaries and (ii) the methodology used to determine the intended beneficiaries within thirty (30) days of the determination of Zones and completion of the analysis of the intended beneficiaries therein, disaggregated, to the maximum extent practicable, by income level, gender, and age.

(d) **Civil Society.** Civil society shall participate in overseeing the implementation of the Program through its representation on the Advisory Council, as provided in Section 3(e) of this Program Annex. In addition, the Work Plans or Procurement Plans (defined below) for each Project shall note the extent to which civil society will have a role in the implementation of a

particular Project Activity. Finally, members of civil society may be recipients of training or other public awareness programs that are integral to the Project Activities.

(e) **Monitoring and Evaluation ("*M&E*")**. Annex III of this Compact generally describes the plan to measure and evaluate progress toward achievement of the Objectives of this Compact. (the "***M&E Plan***").

**3. Implementation Framework.**

The implementation framework and the plan for ensuring adequate governance, oversight, management, monitoring, evaluation and fiscal accountability for the use of MCC Funding is summarized below and in the Schedules attached to this Program Annex, or as may otherwise be agreed in writing by the Parties.

(a) **General**. The elements of the implementation framework will be further described in relevant Supplemental Agreements and in a detailed plan for the implementation of the Program and each Project (the "***Implementation Plan***"), which will be memorialized in one or more documents and shall consist of: a Financial Plan (defined below), Budget (defined below), Fiscal Accountability Plan (defined below), Procurement Plan (defined below), Program and Project Work Plans (defined below), and M&E Plan. MCA-Madagascar (defined below) shall adopt each component of the Implementation Plan in accordance with the requirements and timeframe as may be specified in this Program Annex, the Disbursement Agreement or as may otherwise be agreed by the Parties from time to time. MCA-Madagascar may modify, alter, or amend the Implementation Plan or any component thereof without amending this Compact, provided any material modification, alteration, or amendment of the Implementation Plan or any component thereof has been approved by MCC and is otherwise consistent with the requirements of this Compact and any relevant Supplemental Agreement between the Parties. By such time as may be specified in the Disbursement Agreement or as may otherwise be agreed by the Parties from time to time, MCA-Madagascar shall adopt one or more work plans for the overall administration of the Program and for each Project (collectively, the "***Work Plans***"). The Work Plan(s) shall set forth the details of each activity to be undertaken or financed by MCC Funding as well as the allocation of roles and responsibilities for specific Project activities, or other programmatic guidelines, performance requirements, targets, or other expectations for a Project.

(b) **Government**. The Government shall promptly take all necessary and appropriate actions to carry out the Government Responsibilities and other obligations or responsibilities under this Compact and in furtherance of this Compact, including undertaking or pursuing such legal, legislative or regulatory actions or procedural changes as may be necessary or appropriate for the achievement of the Objectives and successful implementation of the Program. The Government shall establish, or cause to be established, a legal entity, in a form mutually agreeable to the Parties ("***MCA-Madagascar***"), which shall be a Permitted Designee and shall be responsible for the oversight and management of the implementation of this Compact on behalf of the Government. MCA-Madagascar shall be organized, and have such roles and responsibilities, as described in Section 3(d) of this Program Annex and as provided in the Governance Agreement; *provided, however*, the Government or other Permitted Designee may, subject to MCC approval, carry out any of the roles and responsibilities delegated to MCA-Madagascar and described in Section 3(d) of this Program Annex or elsewhere in this Program

Annex, the Governance Agreement, or any other Supplemental Agreement prior to and during the initial period of the establishment and staffing of MCA-Madagascar, but in no event longer than six months from the entry into force of this Compact, unless otherwise agreed by the Parties in writing. The Government shall promptly take all necessary and appropriate actions, including any necessary legal, legislative or regulatory actions, to ensure that MCA-Madagascar is duly authorized and sufficiently organized, staffed and empowered to carry out any Designated Rights and Responsibilities, entering into an appropriate agreement with MCA-Madagascar to designate MCA-Madagascar to implement and to exercise the Designated Rights and Responsibilities.

(c) **MCC.**

(i) Notwithstanding Section 3.1 of this Compact or any provision in this Program Annex to the contrary, and except as may be otherwise agreed upon by the Parties from time to time, MCC must approve in writing each of the following transactions, activities, agreements and documents prior to the execution or carrying out of such transaction, activity, agreement or document and prior to MCC Disbursements or Re-Disbursements in connection therewith:

(1) MCC Disbursements;

(2) Each Budget, and any amendments thereto;

(3) The Financial Plan, Supplemental Financial Plan (defined in Annex II) and any amendments thereto;

(4) Agreements (i) between the Government and MCA-Madagascar, (ii) between the Government, a Government Affiliate, MCA-Madagascar or any other Permitted Designee on the one hand, and any Provider or Affiliate of a Provider, on the other hand, with an aggregate value of MCC Funding equal to or greater than USD $500,000, or such other amount as may be agreed to by the Parties, or which, when added to the value of other agreements made or expected to be made between the Government, any Government Affiliate, MCA-Madagascar or any other Permitted Designee with the same Provider or any Affiliate of such Provider during the Compact Term would be equal to or greater than USD $500,000, or such other amount as may be agreed to by the Parties, or (iii) in which the Government, a Government Affiliate, MCA-Madagascar or any other Permitted Designee appoints or engages any of the following in furtherance of this Compact with any of the following:

(A) Auditor (defined below) or Reviewer (defined below);

(B) Fiscal Agent (defined below);

(C) Each Bank (defined below);

(D) Procurement Agent (defined below);

(E) Outside Project Manager (defined below);

(F) Implementing Entity (as defined below); and

(G) Director, officer, and other key employee of MCA-Madagascar, including the Manager of Administration and Finance (including any compensation for such person).

(Any agreement described in clause (i) through (iii) of this Section 3(c)(i)(4) and any amendments thereto, each, a "***Material Agreement***");

(5) Any modification, termination or suspension of a Material Agreement, or any action that would have the effect of such a modification, termination or suspension of a Material Agreement;

(6) Any agreements that are not at arm's length or with a party related to the Government or MCA-Madagascar or any of their respective Affiliates;

(7) Re-Disbursements (each, a "***Material Re-Disbursement***") equal to or greater than USD $100,000, or such other amount as may be agreed to by the Parties, or which, when added to other Re-Disbursements made or expected to be made to the same Provider or any Affiliate during the Compact Term, or such other period as MCC may determine from time to time, would be equal to or greater than USD $100,000, or such other amount as may be agreed to by the Parties;

(8) Terms of reference for the procurement of goods or services for which the value of the contract if entered into or the goods or services procured would be equal to or greater than USD $250,000, or such other amount as may be agreed to by the Parties (each, a "***Material Terms of Reference***");

(9) The Implementation Plan, including each component plan thereto, and any material amendments to the Implementation Plan or any component thereto;

(10) Pledges of any MCC Funding or any Program Assets or any guarantee directly or indirectly of any indebtedness (each, a "***Pledge***");

(11) Any disposition (in whole or in part), liquidation, dissolution, winding up, reorganization or other change of (A) MCA-Madagascar, including any revocation or modification of any decree or charter document establishing MCA-Madagascar, or (B) any subsidiary or Affiliate of MCA-Madagascar;

(12) Any change in character or location of any Permitted Account (defined below);

(13) Formation or acquisition of any subsidiary (direct or indirect) or other Affiliate of MCA-Madagascar;

(14) Any change in the composition of the Steering Committee of MCA-Madagascar (defined below), including approval of the nominee for Chairman (defined below), and any filling of the vacancy of the Chairman's seat, and the representatives nominated by the Advisory Council (defined below) for the designated Advisory Council seats on the Steering Committee;

(15) The management information system to be developed and maintained by the Management of MCA-Madagascar (defined below), and any material modifications to such system;

(16) Any decision to amend, replace, terminate or otherwise change any of the foregoing; and

(17) Any other activity, agreement, document or transaction requiring the approval of MCC in this Compact, the Governance Agreement, the Disbursement Agreement, or any other Supplemental Agreement between the Parties.

The Chairman of the Steering Committee (the "***Chairman***") and/or the Managing Director of MCA-Madagascar (the "***Managing Director***") or other designated officer, as provided in the Governance Agreement, shall certify any documents or reports delivered to MCC in satisfaction of the Government's reporting requirements under this Compact or any Supplemental Agreement between the Parties (the "***Compact Reports***").

(ii) MCC shall have the authority to exercise its approval rights set forth in this Section 3(c) in its sole discretion and independent of any participation or position taken by the MCC Representative at a meeting of the Steering Committee.

(d) **MCA-Madagascar**.

(i) General. Unless otherwise agreed by the Parties in writing, MCA-Madagascar shall, as a Permitted Designee, be responsible for the oversight and management of the implementation of this Compact. MCA-Madagascar shall be governed by the terms and conditions set forth in a governance agreement to be entered into by the Government and MCA-Madagascar, in a form and substance satisfactory to MCC, on or before the time specified in the Disbursement Agreement ("***Governance Agreement***") and on the following principles:

(1) The Government shall ensure that MCA-Madagascar shall not assign, delegate or contract any of the Designated Rights and Responsibilities without the prior written consent of the Government and MCC. MCA-Madagascar shall not establish any Affiliates or subsidiaries (direct or indirect) without the prior written consent of the Government and MCC.

(2) Unless otherwise agreed by the Parties in writing, MCA-Madagascar shall consist of (a) a special steering committee (the "***Steering Committee***") to oversee MCA-Madagascar's responsibilities and obligations under the this Compact (including any Designated Rights and Responsibilities) and (b) a management team ("***Management***") to have overall management responsibility for the implementation of this Compact.

(ii) Steering Committee.

(1) Formation. The Government shall ensure that the Steering Committee shall be formed, constituted, governed and operated in accordance with the terms and conditions set forth in the Governance Agreement.

(2) Composition. Unless otherwise agreed by the Parties in writing, the Steering Committee shall consist of seven voting members, one of whom shall be appointed the Chairman as provided in the Governance Agreement, and three non-voting observers.

(A) The voting members shall be as follows, provided that the Government members identified in subsections (i) – (v) below may be replaced by another government official, subject to approval by the Government and MCC:

(i) Chief of Staff of the Presidency of the Republic of Madagascar;

(ii) The Secretary General of the Ministry of Economy, Finance and Budget;

(iii) The Secretary General of the Ministry of Industry, Commerce and Private Sector Development;

(iv) The Secretary General of Agriculture, Livestock and Fisheries; and

(v) Three (3) representatives of the Advisory Council (nominated to serve two year terms by the Advisory Council and any vacancy to be filled by nomination by the Advisory Council).

(B) The non-voting observers shall be:

(i) A Representative designated by MCC (the "***MCC Representative***"); and

(ii) Two Advisory Council representatives-elect who will be non-voting observers during the one-year period prior to the beginning of their respective terms.

(C) Each voting member position identified in Sections 3(d)(ii)(2)(A)(i) – (iv) of this Program Annex shall filled by the individual then holding the office identified and such individuals shall serve in their capacity as the applicable Government official and not in their personal capacity.

(D) Subject to the Governance Agreement, the Parties contemplate that the Chief of Staff of the Presidency of the Republic of Madagascar shall initially fill the seat of Chairman.

(E) Each non-voting observer identified in Section 3(d)(ii)(2)(B) of this Program Annex shall have rights to attend all meetings of the Steering Committee, participate in the discussions of the Steering Committee, and receive all information and documents provided to the Steering Committee, together with any other rights of access to records, employees or facilities as would be granted to a member of the Steering Committee under the Governance Agreement.

(3) Role and Responsibilities.

(A) The Steering Committee shall oversee Management, the overall implementation of the Program, and the performance of the Designated Rights and Responsibilities.

(B) Certain actions, documents or agreements may only be taken or executed and delivered, as the case may be, by MCA-Madagascar upon the approval and authorization of the Steering Committee as set forth in the Governance Agreement, including each MCC Disbursement Request (defined below), selection or termination of certain Providers, any component of the Implementation Plan, certain Re-Disbursements and certain terms of reference.

(C) The Chairman shall certify the approval by the Steering Committee of all Compact Reports or any other documents or reports from time to time delivered to MCC by MCA-Madagascar (whether or not such documents or reports are required to be delivered to MCC), and that such documents or reports are true, accurate and complete.

(D) Without limiting the generality of the Designated Rights and Responsibilities that the Government may designate MCA-Madagascar as the implementer or exerciser of in accordance with this Compact, and subject to MCC's contractual rights of approval as set forth in Section 3(c) of this Program Annex or elsewhere in this Compact or any relevant Supplemental Agreement, the Steering Committee shall have the exclusive authority as between the Steering Committee and the Management for all actions defined for the Steering Committee in the Governance Agreement and which are expressly designated therein as responsibilities that cannot be delegated further.

(4) Indemnification of Non-Government Steering Committee Representatives. The Government shall ensure, at the Government's sole cost and expense, that appropriate insurance is obtained and appropriate indemnifications and other protections are

provided, to the fullest extent permitted under the laws of the Republic of Madagascar, to ensure that as voting members or non-voting observers the Advisory Council representatives serving on the Steering Committee shall not be held personally liable for the actions or omissions of the Steering Committee. Pursuant to Section 5.5 and Section 5.8 of this Compact, the Government and MCA-Madagascar shall hold harmless the MCC Representative for any liability or action arising out of the MCC Representative's role as a non-voting observer on the Steering Committee. MCA-Madagascar shall provide a written waiver and acknowledgement that no fiduciary duty to MCA-Madagascar is owed by the MCC Representative.

(iii) Management. Unless otherwise agreed in writing by the Parties, Management shall report, through the Managing Director or other Officer (defined below) as designated in the Governance Agreement, directly to the Steering Committee and shall have the composition, roles and responsibilities described below and set forth more particularly in the Governance Agreement.

(1) Appointment. The Officers that make up the Management of MCA-Madagascar shall be selected and appointed by the Steering Committee after a competitive selection process and subject to MCC approval.

(2) Composition. The Government shall ensure that the Management shall be composed of qualified experts from the public or private sectors, including such offices and staff as may be necessary to carry out effectively its responsibilities, each with such powers and responsibilities as set forth in the Governance Agreement and from time to time in any Supplemental Agreement, including without limitation the following: (i) Managing Director; (ii) Manager of Monitoring and Evaluation; (iii) Manager of Procurement; (iv) Manager of Administration and Finance; and (v) a Manager of Land Tenure Project, a Manager of Finance Project, and a Manager of Agricultural Business Investment Project (each a, "***Project Manager***") (the persons holding the positions in sub-clauses (i) through (v) shall be collectively referred to as "***Officers***"). The Parties contemplate that for purposes of the initial period of operations, and in no event longer than six months, MCA-Madagascar may appoint an acting Managing Director, subject to the approval of MCC; *provided*, during such period, the Steering Committee shall ratify the actions of such acting Managing Director and MCA-Madagascar shall select a permanent Managing Director through a competitive selection process and subject to MCC approval in accordance with this Annex I.

(3) Role and Responsibilities.

(A) Management shall assist the Steering Committee in overseeing the implementation of the Program and shall have principal responsibility (subject to the direction and oversight of the Steering Committee and subject to MCC's contractual rights of approval as set forth in Section 3(c) of this Program Annex or elsewhere in this Compact or any relevant Supplemental Agreement) for the overall management of the implementation of the Program.

(B) Without limiting the foregoing general responsibilities or the generality of Designated Rights and Responsibilities

that the Government may designate MCA-Madagascar as the implementer or exerciser of in accordance with this Compact, Management shall develop the components of the Implementation Plan, oversee the implementation of the Projects, manage and coordinate monitoring and evaluation, maintain internal accounting records, conduct and oversee certain procurements, and such other responsibilities as set out in the Governance Agreement or delegated to Management by the Steering Committee from time to time.

(C) Management shall have the obligation and right to approve certain actions and documents or agreements, including certain Re-Disbursements, MCC Disbursement Requests, Compact Reports, certain human resources decisions, and certain procurement actions, as provided in the Governance Agreement.

(4) Additional Resources. Management shall have the authority to engage qualified entities to serve as outside project managers (each, an "***Outside Project Manager***") in the event that it is advisable to do so for the proper and efficient day-to-day management of a Project; *provided, however*, that the appointment or engagement of any Outside Project Manager after a competitive selection process shall be subject to approval by the Steering Committee and MCC prior to such appointment or engagement. Upon Steering Committee approval, Management may delegate, assign, or contract to the Outside Project Managers such duties and responsibilities as it deems appropriate with respect to the management of the Implementing Entities and the implementation of the specific Projects; and *provided, further*, that Management and the relevant Project Manager shall remain accountable for those duties and responsibilities and all reports delivered by the Outside Project Manager notwithstanding any such delegation, assignment or contract. The Steering Committee may, independent of any request from Management, determine that it is advisable to engage one or more Outside Project Managers and instruct Management or, where appropriate, a Procurement Agent to commence and conduct the competitive selection process for such Outside Project Manager.

(e) **Advisory Council**.

(i) Formation and Composition. The Government shall cause to be established an advisory council (the "***Advisory Council***") consisting of no more than twelve (12) members, unless otherwise agreed by the Parties, and comprised of: (A) one or more representatives of the private sector (*e.g.*, association of banks, microfinance association, farmers' association); (B) one or more representatives of civil society (*e.g.*, women's association, chambers of commerce, anti-corruption association, environmental organization); (C) one or more representatives of mayors within the Zones; and (D) one or more representatives of regional governments of the Zones. The composition of the Advisory Council shall be adjusted upon the final determination of all five Zones in order to adequately represent each Zone.

(ii) Role. The Advisory Council shall be a mechanism to provide representatives of the private sector, civil society and local and regional governments the opportunity to provide advice and input to MCA-Madagascar regarding the implementation of the Compact. During quarterly meetings of the Advisory Council, the Manager of Monitoring and Evaluation or other appropriate Management representative shall present an update on the implementation of this Compact and progress towards achievement of the Objectives. The Advisory Council will have an opportunity to regularly provide to Management and the Steering Committee its views or recommendations on the performance and progress on the Projects, components of the Implementation Plan, procurement, financial management or such other issues as may be presented from time to time to the Advisory Council or as otherwise raised by the Advisory Council.

(iii) Meetings. The Advisory Council shall hold quarterly meetings of the full Advisory Council as well as such other periodic meetings of the Advisory Council or subcommittees thereof designated along sectoral (*e.g.*, banking, credit, agribusiness, environmental issues, gender issues), regional (by Zones), or other lines, as may be necessary or appropriate from time to time.

(iv) Steering Committee Representation. The Advisory Council shall nominate, by majority decision, three (3) representatives of the Advisory Council to the Steering Committee as voting members to each serve a two-year term, along with two representatives-elect. A nominee to the Steering Committee shall become a member of the Steering Committee upon approval by MCC and the Government. The Advisory Council shall rotate its representative every two years. No Advisory Council representative may serve on the Steering Committee for more than a single two-year term during the Compact Term. Any vacancy of any Advisory Council seat on the Steering Committee shall be filled by the representative-elect designated for such seat; *provided*, that the elevation of any such representative-elect to the Steering Committee shall be subject to approval by MCC and the Government at the time of such proposed elevation and that, following such approval, the Advisory Council shall appoint a new representative-elect for such position; *provided, further*, that in the absence, or if MCC or the Government do not approve the elevation to the Steering Committee, of a representative-elect, the vacancy shall be filled by a nominee who shall be nominated by the Advisory Council and approved by MCC and the Government.

(v) Accessibility; Transparency. Advisory Council members will be accessible to the beneficiaries they represent to receive the beneficiaries' comments or suggestions regarding the Program. The minutes of all meetings of the Advisory Council and any subcommittee shall be made public on the MCA-Madagascar Website in a timely manner.

(f) **Implementing Entities**. Subject to the terms and conditions of this Compact and any other Supplemental Agreement between the Parties, MCA-Madagascar may provide MCC Funding to one or more Government agencies or to one or more nongovernmental or other public- or private-sector entities or persons to implement and carry out the Projects or any other activities to be carried out in furtherance of this Compact (each, an "***Implementing Entity***"). The Government shall ensure that MCA-Madagascar enters into an agreement with each Implementing Entity, in form and substance satisfactory to MCC, that sets forth the roles and responsibilities of such Implementing Entity and other appropriate terms and conditions, such as

payment of the Implementing Entity (the *"Implementing Entity Agreement"*). An Implementing Entity shall report directly to the relevant Project Manager or Outside Project Manager, as designated in the applicable Implementing Entity Agreement or as otherwise agreed by the Parties.

(g) **Fiscal Agent**. The Government shall ensure that MCA-Madagascar engages one or more fiscal agents (each, a "***Fiscal Agent***"), who shall be responsible for, among other things: (i) ensuring and certifying that Re-Disbursements are properly authorized and documented in accordance with established control procedures set forth in the Disbursement Agreement, the Fiscal Agent Agreement and other relevant Supplemental Agreements; (ii) instructing a Bank to make Re-Disbursements from a Permitted Account, following applicable certification by the Fiscal Agent; (iii) providing applicable certifications for MCC Disbursement Requests; and (iv) producing reports on MCC Disbursements and Re-Disbursements (including any requests therefore) in accordance with established procedures set forth in the Disbursement Agreement, the Fiscal Agent Agreement or any other relevant Supplemental Agreements. Upon the written request of MCC, the Government shall ensure that MCA-Madagascar terminates a Fiscal Agent, without any liability to MCC, and the Government shall ensure that MCA-Madagascar engages a new Fiscal Agent, subject to the approval by the Steering Committee and MCC. The Government shall ensure that MCA-Madagascar enters into an agreement with each Fiscal Agent, in form and substance satisfactory to MCC, that sets forth the roles and responsibilities of the Fiscal Agent and other appropriate terms and conditions, such as payment of the Fiscal Agent (each, a "***Fiscal Agent Agreement***"). During the Compact Term, subject to MCC's approval, certain Fiscal Agent duties and responsibilities may be transferred to the duties and responsibilities of the Manager of Administration and Finance, at which time the Fiscal Agent Agreement shall be amended accordingly.

(h) **Auditors and Reviewers**. The Government shall ensure that MCA-Madagascar engages one or more auditors, reviewers or evaluators to audit, review or evaluate all or any portion of the activities carried out in furtherance of this Compact or audit, review or evaluate such other matters as MCC may reasonably request from time to time. There shall be at a minimum an auditor with the capacity to conduct audits of financial information (the "***Auditor***") in accordance with Section 3.8(e) of this Compact. As requested by MCC in writing from time to time, MCA-Madagascar shall also engage an independent reviewer to conduct reviews of performance and compliance under this Compact, an independent reviewer with the capacity to conduct data quality assessments in accordance with the M&E Plan, as described more fully in Annex III, and/or an independent evaluator to assess performance as required under the M&E Plan (each, a "***Reviewer***"). MCA-Madagascar shall select the Auditor(s) or Reviewers in accordance with the Governance Agreement or other relevant Supplemental Agreement. The Government shall ensure that MCA-Madagascar enters into an agreement with each Auditor or Reviewer, in form and substance satisfactory to MCC, that sets forth the roles and responsibilities of the Auditor or Reviewer with respect to the audit, review or evaluation, including access rights, required form and content of the applicable audit, review or evaluation and other appropriate terms and conditions such as payment of the Auditor or Reviewer (the "***Auditor/Reviewer Agreement***"). In the case of the financial audit, such Auditor/Reviewer Agreement shall be effective no later than 120 days prior to the end of the relevant fiscal year or other period to be audited.

(i) **Procurement Agent**. If requested by MCC, the Government shall ensure that MCA-Madagascar engages one or more procurement agents (each, a "***Procurement Agent***") to carry out and/or certify specified procurement activities in furtherance of this Compact on behalf of the Government, MCA-Madagascar, any Outside Project Manager or Implementing Entity. The role and responsibilities of such Procurement Agent and the criteria for selection of a Procurement Agent shall be as set forth in the applicable Implementation Letter or Supplemental Agreement. The Government shall ensure that MCA-Madagascar enters into an agreement with the Procurement Agent, in form and substance satisfactory to MCC, that sets forth the roles and responsibilities of the Procurement Agent with respect to the conduct, monitoring and review of procurements and other appropriate terms and conditions, such as payment of the Procurement Agent (the "***Procurement Agent Agreement***"). Any Procurement Agent shall adhere to the procurement standards set forth in the Procurement Guidelines and ensure procurements are consistent with the procurement plan (the "***Procurement Plan***") adopted by MCA-Madagascar, which plan shall forecast the upcoming six month procurement activities and be updated every six months.

**4. Finances and Fiscal Accountability.**

(a) **Financial Plan and Budget.**

(i) Financial Plan. The multi-year financial plan for the Program and for each Project (the "***Financial Plan***") is summarized in Annex II to this Compact.

(ii) Budget. During the Compact Term, the Government shall ensure that MCA-Madagascar delivers to MCC a report of annual and quarterly budget requirements for the Program and each Project, projected both on a commitment and cash requirement basis (each a "***Budget***"). Each Budget shall be delivered by such time as specified in the Disbursement Agreement or as may otherwise be agreed by the Parties.

(iii) Modifications to Financial Plan or Budget. Notwithstanding anything to the contrary in this Compact, MCA-Madagascar may modify, alter, or amend the Financial Plan, or any Supplemental Financial Plan, or any Budget without amending this Compact, provided such modification, alteration, or amendment has been approved by MCC and is otherwise consistent with the requirements of this Compact and any relevant Supplemental Agreement between the Parties.

(b) **Disbursement and Re-Disbursement**. The Disbursement Agreement (and disbursement schedules thereto), as amended from time to time, shall specify the terms, conditions and procedures on which MCC Disbursements and Re-Disbursements shall be made. The obligation of MCC to make MCC Disbursements or approve Re-Disbursements is subject to the fulfillment or waiver of any such terms and conditions. The Government and MCA-Madagascar shall jointly submit the applicable request for an MCC Disbursement (the "***MCC Disbursement Request***"), certified by the Fiscal Agent, as may be specified in the Disbursement Agreement. MCC will make MCC Disbursements in tranches to a Permitted Account from time to time as provided in the Disbursement Agreement or as may otherwise be agreed by the Parties, subject to Program requirements and performance by the Government, MCA-Madagascar and other relevant parties in furtherance of this Compact. Re-Disbursements will be made from time to time based on requests by an authorized representative of the appropriate

party designated for the size and type of Re-Disbursement in accordance with the Governance Agreement and Disbursement Agreement; *provided, however*, unless otherwise agreed by the Parties in writing, no Re-Disbursement shall be made unless and until the written approvals specified herein or in the Governance Agreement and Disbursement Agreement for such Re-Disbursement have been obtained and delivered to the Fiscal Agent.

(c) **Fiscal Accountability Plan**. By such time as specified in the Disbursement Agreement or as otherwise agreed by the Parties, MCA-Madagascar shall adopt as part of the Implementation Plan a fiscal accountability plan that identifies the principles and mechanisms to ensure appropriate fiscal accountability for the use of MCC Funding provided under this Compact, including the process to ensure that open, fair, and competitive procedures will be used in a transparent manner in the administration of grants or cooperative agreements and the procurement of goods and services for the accomplishment of the Objectives (the "***Fiscal Accountability Plan***"). The Fiscal Accountability Plan shall set forth, among other things, requirements with respect to the following matters: (i) funds control and documentation; (ii) separation of duties and internal controls; (iii) accounting standards and systems; (iv) content and timing of reports; (v) policies concerning public availability of all financial information; (vi) cash management practices; (vii) procurement and contracting practices, including timely payment to vendors; (viii) the role of independent auditors; and (ix) the roles of fiscal agents and procurement agents.

(d) **Permitted Accounts**. The Government shall establish, or cause to be established, such accounts (each, a "***Permitted Account***", and collectively "***Permitted Accounts***") as may be agreed by the Parties in writing from time to time, including:

(i) A single, completely separate U.S. Dollar interest-bearing account (the "***Special Account***") at the Central Bank of Madagascar ("***Central Bank***") to receive MCC Disbursements.

(ii) An interest-bearing local currency of Madagascar account (the "***Local Account***") at a commercial bank (the "***Commercial Bank***") to which the Fiscal Agent may authorize transfer from any U.S. Dollar Permitted Account of an amount equal to the upcoming month's local currency cash needs of MCA-Madagascar as reflected in the monthly request from MCA-Madagascar. The Commercial Bank shall be selected by MCA-Madagascar following a competitive tender process and subject to MCC approval.

(iii) Such other interest-bearing accounts to receive MCC Disbursements in such bank as the Parties mutually agree upon in writing.

No other funds shall be commingled in a Permitted Account other than MCC Funding and Accrued Interest thereon. All MCC Funding held in a Permitted Account shall earn interest at a rate of no less than such amount as the Parties may agree in the respective Bank Agreement or otherwise. MCC shall have the right, among other things, to view any Permitted Account statements and activity directly on-line or at such other frequency as the Parties may otherwise agree. By such time as shall be specified in the Disbursement Agreement or as otherwise agreed by the Parties, the Government shall ensure that MCA-Madagascar enters into an agreement with each Bank, respectively, satisfactory to MCC, that sets forth the signatory authority, access rights, anti-money laundering and anti-terrorist financing provisions, and other terms related to

the Permitted Account, respectively (each, a "***Bank Agreement***"). For purposes of this Compact, the Central Bank, the Commercial Bank, and any bank holding an account referenced in Section 4(d)(iii) of this Program Annex are each a "***Bank***" and are collectively referred to as the "***Banks***."

(e) **Currency Exchange**. MCC Funding shall be converted to the currency of Madagascar either (i) at the Central Bank prior to the transfer to the Local Account or (ii) at the Commercial Bank upon the transfer to the Local Account; *provided*, currency conversion occurs at the institution offering the more competitive exchange rate and fee structure at the time of the exchange. For this purpose, the Central Bank will use as a standard the mid-point of the trading range on the day prior to the proposed transfer as published by the Central Bank or as otherwise may be agreed to by the Parties in writing. The Fiscal Agent shall instruct the banks at the time of the monthly transfer request whether the Central Bank or the Commercial Bank shall exchange the currency.

**5. Transparency; Accountability.** Transparency and accountability to MCC and to the beneficiaries are important aspects of the Program and Projects. Without limiting the generality of the foregoing, in an effort to achieve the goals of transparency and accountability, the Government shall ensure that MCA-Madagascar:

(a) Establishes an e-mail suggestion box that interested persons may use to communicate ideas, suggestions or feedback to MCA-Madagascar.

(b) Considers as a factor in its decision-making the recommendations of the Advisory Council, particularly in MCA-Madagascar's deliberations over pending key Management decisions and key Steering Committee decisions as shall be specified in the Governance Agreement;

(c) Develops and maintains the MCA-Madagascar Website in a timely, accurate and appropriately comprehensive manner, such MCA-Madagascar Website to include postings of information and documents in English and French, with a summary in Malagasy;

(d) Posts on the MCA-Madagascar Website and otherwise makes publicly available the following documents or information, including by posting on the MCA-Madagascar Website from time to time:

(i) All minutes of the meetings of the Advisory Council and the meetings of the Steering Committee;

(ii) The M&E Plan, as amended from time to time, along with periodic reports on Program performance;

(iii) Such financial information as may be required by this Compact or as may otherwise be agreed from time to time by the Parties;

(iv) All Compact Reports;

(v) All audit reports by an Auditor and any periodic reports or evaluations by a Reviewer; and

(vi) A copy of any formation documents that established MCA-Madagascar and any amendments thereto and the Governance Agreement and any amendments thereto.

## SCHEDULE 1 to ANNEX I

## LAND TENURE PROJECT

This Schedule 1 generally describes and summarizes the key elements of a land tenure Project that the Parties intend to implement in furtherance of the Land Tenure Objective (the "***Land Tenure Project***"). Additional details regarding the implementation of the Land Tenure Project will be included in the Implementation Plan and in relevant Supplemental Agreements.

### 1. Background.

The Government identified the lack of clear land ownership rights as the primary barrier to increased rural investment and agricultural productivity growth. Similarly, the consultative process consistently identified land insecurity and inefficient government land services as high priority areas for reform. Presently, there is widespread distrust of the formal property registration system. Also, a severe backlog exists of requests for title that cannot be processed due to a lack of resources and cumbersome registration processes. Although informal land tenure practices provide a land user with a relative degree of local land tenure security, the conflict between the informal and formal practices is reported to be generating an increasing number of disputes, constraining rural investment and land use improvements, and hindering the expansion of collateral-based lending. As long as land remains an informal and insecure asset, it is more likely to be utilized for subsistence needs than for other revenue-generating activities, and rural credit and land market development will be limited. There is a demand for and a need to blend traditional and modern property recognition and ownership practices so that land tenure security will be increased and transaction costs lowered, particularly in areas where the rural market economy is developing new opportunities for market-based income growth.

### 2. Summary of Project Activities and Expected Results.

The Land Tenure Project is designed to increase land titling and land security in the Zones and improve the efficiency of land service administration. These, in turn, will contribute to better land use, increased rural enterprise investment, and a better environment for collateral-based lending. The Land Tenure Project will strengthen institutional and human resource capacity for land administration services at national, regional, and local levels to ensure sustainability of reforms achieved by the Land Tenure Project. MCC funding will assist Madagascar in formalizing, implementing, and making more efficient its National Land Policy Framework (*"PNF"*), which is considered by property rights experts a coherent approach to land tenure reform that builds from customary into modern practices progressively. The approach is threefold:

1. Formalize the National Land Policy Framework through a communications and education campaign leading to stronger legal recognition of new land tenure procedures, documents, and techniques.

2. Protect property rights and formalize customary rights to land (titling or certification), resolve disputes, and reduce transaction costs by improving the efficiency and transparency of land service administration through system modernization, computerization, and decentralization.

3. Build human capacity for land tenure policy development and land administration services at national, regional and local levels that focuses, *inter alia*, on land tenure regularization (*e.g.*, titling, certification, and dispute resolution).

The Land Tenure Project is aimed at eliminating short-run bottlenecks to poverty-reducing growth and creating effective processes first in priority rural zones where there is a clear opportunity for increased productivity and market participation. This will enable more remote or traditional communities to formalize their land tenure over time as their social and economic conditions create incentives for increased use by such communities of improved national and local land administration services.

The following summarizes the contemplated Land Tenure Project Activities, anticipated results, and, where appropriate, regular benchmarks that may be used to monitor implementation progress. Performance against the benchmarks and the overall impact of the Land Tenure Project will be assessed and reported at the intervals to be specified in the M&E Plan (described in Annex III) or as otherwise agreed by the Parties from time to time. The Parties expect that additional benchmarks will be identified during the implementation of the Land Tenure Project. Estimated amounts of MCC Funding for each Project Activity for the Land Tenure Project are identified in Annex II of this Compact. Conditions precedent to each Land Tenure Project Activity and sequencing of the Land Tenure Project Activities shall be set forth in the Disbursement Agreement or other relevant Supplemental Agreements.

(a) ***Activity: Support the Development of the Malagasy PNF***

Madagascar's initial PNF articulates an integrated coherent approach to land tenure reform. To enable necessary land tenure reforms, MCC Funding will support the following activities designed to assist Madagascar in developing and promoting the country's initial PNF:

(i) Carry out information, education and communication campaigns designed to explain the specific land tenure reforms contemplated in the initial PNF to potential beneficiaries of such reforms, the staff of the National Land Service Administration and other interested parties.

(ii) Consolidate and refine the PNF, during and after completion of the campaigns outlined above, which may result in additional white papers, additional land law proposals, including property tax policy and corresponding legal reform, and suggested donor interventions.

(iii) Conduct public outreach and dissemination of the final PNF after completion of the consolidation and refinement outlined above.

The *expected results* from these activities are:

(1) The adoption of new land legislation that reflects a more coherent approach to land tenure reform and provides stronger legal recognition of new land tenure procedures, documents (certificates) and techniques.

(2) Consensus and broad acceptance for land tenure reform from the National Land Service Administration, potential beneficiaries of such reforms and other interested parties.

(3) The adoption of a new land law that reflects a more coherent approach to land tenure reform and provides stronger legal recognition of new land tenure procedures, documents (certificates) and techniques.

The *key benchmark* to measure progress is expected to be:

(1) Submission to Parliament of draft land legislation based on the final PNF and that recognizes improved land tenure procedures, documents (certificates) and techniques.

(b) ***Activity: Improve the Ability of the National Land Service Administration to Provide Land Services***

To improve the efficiency and transparency of services provided by the National Land Service Administration with respect to property transactions, MCC Funding will support the following activities to be undertaken in the central offices in Antananarivo and in the local land management offices in the Zones:

(i) Index and Restore Documents.

(1) Ask all current holders of land titles and other formal ownership documents to bring these documents to existing land offices to compare the information currently on record with the physical documents being produced.

(2) Take inventory of the existing 800,000 land documents (land titles and surveys) currently stored at the existing land management offices and produce a plan for (i) restoring the damaged land documents and (ii) scanning and digitizing all of the existing documents, including those produced by current holders above.

(3) Restore a portion of the damaged land titles and surveys in and around Antananarivo and in the Zones (approximately 300,000).

(4) Resolve disputes and address irregularities encountered in the indexing and restoration process.

(ii) Modernize and Computerize System.

(1) Install an automated land parcel information system containing property rights information relating to each parcel (*e.g.*, date of transfer, identification of occupant, legal property description, physical boundaries and restrictions).

(2) Scan and digitize a portion of the existing land titles and surveys in and around Antananarivo and in the Zones (approximately 400,000), including those produced by current holders.

(3) Procure satellite imagery for use in generating parcel maps.

(4) Train staff of National Land Service Administration (central and regional offices).

(5) Introduce mobile service units of the National Land Service Administration.

The *expected results* from these activities are:

(1) The protection of existing property rights.

(2) The ability to identify competing property claims and prioritization of property rights.

(3) Low-cost and timely property transactions and other related services, including value-added GIS products.

(4) Central integration of information relating to property registration held at local land management offices.

(5) Elimination of bottlenecks and delays in the present land registration system.

(6) The development of technical capacity and skills within the land management offices in order to sustain reforms.

The *key benchmarks* to measure progress are expected to include:

(1) Percentage of land documents inventoried, restored and/or digitized.

(2) Average time and cost required to carry out property transactions at the national and local land management offices.

(c) ***Activity: Decentralization of Land Services***

MCC Funding will finance the following activities designed to decentralize land services:

(i) Build and equip new local land management offices (ten per Zone).

(ii) Finance an initial two-year period of the operating costs of such new land management offices.

(iii) Provide on-the-job training to local land management office staff.

(iv) Establish procedures and practices for communications and coordination between the National Land Service Administration and local land management offices.

(v) Develop capacity for on-going management of records in the local land management offices.

The *expected results* from these activities are:

(1) Improved access and affordability of property transactions and other related services at local land management offices and sustainability of the same.

(2) Increased confidence in the formal land tenure system by potential beneficiaries.

The *key benchmark* to measure progress is expected to be:

(1) Average time and cost required to carry out property transactions at local land management offices.

(d) ***Activity: Land Tenure Regularization in the Zones***

MCC Funding will finance the following activities designed to facilitate the issuance of titles or land rights certificates for potential beneficiaries in the Zones:

(i) Formalize tenure in selected municipalities (communes) using one of three registration methods endorsed by the National Land Service Administration.

(ii) Implement a fast-track titling and/or property registration process within selected areas within the Zones.

The *expected results* from these activities are:

(1) Formalization of traditional land use and tenure practices.

(2) Improvement in land tenure security and standardized land documentation processes and procedures.

(3) Reduction in time required for titling and/or property registration for potential investors.

The *key benchmarks* to measure progress are expected to include:

(1) Percentage of land in pilot sites in the Zones that is securely demarcated and registered.

(2) Average time and cost required to respond to investor requests for property transactions by the fast-track titling and/or property registration process.

(e) ***Activity: Information Gathering, Analysis and Dissemination***

MCC Funding will finance the following activities designed to improve the capacity of the National Land Service Administration and the local land management offices to sustain the results as listed above (in paragraphs (a) through (d) of this Section 2):

(i) Finance the cost of a resident long-term land tenure expert with international experience to provide ongoing advice and technical assistance regarding policy matters (*e.g.*, to eliminate market distortions) to MCA-Madagascar and policy-level government institutions, offices or agencies.

(ii) Finance occasional short-term national and international experts to provide more operational ongoing technical assistance and training to the staffs of the National Land Service Administration and local land management offices.

(iii) Organize and conduct workshops, seminars and other outreach activities with intended beneficiaries and other stakeholders in order to obtain their feedback and comments to improve procedures relating to property transactions and other related services.

(iv) Organize formal training and study tours outside of Madagascar for the staffs of the National Land Service Administration and local land management offices.

(v) Complete needs assessments for future reform relating to (i) land conflict resolution methods, (ii) policy development and (iii) legal framework, including property tax policy and corresponding legal reform, based on lessons learned from the activities carried out under the Land Tenure Project.

**3. Beneficiaries.**

The principal beneficiaries of the Land Tenure Project are expected to be current land title holders and households and enterprises in the Zones without formal land rights. Following the selection of a Zone, MCA-Madagascar shall publish a more precise identification of the beneficiaries as provided in Section 2(c) of the Program Annex. Certain activities in the Land Tenure Project will have a national scope and impact. These include upgrading the archives and information systems of the National Land Service Administration in Antananarivo, supporting the development of the PNF and knowledge management. Other activities, including the establishment of local land management offices, the development of local expertise and the formalization of traditional land tenure within selected communities, will have specific impact in the Zones.

**4. Donor Coordination.**

Land security is a key element of the Government's development strategy. The country's PRSP recommended establishment of the PNF. The PNF was launched in early 2004 and has attracted the attention of several donors. To date, however, no donors have funded a systematic approach to implement this program on a national scale.

At present, the French government is supporting a technical advisor to the Ministry of Agriculture to develop further the PNF. Several donors are preparing to engage more fully on

land tenure issues in Madagascar. The European Union, International Fund for Agricultural Development (IFAD), Food and Agriculture Organization (FAO) and Agence Française de Développement (AFD) have expressed strong interest in and/or commitment to supporting the establishment of 12 local land management offices. These plans are in varying stages of development. For example, IFAD has commenced a pilot project and the EU intends to provide broader budget support. In preparation for these donor activities, a series of project design activities are being undertaken by various donors. The World Bank (WB) is funding a comprehensive review of land tenure reform proposals in order to refine and further develop the PNF and identify areas of WB intervention.

The Land Tenure Project complements and catalyzes the activities of other donors in the land tenure area. Given the size of MCC support and depending upon the rate of disbursement, the experience gained from the Land Tenure Project will help shape and consolidate other donor support. The Ministry of Agriculture is determining how to allocate donor resources to the needs identified in the PNF.

**5. U.S. Agency for International Development.**

USAID/Madagascar has contributed to reform in land management practices through its community-based natural resource management project but has not funded extensive or direct work on land tenure reform. USAID and its partners have contributed to the consultative process on the initial PNF and assisted in efforts to introduce a secured transactions law in 2002. USAID/Washington can provide land tenure and property registration assistance to MCC and/or MCA-Madagascar as more specific needs are identified.

**6. Sustainability.**

New government institutions have great potential to provide sustainable vehicles for land management and land tenure reform. By decentralizing property transaction and other related services, beneficiaries will be more likely to utilize the system, which should result in better and more current record keeping. In addition, the Land Tenure Project Activities can be implemented with varying levels of technology that are appropriate to the local resources available (*e.g.*, human resources, the availability of electricity). The Land Tenure Project will provide long and short-term technical assistance to ensure the effective design and implementation of Project Activities. The Government intends to use additional donor funds after the Compact to sustain the changes and reforms that may be achieved in the Land Tenure Project and to complete the implementation of the PNF outside the Zones. It is expected that local land management offices will be self-funding based on service fees and user charges after the initial two years of undertaking the Project Activities under this Compact.

**7. Policy and Legal Reform.**

To realize the full benefits of the Land Tenure Project Activities, the following legal reforms will be required in two stages, the Disbursement Agreement to specify in more particularity the sequencing and requirements of each:

(a) The adoption of new land laws that reflects the PNF and provides stronger legal recognition of new land tenure procedures, documents and techniques, including a law to give legal character and value to certificates.

(b) The adoption of ancillary and related legal and regulatory reforms that streamline property transactions and related services, including property tax policy and corresponding legal reforms, *e.g.*, to prevent or eliminate potential negative tax consequences on title or certificate holders.

## SCHEDULE 2 to ANNEX I

## FINANCE PROJECT

This Schedule 2 generally describes and summarizes the key elements of the finance Project that the Parties intend to implement in furtherance of the Finance Objective (the "***Finance Project***"). Additional details regarding the implementation of the Finance Project will be included in the Implementation Plan and in relevant Supplemental Agreements.

### 1. Background.

Through the consultative process, the Government determined that the mobilization of domestic savings and the reduction of the cost of credit are priority conditions for sustained economic growth and poverty reduction in Madagascar. In order to accomplish these goals, it is necessary (i) to increase efficiency and reduce risk in the country's financial system; (ii) to improve the real and perceived creditworthiness of potential borrowers so that financial institutions can increase lending; and (iii) to introduce greater competition among banks and other financial institutions. In addition, the Government determined that the introduction of more appropriate financial products into the financial system (*e.g.*. savings bonds, Treasury Bills in small denominations, warehouse receipts, leasing) and improvement in the manner through which financial institutions distribute their products to buyers will increase the alternatives for investors and the availability of credit in rural areas.

### 2. Summary of Project Activities and Expected Results.

Given the goals of increasing efficiency and reducing risk in the financial system, improving creditworthiness, and introducing greater competition, the Finance Project is designed to strengthen different areas of the financial system. Most of the Finance Project Activities are aimed at assisting in the improvement of key foundations of a modern financial system: a sound legal environment, an efficient payments and settlement system, a professional Ministry of Finance, and a Central Bank with various monetary policy implementation tools at its disposal. The other Finance Project Activities are aimed at assisting lenders and borrowers to build on that foundation by strengthening accounting services, building capacity among rural producers to access the financial system, and increasing the capabilities of microfinance institutions ("***MFIs***").

The following summarizes the Finance Project activities, anticipated results, and, where appropriate, regular benchmarks that can be used to monitor implementation progress. Performance against the benchmarks and the overall impact of the Finance Project will be assessed at the intervals specified in the M&E Plan (described in Annex III) or otherwise agreed by the Parties from time to time. The Parties expect that additional benchmarks will be identified during the implementation of the Finance Project. The estimated amounts of MCC Funding for each Project Activity of the Finance Project are identified in Annex II. Conditions precedent to each Finance Project Activity and sequencing of the Finance Project Activities shall be set forth in the Disbursement Agreement or other relevant Supplemental Agreements.

(a) ***Activity: Promote Legal and Regulatory Reform***

MCC Funding will support the following activities designed to improve the efficiency of the Malagasy financial system:

(i) Finance the development of new banking laws and laws regulating financial instruments and markets, including enabling legislation for expanded intermediation and new credit and investment instruments.

(ii) Train government officials, judges and potential beneficiaries on the contents and application of these new laws.

(iii) Promote public awareness of these new laws through an educational and public awareness campaign.

The *expected result* of these activities is:

(1) Legislation permitting a multi-tiered financial system.

The *key benchmark* to measure progress is expected to be:

(1) Submission, passage and implementation of new legislation that permit a multi-tiered financial system, as recommended by outside experts and relevant commissions.

(b) ***Activity: Reform Sovereign Debt Management and Issuance***

MCC Funding will support the following activities designed to reform sovereign debt management and issuance:

(i) Automate all sovereign debt issuance operations.

(ii) Create new forms of sovereign debt that will appeal to a broader set of investors, including new denominations of Treasury bills.

(iii) Create a fiscal policy unit within the Ministry of Finance that will advise the Minister of Finance on sovereign debt portfolio management and issuance alternatives.

The *expected results* of these activities are:

(1) Wider distribution of treasury bills among entrepreneurs and enterprises.

(2) Increased investment of savings in financial instruments.

(3) Increased lending by financial institutions.

The *key benchmarks* to measure progress are expected to include:

(1) Number of holders of smaller denomination treasury bills.

(2) Number of treasury bills held outside of Antananarivo.

(3) Volume of treasury bill holdings.

(c) ***Activity: Strengthen the National Savings Bank ("NSB")***

The NSB has the largest branch network and customer base of any financial institution in Madagascar and the greatest potential of any financial institution to reach large numbers of rural poor. MCC Funding will support the following activities designed to create conditions to permit NSB to administer funds on behalf of MCA-Madagascar directed to MFIs and, thereby, improve access to financial services in the Zones:

(i) Increase the operational efficiency of the NSB through modernization and computerization, in particular by automating branch operations and agency issuance for sovereign debt instruments.

(ii) Increase the quality of service through staff training and the establishment of new NSB branches in the Zones.

(iii) Increase mobilization of domestic savings.

(iv) Strengthen capacity to manage liquidity facilities for MFIs.

The *expected results* for these activities are:

(1) Availability of savings products (*e.g.*, access to treasury bills, savings accounts) in rural areas.

(2) Increase in administration of funds by NSB on behalf of MCA-Madagascar directed to MFIs.

The *key benchmarks* to measure progress are expected to include:

(1) Number of new NSB bank accounts opened in the Zones.

(2) Volume of savings collected by NSB in the Zones.

(d) ***Activity: Provide New Instruments for Agribusiness Credit***

MCC Funding will support the following activities designed to provide new instruments for agribusiness credit and increase financial lending instruments available for rural producers in the Zones:

(i) Create a revolving fund for refinance of MFI assets.

(ii) Extend warehouse receipts and leasing as a means of extending credit to rural and agricultural producers.

(iii) Conduct a major study on constraints and alternatives for providing access to market-based credit to agribusiness all along the value chain.

The *expected results* for these activities are:

(1) Increased MFI lending in the Zones.

(2) Increased secured warehoused based credit available.

(3) Identification of credit instruments appropriate for the agricultural value chain (producers, packers, processors, shippers, exporters and other enterprises) in the Zones.

(4) Improved stability of MFIs.

The *key benchmarks* to measure progress are expected to include:

(1) Volume of bank credit to rural borrowers.

(2) Volume of MFI lending in the Zones.

(3) MFI portfolio-at-risk delinquency rate.

(e) ***Activity: Modernize National Interbank Payments System***

MCC Funding will support the following activities designed to modernize the bank payment and settlement system:

(i) Conduct a design and cost study for a new national interbank payments system that will reduce check clearing from the current 45 days to D+3.

(ii) Provide information technology and telecommunications equipment and installation services, if the above study demonstrates feasibility and the results are acceptable to MCC (including within the expected budget or if additional financing is secured).

The *expected results* for these activities are:

(1) Implementation of an efficient and secure modern interbank payment system.

(2) Increased confidence in and use of the formal payment system by a wider variety of economic actors.

The *key benchmarks* to measure progress are expected to include:

(1) Time period for check clearing.

(2) Volume of funds in the payment system.

(f) ***Activity: Improve Credit Skills Training, Increase Credit Information and Analysis***

MCC Funding will support the following activities designed to improve the perceived creditworthiness of potential borrowers, in particular to improve credit skills training, increase credit information and enhance ability of financial institutions to conduct credit analysis:

(i) Increase awareness of new accounting standards and provide sustainable training of finance and accounting professionals through Madagascar including accountants, business managers, and microfinance loan officers.

(ii) Create a central database accessible by all providers of credit that contains credit data and payment and repayment history.

The *expected results* for these activities are:

(1) Utilization of the new accounting standards in the Zones.

(2) Increased reliability of financial information for creditors.

The *key benchmark* to measure progress is expected to be:

(1) Reporting of credit and payment information into the central database.

**3. Beneficiaries.**

The principal beneficiaries of the Finance Project are expected to be rural producers and enterprises located in the Zones. Following the selection of the Zones, MCA-Madagascar will publish a more precise identification of the beneficiaries as provided in Section 2(c) of the Program Annex.

Certain activities in the Finance Project activities will have national scope and impact (*e.g.*, legal reforms, interbank payment system) while other activities (*e.g.*, support to MFIs) will have specific impact in the Zones.

**4. Donor Coordination.**

MCA-Madagascar plans to participate in an evaluation of the financial sector to be conducted by the World Bank and IMF. To date, no donors have funded activities to reform the Malagasy financial sector on a national scale; however, there have been several donor-funded projects in microfinance. The World Bank, UNDP, European Union, Agence Française de Développement, African Development Bank, International Labor Organization and USAID have funded activities to study and build capacity of MFIs, improve the legal and regulatory framework for microfinance, and provide financing for MFIs. MCC Funding in the Finance Project will build on these interventions by implementing many of the recommendations of the studies and lessons learned from these other donor projects.

**5. Coordination with U.S. Agency for International Development.**

USAID has helped to develop access to financial services for the poor by supporting the NSB in becoming a profitable private service provider in the area of microfinance by increasing its role as a financial intermediary for low-income savers in the informal sector. In addition to continuing to strengthen capacity of NSB, the Finance Project will build on USAID-funded activities related to warehouse receipts and operationalize many of the recommendations listed in the USAID's 2003 microfinance study. MCC and MCA-Madagascar, where relevant, will solicit input from USAID on the implementation and monitoring of the Finance Project.

**6. Sustainability.**

The Finance Project will (i) support the modernization of the national payments and settlement system; (ii) strengthen the accounting services; (iii) decentralize the treasury bill auction system; (iv) strengthen MFIs; and (v) build capacity among rural producers to access the financial system, all of which actions are intended to promote competition among financial institutions. An enhanced competitive environment is intended to create a cycle that will attract more funds into the financial system and ensure that those funds are allocated at better prices. In association with the World Bank and the IMF, a study of capital markets constraints and opportunities will be undertaken in 2005. The availability of diverse products and services from both capital markets and commercial bank will improve pricing and quality of those products and services. The Finance Project Activities, coupled with the legal and regulatory reforms identified in Section 7 below, will continue to have an impact after expiration of the Compact. Since the activities are largely focused on unleashing the private sector, if successfully implemented under the Compact, they should be self-sustaining.

**7. Policy and Legal Reform.**

The Government has identified the following policy, legal and regulatory reforms and actions that it intends to pursue in support of the Finance Project:

(a) Establish new roles, responsibilities, reporting requirements, and organizational procedures of the Central Bank required for the decentralization of treasury bill operations and their oversight.

(b) Adopt legislation or regulations relating to the new payment and settlement system, including giving legal status to electronic images and signatures.

(c) Adopt legislation establishing a central credit and payment database and defining reporting requirements and procedures for all financial institutions.

(d) Adopt necessary legal and regulatory changes to permit adoption of new financial instruments identified through the agribusiness credit study described in Section 2(d) above.

## SCHEDULE 3 to ANNEX I

## AGRICULTURAL BUSINESS INVESTMENT PROJECT

This Schedule 3 summarizes and describes the key elements of an agricultural business investment project in furtherance of the Agricultural Business Investment Objective (the ***"Agricultural Business Investment Project"***). Additional details regarding the implementation of the Agricultural Business Investment Project will be included in the Implementation Plan and in relevant Supplemental Agreements.

### 1. Background.

The key element in the Malagasy National Agricultural Master Plan is to assist farmers in transitioning from subsistence farming to market agriculture. Low agricultural productivity and non-competitive agribusiness value chains (resulting in high rural poverty) were frequently identified during the consultative process as priority issues that must be addressed. At present, low levels of agricultural investment and profitability throughout Madagascar's agricultural economy result from insecure land rights, limited availability of credit and agribusiness finance, deteriorating transport and irrigation infrastructure, and low use by farmers of inputs such as fertilizer, machinery and pesticides. In addition, there is a limited understanding among agribusiness producers in general of market opportunities and associated requirements.

### 2. Summary of Project Activities and Expected Results.

The Agricultural Business Investment Project will be implemented through a network of MCC funded Agricultural Business Centers ("***ABCs***") in the Zones, with a national coordinating center in Antananarivo ("***NCC***"). These centers will work with a broad set of partners and stakeholders to provide information regarding agribusiness, technology, finance and management, the lack of which constrain growth of the agribusiness sector. The ABCs will improve the quality of credit demand by enhancing the ability, at the firm level, to make better decisions on planting, input management and marketing and to be able to communicate those decisions to possible investors or lenders. There is a clear demand for higher quality resources in order to build regional and local capacity to identify and access profitable agribusiness market opportunities. Linking market opportunities and Malagasy suppliers requires enhanced capacities in market research, agricultural research, access to improved technologies, farm management and business planning, infrastructure development and policies to support productivity and investment returns in the Madagascar agribusiness sector.

The ABC network will leverage management know-how and expertise in agricultural production, policy, finance and value chains to help farmers and entrepreneurs profit from promising agricultural investment opportunities. The Agricultural Business Investment Project is consistent with and reinforces Government's efforts to stimulate the rural market economy by developing new opportunities for market-based income growth. The Agricultural Business Investment Project will also provide the opportunity to support the Government's efforts to implement the National Agriculture Master Plan and to engage in a continuing policy dialogue with relevant stakeholders on agricultural and rural development issues.

The following summarizes each component of the Agricultural Business Investment Project, activities, anticipated results, and, where appropriate, regular benchmarks that can be used to monitor implementation progress. Performance against the benchmarks and the overall impact of the Agricultural Business Investment Project will be assessed at the intervals specified in the M&E Plan (described in Annex III) or otherwise agreed by the Parties from time to time. The Parties expect that additional benchmarks will be identified during the implementation of the Agricultural Business Investment Project. The estimated amounts of MCC Funding for each Project Activity of the Agricultural Business Investment Project are identified in Annex II. Conditions precedent to each Agricultural Business Investment Project Activity and sequencing of the Agricultural Business Investment Project Activities shall be set forth in the Disbursement Agreement or other relevant Supplemental Agreements.

(a) ***Activity: Create and Operate Five ABCs***

MCC Funding will support the following activities designed to promote the development and expansion of micro, small and medium sized enterprises ("***MSMEs***") in the Zones:

(i) Establish five ABCs that will offer a range of services to MSMEs and farmers in the respective Zones. These services may include assistance in the development of business and marketing plans, training in good business practices (*e.g.,* accounting) and in the promotion and adoption of improved technologies by businesses and farmers alike.

(ii) Identify local, regional and international market opportunities for MSMEs and assist them in developing effective business plans in order to improve competitiveness and access to investments.

(iii) Undertake market studies for MSMEs for key higher valued commodities, including production, economic, and financial analysis.

The *expected results* of these activities are:

(1) Market and technology information for key commodities disseminated widely in the Zones.

(2) Viable business plans for MSMEs in the Zones.

(3) Adoption of improved production technologies and higher value crops by farmers.

The *key benchmarks* to measure progress are intended to include:

(1) Number of business plans prepared by or with MSMEs.

(2) Number of farms and enterprises employing the technical assistance received from ABCs.

(b) ***Activity: Create NCC and Coordinate Activities with Government Ministries and ABCs and Identify the Zones***

MCC Funding will support the following activities designed to improve coordination between the Ministry of Agriculture and ABCs:

(i) Establish the NCC in Antananarivo which will coordinate operations and performance in the Zones.

(ii) Develop scopes of work and provisional budgets for the ABCs, including mission, objectives, management functions and services to be provided.

(iii) Provide technical assistance, training and other support to enable the Government to implement effectively its National Agricultural Master Plan.

(iv) Provide the analysis required to select the five Zones and identify the Zones.

The *expected result* from these activities is:

(1) Improved ability of the Government to implement its National Agriculture Master Plan.

(2) Effective information sharing and coordination among the ABCs, the NCC and relevant government agencies.

The *key benchmarks* to measure progress are expected to include:

(1) Zones identified.

(2) NCC created.

(c) ***Activity: Identify Investment Opportunities***

MCC Funding will support the following activity designed to identify local, regional and international market opportunities and the necessary requirements and means to allow investors and producers to take advantage of such opportunities:

(i) Provide technical assistance and conduct research to identify business opportunities and requirements in local, regional and international markets.

The *expected results* for this activity are:

(1) Completion of five zonal investment strategies which identify local, regional, and international market opportunities and the means, especially investments, required to respond to such opportunities.

(2) Dissemination of information regarding such market opportunities and necessary requirements through the NCC and the ABCs to local, regional, international investors and producers and donors.

The *key benchmarks* to measure progress are expected to include:

(1) Number of cost-effective investment strategies developed for each Zone.

(2) Number of agribusiness investment strategies developed in each Zone.

(3) Number of investors (local, regional, international), producers, donors receiving or soliciting information from the ABCs with respect to business opportunities.

(d) ***Activity: Build Management Capacity in the Zones***

MCC Funding will support the following activity designed to increase business management expertise and technical knowledge in the Zones:

(i) Conduct training and outreach activities (information, education and communication) with MSMEs and rural producers to improve entrepreneurial capacities and management skills and disseminate best practices to enable them to operate in a more efficient manner.

(ii) Establish demonstration centers in the Zones to illustrate to rural producers the benefits of sustainable production and processing practices, including environmental stewardship factors.

The *expected results* from these activities are:

(1) MSMEs and rural producers, trained in best practices, operate more competitively.

(2) Rural producers and MSMEs adopt improved production and processing practices.

The *key benchmarks* to measure progress are expected to be:

(1) Number of farms and enterprises that adopt new marketing and/or production technologies or techniques or engage in higher value production.

(2) Value of change in marketing and production techniques.

**3. Beneficiaries.**

The principal direct beneficiaries of the Agricultural Business Investment Project are expected to be MSMEs, rural producers and households in the Zones. Following the selection of the Zones, MCA-Madagascar will publish a more precise identification of the beneficiaries as provided in Section 2(c) of the Program Annex. Certain activities in the Agricultural Business Investment Project will have national scope and impact (*e.g.*, investment strategy development, NCC and ABC activities, information systems and knowledge management). Other activities (*e.g.*. training MSMEs and rural producers) will have specific impact in the Zones.

**4. Donor Coordination.**

Enhanced agricultural productivity and reduced rural poverty is an integral part of Government's national development strategy as highlighted in the PRSP. The Agricultural Business Investment Project complements other donor supported projects, including the USAID Agricultural Business Investment project (BAMEX) and the International Finance Corporation SME Solutions Center. The Agricultural Business Investment Project catalyzes and scales up the activities of other donors in this area. Given the size of MCC support and speed of disbursement, the experience gained from the Agricultural Business Investment Project will help shape and consolidate other donor support.

**5. Coordination with U.S. Agency for International Development.**

The Agricultural Business Investment Project Activities are fully consistent with USAID's program in Madagascar. The current USAID agricultural and trade program, which was initiated in 2004, addresses market and business development through the introduction of more productive technologies, creation of linkages between producers, agribusinesses, and external markets, and improvements in macroeconomic and trade policies to encourage investments and exports. These USAID activities lay a solid foundation for the Agricultural Business Investment Project Activities which will scale up both the geographic coverage and commercial services to be offered.

**6. Sustainability.**

Beyond the Compact Term, the services provided by the ABCs to targeted clients in the agribusiness community in the Zones should be available through local and regional private sector entities. The Agricultural Business Investment Project will enhance the technical and management capacities of micro, small, and medium sized companies and agricultural producers by providing information and resources to the private sector to take advantage of investment opportunities. At the same time, the public sector will be able to identify further activities or investment that will strengthen such opportunities. Sustainability will result from the profitable use of such information and resulting increased investment. After the Compact Term, these enterprises should be both successful models and providers of services similar to those to be offered by the ABCs. While the ABCs may not continue indefinitely, to the extent they are continued after the Compact Term, ABCs will be able to support their operations through fee-based or subscription services by implementing a plan in which required participation by the private sector will increase progressively. Additional strategies by the Government include producer check-off programs to fund a portion of the operations. A stronger presence of the

Ministry of Agriculture, Livestock and Fisheries in the Zones will continue to provide services to farmers and MSMEs.

**7. Policy and Legal Reform.**

It is not expected that there are specific policy and legal reforms required to support the Agricultural Business Investment Project. The Agricultural Business Investment Project is consistent with the overall Malagasy National Agricultural Master Plan for moving subsistence farming to market driven agriculture.

**8. Proposals.**

MCA-Madagascar will develop, subject to MCC approval, a process for consideration of solicited and unsolicited proposals. With respect to solicited proposals, the evaluation process will include, consistent as appropriate with the Procurement Guidelines, the issuance of a published request for proposals with specific identified evaluation criteria and peer reviewers. MCA-Madagascar may receive unsolicited proposals for the enhancement of the environment for agribusiness investment in the Zones. These unsolicited proposals will be evaluated for their relevance in contributing to the attainment of the Agricultural Business Investment Objective and the qualifications of the applicants together with the availability of Agricultural Business Investment Project resources and MCC Funding in connection therewith.

## ANNEX II

## FINANCIAL PLAN SUMMARY

This Annex II to the Compact (the "***Financial Plan Annex***") summarizes the Financial Plan for the Program. Each capitalized term in this Financial Plan Annex shall have the same meaning given such term elsewhere in this Compact.

1. **General.** A Multi-year Financial Plan Summary is attached hereto as Exhibit A (the "***Multi-Year Financial Plan Summary***"). By such time as specified in the Disbursement Agreement, MCA-Madagascar will adopt, subject to MCC approval, a Financial Plan that includes, in addition to the multi-year summary of anticipated estimated MCC Funding and the Government's contribution of funds and resources, an estimated draw-down rate for the first year of the Compact based on the achievement of performance milestones, as appropriate, and the satisfaction or waiver of conditions precedent. Each year, at least 30 days prior to the anniversary of the entry into force of this Compact, the Parties shall mutually agree in writing to a supplemental annual financial plan for the upcoming year of the Program, which shall include a more detailed plan for such year, taking into account the status of the Program at such time and making any necessary adjustments to the Financial Plan (each, a "***Supplemental Financial Plan***").

2. **Implementation and Oversight.** The Financial Plan shall be implemented by MCA-Madagascar, consistent with the approval and oversight rights of MCC and the Government as provided in this Compact, the Governance Agreement and the Disbursement Agreement.[1]

3. **Estimated Contributions of the Parties.** The Multi-Year Financial Plan Summary identifies the estimated annual contribution of MCC Funding for Program administration and each Project. The Government's contribution of resources to Program administration and each Project shall consist of (i) "in-kind" contributions in the form of Government Responsibilities and any other obligations and responsibilities of the Government identified in the Compact, including contributions identified in the notes to the Multi-Year Financial Plan Summary, and (ii) such other contributions or amounts as may be identified in relevant Supplemental Agreements between the Parties or as may otherwise be agreed by the Parties; *provided*, in no event shall the Government's contribution of resources be less than the amount, level, type and quality of resources required to effectively carry out the Government Responsibilities or any other responsibilities or obligations of the Government under or in furtherance of this Compact.

4. **Modifications.** The Parties recognize that the anticipated distribution of MCC Funding between and among the various Program activities and Project Activities will likely require adjustment from time to time during the Compact Term. In order to preserve flexibility in the administration of the Program, the Parties may, upon agreement of the Parties in writing and without amending the Compact, change the designations and allocations of funds between

[1] The role of civil society in the implementation of the Compact (including through participation on the Advisory Board and Steering Committee), the responsibilities of the Government and MCC in achieving the Compact Objectives, and the process for the identification of beneficiaries are addressed elsewhere in this Compact and therefore are not repeated here.

Program administration and a Project, between one Project and another Project, between different activities within a Project, or between a Project identified as of the entry into force of this Compact and a new Project, without amending the Compact; *provided, however*, that such reallocation (i) is consistent with the Objectives, (ii) does not cause the amount of MCC Funding to exceed the aggregate amount specified in Section 2.1(a) of this Compact, and (iii) does not cause the Government's responsibilities or overall contribution of resources to be less than specified in Section 2.2(a) of this Compact, this Annex II or elsewhere in the Compact.

5. **Conditions Precedent; Sequencing.** MCC Funding will be disbursed in tranches. The obligation of MCC to approve MCC Disbursements and Material Re-Disbursements for the Program and each Project is subject to satisfactory progress in achieving the Objectives and on the fulfillment or waiver of any conditions precedent specified in the Disbursement Agreement for the relevant Program activity or Project Activity. The sequencing of Project Activities and other aspects of how the Parties intend the Projects to be implemented will be set forth in the Disbursement Agreement and the applicable components of the Implementation Plan, including Work Plans for the applicable Project, and MCC Disbursements and Re-Disbursements will be disbursed consistent with that sequencing.

6. **Objectives; Benchmarks.** The Compact Goal, Program Objective and the Project Objectives are identified in Section 1.1 of this Compact. The key expected results of each Project Activity are identified in Schedules 1 to 3 of Annex I. Progress towards achievement of the Compact Goal, the Objectives, and the expected results shall be measured in accordance with the M&E Plan, which is summarized at Annex III. The M&E Plan will include regular benchmarks for measuring progress, including those Compact-, Program- and Project-level performance indicators identified in Annex III, along with the frequency by which such benchmarks will be measured.

## EXHIBIT A: Multi-Year Financial Plan Summary

| Project | Year 1 | Year 2 | Year 3 | Year 4[1] | Total |
|---|---|---|---|---|---|
| **1. Land Tenure Project[2]** | | | | | |
| (a) Support the Development of the Malagasy National Land Policy Framework[3] | 295[4] | 759 | 12 | | 1,066 |
| (b) Improve the Ability of the National Land Service Administration to Provide Land Services | 6,823 | 11,370 | 1,650 | | 19,844 |
| (c) Decentralization of Land Services | 1,727 | 4,059 | 1,922 | 27 | 7,735 |
| (d) Land Tenure Regularization in the Zones | 251 | 3,685 | 3,770 | 159 | 7,865 |
| (e) Information Gathering, Analysis and Dissemination | 645 | 424 | 224 | | 1,293 |
| **Sub-Total** | **9,740** | **20,298** | **7,579** | **186** | **37,803** |
| **2. Finance Project[5]** | | | | | |
| (a) Promote Legal and Regulatory Reform | 888 | 176 | | | 1,064 |
| (b) Reform Sovereign Debt Management and Issuance | 723 | 285 | | | 1,008 |
| (c) Strengthen the National Savings Bank | 1,505 | 427 | | | 1,932 |
| (d) Provide New Instruments for Agribusiness Credit | 2,637 | 5,289 | 500 | | 8,426 |
| (e) Modernize National Interbank Payments System | 1,000 | 10,000[6] | 10,000[7] | | 21,000 |
| (f) Improve Credit Skills Training, Increase Credit Information and Analysis | 782 | 1,546 | 130 | | 2,458 |
| **Sub-Total** | **7,535** | **17,723** | **10,630** | **0** | **35,888** |
| **3. Agricultural Business Investment Project[8]** | | | | | |
| (a) Create and Operate Five Agricultural Business Centers (ABCs) | 2,500 | 2,781 | 2,888 | 3,120 | 11,289 |
| (b) Create National Coordinating Center and Coordinate Activities with Government Ministries and ABCs and Identify the Zones | 74 | 30 | | | 104 |
| (c) Identify Investment Opportunities | 2,000 | 3,000 | 1,090 | | 6,090 |
| (d) Build Management Capacity in the Zones | 100 | 50 | 50 | | 200 |
| **Sub-Total** | **4,674** | **5,861** | **4,028** | **3,120** | **17,683** |
| **4. Monitoring and Evaluation[9]** | 305 | 847 | 844 | 1,379 | 3,375 |
| **Sub-Total** | **305** | **847** | **844** | **1,379** | **3,375** |
| **5. Program Administration and Control** | | | | | |
| (a) Program administration | 2,297 | 1,627 | 1,617 | 1,612 | 7,153 |
| (b) Fiscal control, procurement management and audit | 2,198 | 1,891 | 1,891 | 1,891 | 7,871 |
| **Sub-Total** | **4,495** | **3,518** | **3,508** | **3,503** | **15,024** |
| | | | | | |
| **TOTAL ESTIMATED MCC CONTRIBUTION** | **26,749** | **48,247** | **26,589** | **8,188** | **109,773** |

## EXHIBIT A: MULTI-YEAR FINANCIAL PLAN SUMMARY (Notes)

[1] Although most Project Activities will take place from Year 1 through Year 3, the four-year Compact term will allow additional time to ensure that Project Activities are completed. Monitoring and Evaluation, Administrative, Procurement and Control costs are allocated in Year 4 to maintain a consistent level of monitoring and evaluation and Program management to support these activities, but only will be expended for monitoring and evaluation and Program management if the Program delays make the expenditures necessary.

[2] The Government will provide in-kind contributions in the form of Ministry of Agriculture staff time and resources to work towards the expected results of this Project, which contributions will be more specifically set forth in the relevant components of the Implementation Plan or relevant Supplemental Agreement between the Parties.

[3] The Government has provided in-kind contributions in the form of Ministry of Agriculture staff time and responses used for drafting the Land Policy Letter, which serves as the support document for the National Land Policy Framework, which contributions will be more specifically set forth in the relevant components of the Implementation Plan or relevant Supplemental Agreement between the Parties.

[4] Amounts shown are U.S. Dollars in thousands.

[5] The Government will provide in-kind contributions in the form of Ministry of Finance and Central Bank staff time and resources to work towards the expected results for this Project, which contributions will be more specifically set forth in the relevant components of the Implementation Plan or relevant Supplemental Agreement between the Parties.

[6] This amount will be disbursed only upon satisfaction of (i) completion of feasibility cost study satisfactory to MCC, (ii) agreements executed with users regarding fees and charges, and (iii) other conditions set out in the Disbursement Agreement.

[7] This amount will be disbursed only upon satisfaction of (i) completion of feasibility cost study satisfactory to MCC, (ii) agreements executed with users regarding fees and charges, and (iii) other conditions set out in the Disbursement Agreement.

[8] The Government will provide in-kind contributions in the form of Ministry of Agriculture and Ministry of Finance staff time and resources to work towards the expected results for this Project, which contributions will be more specifically set forth in the relevant components of the Implementation Plan or relevant Supplemental Agreement between the Parties.

[9] The Government will provide in-kind contributions in the form of Ministry of Agriculture and INSTAT staff time and resources towards data collection and other monitoring and evaluation functions, which contributions will be more specifically set forth in the relevant components of the Implementation Plan or relevant Supplemental Agreement between the Parties.

## ANNEX III

## DESCRIPTION OF THE M&E PLAN

This Annex III to the Compact (the "***M&E Annex***") generally describes the elements of the M&E Plan for the Program. Each capitalized term in this M&E Annex shall have the same meaning given such term elsewhere in this Compact.

### 1. Overview.

In accordance with Section 609(b)(1)(c) of the Act, the Parties contemplate implementing an M&E Plan to regularly assess the progress towards the Compact Goal and Objectives, estimate the magnitude of the economic growth and poverty reduction impacts of the Program, and generally contribute to the overall accountability for the implementation of the Program. As described below, the M&E Plan shall include a monitoring component, which will describe the monitoring methodology and specify the expectations for certain results for each Project and for the Program (the "***Monitoring Component***") and an evaluation component, which will describe the evaluation methodology and focus on the process for estimating the economic growth and poverty reduction impacts of the Program (*i.e.*, the Compact Goal) (the "***Evaluation Component***").

The M&E Plan will consist of multiple parts developed separately for the Program and each of the Project Activities. Subject to satisfaction of other conditions precedent, MCC Disbursements and Re-Disbursements for any Project Activity may be made only after MCA-Madagascar adopts, and MCC approves, the components of the overall M&E Plan related to such Project Activities. As described below in Section 2 of this M&E Annex, the M&E Plan will identify the appropriate performance indicators, targets, and baselines, or a process for the identification of indicators, targets, and baselines, institutions responsible for their measurement; describe intended beneficiaries; identify milestones for progress on policy or legal reforms; set out requirements for periodic performance reporting; identify the assumptions and risks underlying the accomplishment of the Objectives; and set a timeline for program evaluation. Identification of the Zones and collection of additional baseline data is required before the estimated targets can be finalized for certain Project Activities. The Parties will seek to promptly collect and review such data and expect to have this completed for all Program and Project Activities no later than 12 months after the entry into force of this Compact. Shortly thereafter, the Parties expect to have a complete M&E Plan. The Parties expect that the M&E Plan for each Project Activity will be completed prior to MCC Disbursement or Re-Disbursement for the Project Activity.

The Parties anticipate the key terms of the M&E Plan, including estimated indicators and targets, to be as set forth in this M&E Annex, subject to (i) modifications based on (A) identification of the Zones and (B) collection and review of the baseline data and other data; and (ii) the completion and adoption of the final M&E Plan by MCA-Madagascar, subject to MCC approval.

**2. Elements of the M&E Plan.**

The roles and responsibilities of the relevant parties and Providers in connection with monitoring and evaluation shall be set forth in the M&E Plan, which shall include the following elements for the Program, each Project and Project Activity:

(a) **Monitoring Component**. The Monitoring Component shall set out (i) the expected results of the Program as described under Section 2 of Schedules 1 – 3 of the Program Annex, and (ii) the performance indicators to be used to measure progress at the Compact Goal, Program Objective, Project Objective and Project Activity levels (as described in Section 4 below). The Monitoring Component shall also identify, where appropriate, any additional indicators, baseline data, data sources, reporting requirements, expected timelines, performance targets, policy milestones (including ministry procedural changes) and legal reforms. Exhibit A attached hereto illustrates the M&E Plan in terms of the Compact Goal and Objectives.

(b) **Evaluation Component**. The Program shall be evaluated on the extent to which the interventions contributed to the Compact Goal. The Evaluation Component shall set out a process and timeline for analyzing data collected through baseline data collection and the monitoring process in order to assess the economic impact of the Program. In addition, the M&E Plan may require interim independent evaluations of individual Project Activities, Projects or the Program as a whole prior to the expiration of the Compact. Either MCC or MCA-Madagascar may from time to time request such interim independent evaluations. If an evaluator is engaged by MCA-Madagascar, the evaluator will be an externally contracted independent source, selected by MCA-Madagascar subject to the approval of MCC, following a tender in accordance with the Procurement Guidelines, and otherwise in accordance with any relevant Implementation Letter or Supplemental Agreement. The cost of an independent evaluation may be paid from MCC Funding. In the event MCA-Madagascar requires an interim independent evaluation at the request of the Government, no MCC Funding or MCA-Madagascar resources may be applied to such evaluation, without MCC's prior written approval, if the evaluation is for the purpose of contesting an MCC determination with respect to a Project or to seek funding from other donors. MCC shall engage an independent evaluator to conduct an impact evaluation at the completion of the Program.

(c) **Beneficiaries**. As Zones are identified, the M&E Plan shall be modified to reflect this additional Zone-specific information about the beneficiaries, including, to the extent practicable, disaggregated by gender, income level and age. In accordance with the Evaluation Component of the M&E Plan, MCA-Madagascar shall deliver to MCC information about the characteristics of the beneficiaries of the Program that are inside and outside the Zones.

(d) **Data Quality Reviews**. From time to time, as determined in the M&E Plan or as otherwise requested by MCC, the quality of the data gathered through the M&E Plan shall be reviewed to ensure that data reported are as valid, reliable, and timely as resources will allow. The objective of any data quality review will be to verify the quality and the consistency of performance data across different implementation units and reporting institutions. Such data

quality reviews will also serve to identify where those levels of quality are not possible given the realities of data collection.

(e) **Policy or Legal Reform; Procedural Changes or Regulatory Actions**. The M&E Plan shall identify mechanisms to measure progress on any required changes in government ministry procedures, regulatory actions, policy and/or legal reforms identified as conditions necessary or advisable to achievement of the Objectives.

(f) **Data Collection and Reporting**. The M&E Plan shall establish guidelines for data collection and a reporting framework, including a schedule of activities and responsible parties. Prior to, and as a condition precedent to, any Re-Disbursements with respect to a Project or Project Activity, the baseline data or report, as applicable and as specified in the Disbursement Agreement, with respect to such Project or Project Activity must be completed, in form and manner satisfactory to MCC. With respect to any data or reports received by MCA-Madagascar pursuant to Section 4 of this Annex III or as otherwise set forth in the M&E Plan, MCA-Madagascar shall promptly deliver such reports to MCC along with any other related documents, as specified in this Annex III or as may be requested from time to time by MCC.

(g) **Performance; Transparency**. The M&E Plan shall require MCA-Madagascar to conduct regular Program and Project performance reviews and issue reports on such reviews. Information regarding the Program's performance, including the M&E Plan, and any amendments or modifications thereto, and periodic reports, will be made publicly available on the MCA-Madagascar Website and elsewhere.

(h) **Costs**. A detailed cost estimate for all components of the M&E Plan shall be set forth in the M&E Plan.

(i) **Assumptions and Risks**. The M&E Plan shall identify any assumptions and risks, external to the Program, underlying the accomplishment of the Objectives; *provided, however,* such assumptions and risks shall not excuse performance of the Parties, unless otherwise expressly agreed to in writing by the Parties.

(j) **Modifications**. Notwithstanding anything to the contrary in the Compact, including the requirements of this M&E Annex, the Parties may modify or amend the M&E Plan or any component thereof, including those elements described herein, without amending the Compact; *provided*, any such modification or amendment of a M&E Plan has been approved by MCC and is otherwise consistent with the requirements of this Compact and any relevant Supplemental Agreement between the Parties.

**3. Evaluation of Economic Growth and Poverty Reduction Impacts.**

The Proposal identified low investment in rural areas as a major cause of low economic growth and poverty in Madagascar. The Program seeks to stimulate such investment through the Land Tenure, Finance, and Agriculture Business Investment Projects. At the termination or expiration

of the Compact Term or shortly thereafter, an impact evaluation will be conducted to determine the extent to which income and productivity were raised by the Program. Specifically, the impact on economic growth and poverty reduction will be measured through the following two indicators (as described in Section 4(a) of this M&E Annex):

1. Household income
2. Land productivity

The evaluation should seek to understand and quantify the causal relationship between the Projects and these goals, including the channels through which the Projects make an impact.

The economic analysis of the Program estimates that it will produce an increase in total investment of approximately 27 percent (27%) of average land values in each region. The analysis further estimates that each dollar of credit invested will, on average, raise crop-related income by approximately 18 cents per year. The analysis yields an overall target of an increase in income equal to five percent (5%) of average land values in each Zone starting in Year 3 of the Program. Once baseline data on average land value and the Zones are identified, targets for increased household income can be established. Therefore, any targets provided herein or in the M&E Plan are estimates only.

In order to support this evaluation, the Program will fund a portion of the annual national household surveys in addition to the annual agricultural productivity and enterprise surveys described below. National data collection for these surveys will allow for a better understanding of the impact of the Program by enabling Program evaluators to compare the households, farms, and enterprises in the Zones to households, farms, and enterprises in other regions with similar characteristics. In addition, national data will produce benefits outside of evaluating the Program. The availability of this data will allow the Government to better plan and carry out its economic development agenda more broadly.

**4. Performance Indicators.**

(a) **Compact Goal**. It is anticipated that the Compact Goal will be achieved through successful implementation of the Projects as well as with other non-Compact activities or sources of funding. Progress towards the Compact Goal shall be measured in the following manner:

(i) Indicators. The performance indicators for the Compact Goal are: (i) increase in household income in each of the Zones (***"Compact Goal Indicator 1"***) and (ii) increase in land productivity in each of the Zones, (*e.g.*, agricultural output per hectare) (***"Compact Goal Indicator 2"***).

(ii) Estimated Target. Following the identification of the Zones and collection and review of baseline data, the Parties will estimate the targets for these indicators and the M&E Plan will specify such estimated targets.

(iii) Baseline. Once baseline data on average land value and the Zones are identified, targets for increased household income can be established. MCA-Madagascar shall ensure that INSTAT (defined below) provides to MCC the baseline data, as specified in the M&E Plan, with respect to Compact Goal Indicator 1 and Compact Goal Indicator 2 no later than the 10 month anniversary following the entry into force of this Compact.

(iv) Frequency and Reporting of Measurement. With respect to Compact Goal Indicator 1, MCA-Madagascar shall obtain, at least on an annual basis or at such other interval agreed to in writing by the Parties, data from the National Institute of Statistics ("***INSTAT***") household survey (including survey report and underlying data), which survey MCA-Madagascar shall provide to MCC. The M&E Plan will specify what surveys or portions thereof will be paid for with MCC Funding. With respect to Compact Goal Indicator 2, MCA-Madagascar shall obtain, at least on an annual basis or at such other interval agreed to in writing by the Parties, data from surveys (including the survey report and underlying data) conducted by the INSTAT with the Republic of Madagascar's Ministry of Agriculture, Livestock and Fisheries (the "***Ministry of Agriculture***"), which survey MCA-Madagascar shall provide to MCC.

(v) Results. Results from the Compact Goal Indicator 1 and Compact Goal Indicator 2 are expected by the end of the Compact Term.

(b) **Program Objective**. Progress towards the completion of the Program Objective shall be measured in the following manner:

(i) Indicator. The performance indicator for the Program Objective shall be the total new investment made by farms and enterprises in the Zones (the "***Program Objective Indicator***").

(ii) Estimated Target. In order to establish the specific target for the Program, the Agricultural Business Investment Project will identify all five Zones by the first anniversary of the entry into force of this Compact. As a starting point for establishing the estimated target, estimates of the economic growth and poverty reduction impacts of the Program anticipate the Land Tenure Project will increase investment in the Zones by approximately 27 percent (27%) of the total current land value. The analysis assumes that the Finance Project will make sufficient credit available in the Zones to achieve the target.

(iii) Baseline. The baseline for the Program shall be established by the 10 month anniversary of the entry into force of this Compact. The Government shall cause INSTAT to conduct an enterprise survey and INSTAT, working with the Ministry of Agriculture, to conduct an agricultural productivity survey that will collect information on the current level of investment by farms and enterprises. Data collection will occur on a national basis, allowing for comparisons of the Zones with similar regions outside the Zones. MCC provided funding, not reflected in the MCC Funding, for these baseline surveys to commence prior to conclusion of this Compact and continue in the initial period of the Compact Term through assistance for the implementation of the Program and under the administration and management of USAID and U.S. Census Bureau working with INSTAT and the Ministry of

Agriculture. MCA-Madagascar shall ensure that INSTAT and the Ministry of Agriculture provide to MCC this baseline data prior to the MCC Disbursement or Re-Disbursement for any Project Activity to which this baseline data is relevant as specified in the Disbursement Agreement.

(iv) Frequency and Reporting of Measurement. MCA-Madagascar shall obtain, on an annual basis or at such other interval agreed to in writing by the Parties, data from the INSTAT enterprise survey, which measures investment by enterprises, and the Ministry of Agriculture agriculture survey and INSTAT household survey, which both measure investment by farms. MCA-Madagascar shall provide each survey (including survey reports and underlying data) to MCC.

(v) Results. Results from the Program Objective Indicator are expected by the third anniversary of the Compact Term.

(c) **Project Objectives**. Progress towards the completion of the Project Objectives shall be measured using the indicators identified below.

(i) Land Tenure Objective. Progress towards the completion of the Land Tenure Objective shall be measured in the following manner:

(1) Indicator. The performance indicator for the Land Tenure Objective shall be percentage of targeted hectares within the Zones with a title or certificate (the "***Land Tenure Objective Indicator***").

(2) Estimated Target. The estimated target for the Land Tenure Project is 100 percent (100%) of 250,000 hectares by the end of the Compact Term. A more precise estimate of the number of hectares will be established by the first anniversary of the entry into force of this Compact for the first two Zones and by the second anniversary of the entry into force of this Compact for the remaining three Zones. The Proposal estimated that the Land Tenure Project will title approximately 50,000 hectares in each of the Zones. In order to establish more definitively the target, the Agricultural Business Investment Project will identify the Zones and the Land Tenure Project will identify the areas for titling or land certificates.

(3) Baseline. The baseline for the Land Tenure Project is zero.

(4) Frequency and Reporting of Measurement. In accordance with specifications and requirements as set forth in the M&E Plan, MCA-Madagascar shall obtain, every six months or at such other interval agreed to in writing by the Parties, information regarding the hectares targeted for title or certificate issuance in the Zones from the Ministry of Agriculture (Land Management Department), and report such information to MCC. MCA-Madagascar shall obtain and report to MCC data on the Land Tenure Objective Indicator every six months starting at month 18 following the entry into force of this Compact for the first two

identified Zones and starting at month 24 following the entry into force of this Compact for the remaining three Zones.

(5) Results. The results from the Land Tenure Objective Indicator are expected for the first two identified Zones within 18 months following the entry into force of this Compact and within 25 months following the entry into force of this Compact for the remaining three Zones.

(ii) Finance Objective. Progress towards the completion of the Finance Objective shall be measured in the following manner:

(1) Indicators. The performance indicators for the Finance Project are: (i) the value of new loans; (ii) the number of new loans; (iii) the value of new bank accounts; and (iv) the number of new bank accounts (collectively referred to as the "***Finance Objective Indicators***").

(2) Estimated Target. Estimates of the economic growth and poverty reduction impacts of the Program anticipate that the Land Tenure Project will result in land being used as collateral for increased lending in the Zones, and that the Finance Project will increase the client base of the National Savings Bank by approximately 25 percent (25%). The estimated targets for the Finance Project are (i) an increase of an additional USD $31 million in lending in the Zones and (ii) an increase of 184,000 savings accounts with a value of USD $1.8 million. In order to establish the target for loans, the Agricultural Business Investment Project will identify the specific Zones and establish average land value for each Zone. Targets may be revised upon identification of the specific Zones and collection of baseline data.

(3) Baseline. The Parties expect to establish the baseline by the third month following the entry into force of this Compact. To establish the baseline, the Government shall ensure that the Central Bank reports to MCA-Madagascar (or the Government) baseline for loans on a national basis, disaggregated by region. The Government shall ensure that the National Savings Bank reports to MCA-Madagascar (or the Government) on bank accounts by Zone. MCA-Madagascar shall provide to MCC the baseline data, as specified in the M&E Plan, with respect to each of the Finance Objective Indicators prior to the MCC Disbursement or initial Re-Disbursement for any Finance Project Activity.

(4) Frequency and Reporting of Measurement. In accordance with the specifications and reporting requirements of the M&E Plan, MCA-Madagascar shall obtain, every six months commencing at the second anniversary of the entry into force of this Compact or at such other interval as agreed to in writing by the Parties, data and report on the number and value of bank accounts and loans from a source acceptable to MCC and to be selected prior to the adoption of the M&E Plan. MCA-Madagascar shall provide such data and report to MCC.

(5) Results. The results from the Finance Objective Indicators are expected by the second anniversary after the entry into force of this Compact.

(iii) Agriculture Business Investment Objective. Progress towards the completion of the Agriculture Business Investment Objective shall be measured in the following manner:

(1) Indicator. The performance indicator for the Agricultural Business Investment Project is the number of farms and enterprises that adopt new technologies or engage in higher value production (***"Agricultural Business Investment Objective Indicator"***).

(2) Estimated Target. A timeline and plan for establishing the target for the Agricultural Business Investment Project shall be determined by the Parties prior to any MCC Disbursement or Re-Disbursement of MCC Funding relating to this Project, except as may be necessary to identify the Zones. The INSTAT/Ministry of Agriculture agricultural survey and the INSTAT enterprise survey will provide information on the farms and enterprises in the Zones. In order to establish the estimated target for the number of farms and enterprises, (i) the Zones must be identified and (ii) data collection related to farms and enterprises must be completed.

(3) Baseline. The baseline for the Agricultural Business Investment Project is zero.

(4) Frequency and Reporting of Measurement. MCA-Madagascar shall obtain, on an annual basis or at such other interval agreed to in writing by the Parties, data from the INSTAT enterprise survey or from the Agricultural Business Centers as agreed in writing by the Parties. The relevant Implementing Entit(y)(ies) shall deliver a report to MCA-Madagascar, and MCA-Madagascar shall deliver such report to MCC, on the recommendations for the selection of Zones three through five following their identification. In accordance with the specifications, reporting requirements and timeframe specified in the M&E Plan, MCA-Madagascar shall obtain data and report on current production methods and crops from a source acceptable to MCC, and MCA-Madagascar shall provide such data and report to MCC. MCA-Madagascar shall obtain and report to MCC data on the Agricultural Business Objective Indicator on at least an annual basis starting at month 24 following the entry into force of this Compact.

(5) Results. The results from the Agricultural Business Investment Objective Indicator are expected by the second anniversary of the entry into force of this Compact.

(d) **Project Activity Objectives**. The M&E Plan will also include activity-level measures and a timeline for collecting baselines and establishing targets, where applicable, representing interim measures of the progress towards the Project Objectives. These measures and timelines, as well as any additional measures, shall be finalized for each Project Activity (including adoption by MCA-Madagascar of the relevant portion of the M&E Plan and approval by MCC) before any MCC Disbursement or Re-Disbursement for the specific Project Activities; *provided, however*, with respect to the Agricultural Business Investment Project Activity of identifying the Zones, MCC Disbursements or Re-Disbursements may be made, subject to

satisfaction of other conditions precedent in the Disbursement Agreement, even if the activity-level measures, baseline and targets are not set for the entire Project Activity (*i.e.*, the activity described in Section 2(b) of Schedule 3 of Annex I). The M&E Plan shall further specify the plan for measuring and monitoring each of the Project Activities. The estimated targets for these activities will be determined following the identification of the Zones and collection and review of baseline data. Some of the anticipated expected results and key benchmarks for each Project Activity are described in Section 2 of the Schedule for each Project attached to the Program Annex and in this Section 4(d). The targets listed in this Section 4(d) are estimates until the Parties (i) obtain additional information through implementation of the Compact (*e.g.*, all existing land documents are inventoried) and (ii) establish certain baseline data (*e.g.*, average time and cost of property transactions). The table below summarizes certain of the anticipated interim measurements and estimated targets for each Project.

| Land Tenure Project Activities | Measures | Estimated Targets |
|---|---|---|
| ▪ Support the Development of the Malagasy PNF<br>▪ Improve the Ability of the National Land Service Administration to Provide Land Services<br>▪ Decentralization of Land Services<br>▪ Land Regularization in the Zones<br>▪ Information Gathering, Analysis and Dissemination | ▪ Submission and passage of new legislation that recognizes improved land tenure procedures, documents (certificates) and techniques<br>▪ Percentage of land documents inventoried, restored, and/or digitized<br>▪ Percent of land in pilot sites in the Zones that is securely demarcated and registered<br>▪ Average time and cost required to carry out property transactions at national and local levels | ▪ Land legislation that recognizes improved land tenure procedures adopted by Month 15<br>▪ 100% of approximately 800,000 documents inventoried, 300,000 damaged land documents restored and 400,000 of the existing documents digitized<br>▪ 100% of approximately 250,000 hectares demarcated |

| Finance Project Activities | Measures | Estimated Targets |
|---|---|---|
| ▪ Promote Legal and Regulatory Reform<br>▪ Reform Sovereign Debt Management and Issuance<br>▪ Strengthen the National Savings Bank<br>▪ Provide New Instruments for Agribusiness Credit<br>▪ Modernize National Interbanks Payments System | ▪ Submission, passage, and implementation of new legislation that permit a multi-tiered financial system as recommended by outside experts and relevant commissions<br>▪ Number of holders of smaller denomination treasury bills<br>▪ Volume of treasury bill holdings | ▪ Legislation permitting a multi-tiered financial system submitted by Month 5<br>▪ Check clearing delay reduced from 45 days to 3 days<br>▪ Growth rate of volume of funds in the payment system to exceed GDP growth rate<br>▪ MFI portfolio-at-risk delinquency rate reaches and remains steady at 4-6% |

| Finance Project Activities | Measures | Estimated Targets |
|---|---|---|
| ▪ Improve Credit Skills Training, Increase Credit Information and Analysis | ▪ Number of treasury bills held outside of Antananarivo<br>▪ Check clearing delay<br>▪ Volume of funds in the payment system<br>▪ Volume of microfinance institution (MFI) lending in the targeted zones<br>▪ MFI portfolio-at-risk delinquency rate<br>▪ Reporting of credit and payment information to a central database | ▪ $5 million increase in MFI lending in the Zones |

| Agriculture Business Investment Project Activities | Measures | Estimated Targets |
|---|---|---|
| ▪ Create and Operate Five ABCs<br>▪ Create NCC and Coordinate Activities with Government Ministries and ABCs and Identify the Zones<br>▪ Identify the Investment Opportunities<br>▪ Build Management Capacity in the Zones | ▪ Zones identified and cost-effective investment strategies developed<br>▪ Number of farms and enterprises employing technical assistance received<br>▪ Number of farms/enterprises receiving/soliciting information on business opportunities | ▪ Five Zones identified and cost-effective investment strategies developed by Month 12<br>▪ One agribusiness investment strategy developed for each zone<br>▪ Value of change in marketing and production techniques exceeds costs |

**5. Implementation of M&E Plan.**

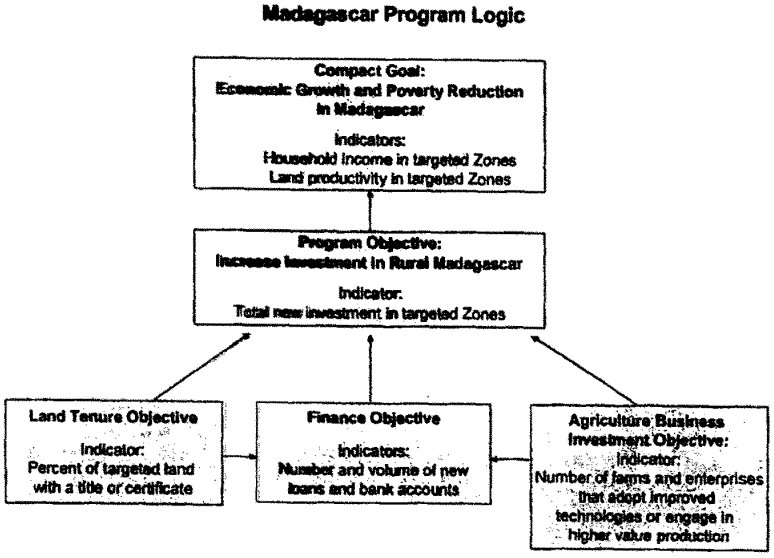
(a) **Approval and Implementation**. The approval and implementation of the M&E Plan, as amended from time to time, shall be in accordance with the Program Annex, this M&E Annex, the Governance Agreement, and any other relevant Supplemental Agreement.

(b) **Advisory Council**. The completed portions of the M&E Plan will be presented to the Advisory Council at the Advisory Council's initial meetings and any amendments or modifications thereto or any additional components of the M&E Plan will be presented to the Advisory Council at appropriate subsequent meetings of the Advisory Council. The Advisory Council will have opportunity to present its suggestions to the M&E Plan, which the Steering Committee will take into consideration, as a factor, in its review of any amendments to the M&E Plan during the Compact Term.

(c) **MCC Disbursement and Initial Re-Disbursement for a Project Activity**. Prior to, and as a condition precedent to, the initial MCC Disbursement or Re-Disbursement with respect to a Project Activity that will be covered by a baseline survey, or the execution of the initial contract for services with any Provider with respect to a Project Activity that will be covered by a baseline survey, a technical review of the baseline survey shall be completed to ensure compliance with standard statistical practices. The Parties shall specify in the Disbursement Agreement the Project Activities that require completion of baseline data collection and technical review of that data as a condition precedent to MCC Disbursement or Re-Disbursement.

# EXHIBIT A

## MADAGASCAR PROGRAM LOGIC



[FR Doc. 05–8531 Filed 4–27–05; 8:45 am]

**BILLING CODE 9210–01–C**

## NUCLEAR REGULATORY COMMISSION

**[Docket No. 50–382]**

### Entergy Operations, Inc.; Notice of Issuance of Amendment to Facility Operating License

The U.S. Nuclear Regulatory Commission (Commission) has issued Amendment No. 199 to Facility Operating License (FOL) No. NPF–38 to Entergy Operations, Inc. (the licensee), which revised the FOL and Technical Specifications (TSs) for operation of the Waterford Steam Electric Station, Unit 3 (Waterford 3), located in St. Charles Parish, Louisiana. The amendment modified the FOL and the TSs to allow an increase in the maximum authorized reactor core power level from 3441 megawatts thermal (MWt) to 3716 MWt, which represents a power increase of about 8 percent and is considered to be an extended power uprate (EPU). The amendment is effective as of the date of issuance and is to be implemented prior to restart from refueling outage 13 at the uprated power level.

The application for the amendment was dated November 13, 2003, Agencywide Documents Access and Management System (ADAMS) Accession Number ML040260317, as supplemented by letters dated January 29 (ML040340728), March 4 (ML040690028), April 15 (ML041110527), May 7 (ML041330175), May 12 (ML041380147), May 13 (ML041380145), May 21 (ML041460407), May 26 (ML041490335), July 14 (ML042010150), July 15 (ML042020294), July 28 (ML042120475), August 10 (ML042250177), August 19 (ML042360712), August 25 (ML042440417), September 1 (ML042470194), September 14 (ML042660243), October 8 (2 letters, ML042880327 and ML042880418), October 13 (ML042890193), October 18 (ML042940577), October 19 (ML043010129) October 21 (ML043010238), October 29 (2 letters, ML043080406 and ML043080403), November 4 (ML043140283), November 8 (ML043200122), November 16 (ML043270472), and November 19, 2004 (ML043280359), and January 5 (ML050100225), January 14 (ML050210054), February 5 (ML050400463), February 16 (ML050490396), and March 17, 2005 (ML050810095).

The application for the amendment complies with the standards and requirements of the Atomic Energy Act of 1954, as amended (the Act), and the Commission's rules and regulations in Title 10 of the Code of Federal Regulations (10 CFR) Chapter I, which are set forth in the license amendment.

The draft environmental assessment (EA), published in the **Federal Register** on October 12, 2004 (69 FR 60672), was related to the application dated November 13, 2003, as supplemented through August 10, 2004. The supplements, including those dated through March 17, 2005, did not change the assessment in the draft EA. The draft EA was published to provide a 30-day public comment period. There was one comment from Entergy Operations, Inc. dated November 11, 2004, which stated that (1) while the draft EA had implied that all sanitary wastes at Waterford 3 discharge to an onsite sewage treatment plant, the sanitary wastes at Waterford 3 are discharged from two different locations, and (2) the draft EA does accurately reflect that no increase in sanitary wastes is expected as a result of the proposed EPU.

The Commission has issued the Final EA related to the action and the determination on the environmental impact stated in the draft EA has not changed. Based upon the EA, the Commission has concluded that the issuance of the amendment will not have a significant effect on the quality of the human environment (70 FR 17128, published April 4, 2005).

As a part of the EPU application, by supplement dated October 29, 2004, the licensee requested, pursuant to 10 CFR 50.90, approval of an amendment for Waterford 3, to revise the minimum volume in the emergency diesel generator fuel oil storage tanks (FOSTs) required by Waterford 3 TSs 3.8.1.1 and 3.8.1.2. The NRC staff has determined that the amendment involves no significant increase in the amounts, and no significant change in the types, of any effluents that may be released offsite, and that there is no significant increase in individual or cumulative occupational radiation exposure. The Commission had previously issued a proposed finding that the amendment involved no significant hazards consideration, and there was no public comment on such finding published December 7, 2004 (69 FR 70716). This amendment revised the TSs for FOL No. NPF–38. The Commission's related evaluation of this change is contained in the Safety Evaluation for the EPU application. The effective date for this amendment is as of the date of issuance and to be implemented prior to restart from the refueling outage 13 in the spring of 2005 to support the power uprate implementation.

Accordingly, the amendment requesting changes to the FOST TSs meets the eligibility criteria for categorical exclusion set forth in 10 CFR 51.22(c)(9). Pursuant to 10 CFR 51.22(b) no environmental impact statement or environmental assessment need be prepared in connection with the issuance of this amendment. For further details with respect to the action, see (1) the application for the EPU amendment dated November 13, 2003, as supplemented by letters dated January 29, March 4, April 15, May 7, May 12, May 13, May 21, May 26, July 14, July 15, July 28, August 10, August 19, August 25, September 1, September 14, October 8 (2 letters), October 13, October 18, October 19, October 21, October 29 (2 letters), November 4, November 8, November 16, November 19, 2004, January 5, January 14, February 5, February 16, and March 17, 2005; (2) the Commission's related Safety Evaluation dated April 15, 2005; and (3) the Commission's EA. Documents may be examined, and/or copied for a fee, at the NRC's Public Document Room (PDR), located at One White Flint North, Public File Area O1F2, 11555 Rockville Pike (first floor), Rockville, Maryland. Publicly available records will be accessible electronically from the ADAMS Public Electronic Reading Room on the internet at the NRC Web site, *http://www.nrc.gov/NRC/ADAMS/index.html*. Persons who do not have access to ADAMS or who encounter problems in accessing the documents located in ADAMS should contact the NRC PDR Room Reference staff by telephone at 1–800–397–4209, (301) 415–4737, or by e-mail to *pdr@nrc.gov*.

Dated at Rockville, Maryland, this 15th day of April 2005.

For The Nuclear Regulatory Commission.

**Thomas W. Alexion,**

*Project Manager, Section 1, Project Directorate IV, Division of Licensing Project Management, Office of Nuclear Reactor Regulation.*

[FR Doc. E5–2038 Filed 4–27–05; 8:45 am]

**BILLING CODE 7590–01–P**

## NUCLEAR REGULATORY COMMISSION

**[Docket Nos. 50–445 AND 50–446]**

### TXU Generation Company, LP; Notice of Withdrawal of Application for Amendment to Facility Operating Licenses

The U.S. Nuclear Regulatory Commission (the Commission) has granted the request of TXU Generation Company, LP (the licensee) to withdraw its December 31, 2003, application for proposed amendment to Facility Operating License No. NPF–87 and Facility Operating License No. NPF–89 for Comanche Peak Steam Electric Station, Units 1 and 2, respectively, located in Somervell County, Texas.

The proposed amendment would have revised the facility technical specifications pertaining to extending the allowable Completion Times for the Required Actions associated with restoration of an inoperable Diesel Generator (DG) and associated changes.

The Commission had previously issued a Notice of Consideration of Issuance of Amendment published in the **Federal Register** on February 3, 2004 (69 FR 5209). However, by letter dated March 17, 2005, the licensee withdrew the proposed change.

For further details with respect to this action, see the application for amendment dated December 31, 2003, and the licensee's letter dated March 17, 2005, which withdrew the application for license amendment. Documents may be examined, and/or copied for a fee, at the NRC's Public Document Room (PDR), located at One White Flint North, Public File Area O1 F21, 11555 Rockville Pike (first floor), Rockville, Maryland. Publicly available records will be accessible electronically from the Agencywide Documents Access and Management Systems (ADAMS) Public Electronic Reading Room on the Internet at the NRC Web site, *http://www.nrc.gov/reading-rm/adams/html*. Persons who do not have access to ADAMS or who encounter problems in accessing the documents located in ADAMS, should contact the NRC PDR Reference staff by telephone at 1–800–397–4209, or (301) 415–4737 or by e-mail to *pdr@nrc.gov*.

Dated at Rockville, Maryland, this 20th day of April 2005.

For the Nuclear Regulatory Commission.

**David H. Jaffe,**

*Senior Project Manager, Section 1 Project Directorate IV, Division of Licensing Project Management, Office of Nuclear Reactor Regulation.*

[FR Doc. E5–2036 Filed 4–27–05; 8:45 am]

BILLING CODE 7590–01–P

## NUCLEAR REGULATORY COMMISSION

**[Docket No. 52–009]**

### System Energy Resources, Inc.; Notice of Availability of the Draft Environmental Impact Statement for an Early Site Permit (ESP) at the Grand Gulf ESP Site and Associated Public Meeting

Notice is hereby given that the U.S. Nuclear Regulatory Commission (NRC, the Commission) has published NUREG–1817, ''Environmental Impact Statement for an Early Site Permit (ESP) at the Grand Gulf ESP Site: Draft Report for Comment.'' The site is located near the Town of Port Gibson in Claiborne County, Mississippi. The application for the ESP was submitted by letter dated October 16, 2003, pursuant to Title 10 of the Code of Federal Regulations part 52 (10 CFR part 52). A notice of receipt and availability of the application, which included the environmental report (ER), was published in the **Federal Register** on November 14, 2003 (68 FR 64665). A notice of acceptance for docketing of the application for the ESP was published in the **Federal Register** on December 1, 2003 (68 FR 67219). A notice of intent to prepare an environmental impact statement and to conduct the scoping process was published in the **Federal Register** on December 31, 2003 (68 FR 75656).

The purpose of this notice is to inform the public that NUREG–1817, ''Environmental Impact Statement for an Early Site Permit (ESP) at the Grand Gulf ESP Site: Draft Report for Comment,'' is available for public inspection in the NRC Public Document Room (PDR) located at One White Flint North, 11555 Rockville Pike (first floor), Rockville, Maryland 20852, or from the Publicly Available Records (PARS) component of NRC's Agencywide Documents Access and Management System (ADAMS), and will also be placed directly on the NRC Web site at *http://www.nrc.gov.* ADAMS is accessible from the NRC Web site at *http://www.nrc.gov/reading-rm/adams.html* (the Public Electronic Reading Room). Persons who do not have access to ADAMS, or who encounter problems in accessing the documents located in ADAMS, should contact the PDR reference staff at 1–800–397–4209, (301) 415–4737, or by e-mail to *pdr@nrc.gov.* In addition, the Harriette Person Memorial Library, located at 606 Main Street, Port Gibson, Mississippi, has agreed to make the DEIS available for public inspection.

The NRC staff will hold a public meeting to present an overview of the DEIS and to accept public comments on the document. The public meeting will be held at the Port Gibson City Hall, located at 1005 College Street, Port Gibson, Mississippi, on Tuesday, June 28, 2005. The meeting will convene at 7 p.m. and will continue until 10 p.m., as necessary. The meeting will be transcribed and will include: (1) A presentation of the contents of the DEIS, and (2) the opportunity for interested government agencies, organizations, and individuals to provide comments on the draft report. Additionally, the NRC staff will host informal discussions one hour before the start of the meeting at the library. No formal comments on the DEIS will be accepted during the informal discussions. To be considered, comments must be provided either at the transcribed public meeting or in writing. Persons may register to attend or present oral comments at the meeting by contacting Ms. Cristina Guerrero, by telephone at 1–800–368–5642, extension 3835, or by Internet to the NRC at *GrandGulfEIS@nrc.gov* no later than June 21, 2005. Members of the public may also register to speak at the meeting within 15 minutes of the start of the meeting. Individual oral comments may be limited by the time available, depending on the number of persons who register. Members of the public who have not registered may also have an opportunity to speak, if time permits. Ms. Guerrero will need to be contacted no later than June 21, 2005, if special equipment or accommodations are needed to attend or present information at the public meeting, so that the NRC staff can determine whether the request can be accommodated.

Members of the public may send written comments on the DEIS concerning the Grand Gulf ESP application to the Chief, Rules and Directives Branch, Division of Administrative Services, Office of Administration, Mailstop T–6D59, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, and should cite the publication date and page number of this **Federal Register** Notice. Comments may also be delivered to Room T–6D59, Two White Flint North, 11545 Rockville Pike, Rockville, Maryland 20852, from 7:30

a.m. to 4:15 p.m. during Federal workdays. To be considered, written comments should be postmarked by July 14, 2005. Electronic comments may be sent by the Internet to the NRC at *GrandGulfEIS@nrc.gov.* Electronic submissions should be sent no later than July 14, 2005. Comments will be available electronically and accessible through the NRC's PERR link at *http://www.nrc.gov/reading-rm/adams.html.*

*For Further Information Contact:* Cristina Guerrero, License Renewal and Environmental Impacts Program, Division of Regulatory Improvement Programs, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001. Ms. Guerrero may be contacted at the aforementioned telephone number or e-mail address.

Dated at Rockville, Maryland, this 15th day of April, 2005.

For the Nuclear Regulatory Commission.

**Pao-Tsin Kuo,**

*Program Director, License Renewal and Environmental Impacts Program, Division of Regulatory Improvement Programs, Office of Nuclear Reactor Regulation.*

[FR Doc. E5–2037 Filed 4–27–05; 8:45 am]

**BILLING CODE 7590–01–P**

## OFFICE OF PERSONNEL MANAGEMENT

### Submission for OMB Review: Comment Request for Review of a Revised Information Collection: Standard Form 1153

**AGENCY:** U.S. Office of Personnel Management.

**ACTION:** Notice.

**SUMMARY:** In accordance with the Paperwork Reduction Act of 1995 (Pub. L. 104–13, May 22, 1995), this notice announces that the U.S. Office of Personnel Management (OPM) submitted to the Office of Management and Budget (OMB) a request for review of a revised information collection. Standard Form 1153, Claim for Unpaid Compensation of Deceased Civilian Employee, is used to collect information from individuals who have been designated as beneficiaries of the unpaid compensation of a deceased Federal civilian employee or who believe that their relationship to the deceased entitles them to receive the unpaid compensation of a deceased Federal civilian employee. OPM needs this information in order to adjudicate the claim and properly assign a deceased Federal civilian employee's unpaid compensation to the appropriate individuals(s).

We received no comments on our 60-day notice on Standard Form 1153, published in the **Federal Register** on November 26, 2004.

Approximately 3,000 SF 1153 forms are submitted annually. It takes approximately 15 minutes to complete the form. The annual estimated burden is 750 hours.

For copies of this proposal, contact Mary Beth Smith-Toomey on (202) 606–8358, FAX (202) 418–3251, or e-mail to *mbtoomey@opm.gov.* Please include a mailing address with your request.

**DATES:** Comments on this proposal should be received within 30 calendar days from the date of this publication.

**ADDRESSES:** Send or deliver comments to—Robert D. Hendler, Program Manager, Center for Merit Systems Compliance, Division for Human Capital Leadership and Merit System Compliance Group, U.S. Office of Personnel Management, 1900 E Street, NW., Room 6484, Washington, DC 20415; and Brenda Aguilar, OPM Desk Officer, Office of Information and Regulatory Affairs, Office of Management and Budget, New Executive Office Building, NW., Room 10235, Washington, DC 20503.

U.S. Office of Personnel Management.

**Dan G. Blair,**

*Acting Director.*

[FR Doc. 05–8460 Filed 4–27–05; 8:45 am]

**BILLING CODE 6325–43–P**

## SECURITIES AND EXCHANGE COMMISSION

**[Release No. 34–51597; File No. SR–BSE–2004–51]**

### Self-Regulatory Organizations; Notice of Filing of Proposed Rule Change, and Amendment Nos. 1, 2, and 3 Thereto, by the Boston Stock Exchange, Inc. Relating to the Trading of Market Orders on the Boston Options Exchange

April 21, 2005.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on December 15, 2004, the Boston Stock Exchange, Inc. (''BSE'' 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 January 5, 2005, the Exchange filed Amendment No. 1 to the proposed rule change. On April 19, 2005, the Exchange filed Amendment No. 2 to the proposed rule change.[3] On April 21, 2005, the Exchange filed Amendment No. 3 to the proposed rule change.[4] The Commission is publishing this notice to solicit comments on the proposed rule change, as amended, from interested persons.

#### I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend the rules of the Boston Options Exchange (''BOX'') to allow market orders to trade on BOX. The text of the proposed rule change is set forth below. Italics indicate additions; brackets indicate deletions.[5]

**Rules of the Boston Stock Exchange**

**Rules of the Boston Options Exchange Facility**

Trading of Options Contracts on BOX

Chapter V. Doing Business on BOX

Sec. 1 through Sec. 8 No change.

Sec. 9 Opening the Market.

The following rules are in effect until August 6, 2005:

(a) Pre-Opening Phase. For some period of time before the opening in the underlying security (as determined by BOXR but not less than one hour and distributed to all BOX Participants via regulatory circular from BOXR), the BOX Trading Host will accept orders and quotes. During this period, known as the Pre-Opening Phase, orders and quotes are placed on the BOX Book but do not generate trade executions. Complex Orders and contingency orders (except ''Market-on-Opening'', Minimum Volume, and Fill and Kill orders) do not participate in the opening and are not accepted by the BOX Trading Host during this Pre-Opening Phase. BOX-Top Orders and Price Improvement Period orders are not accepted during the Pre-Opening Phase.

(b) Calculation of Theoretical Opening Price. From the time that the BOX Trading Host commences accepting orders and quotes at the start of the Pre-Opening Phase, the BOX Trading Host will calculate and provide the Theoretical Opening Price (''TOP'') for

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] Amendment No. 2 superseded and replaced the original filing and Amendment No. 1 in their entirety.

[4] In Amendment No. 3, BSE made several conforming and technical changes to the proposed rule text.

[5] At the request of the BSE, the Commission staff has made several corrections to the rule text. Telephone conversation between Annah Kim, Chief Regulatory Officer, BOX, *et al.*, and Ira Brandriss, Assistant Director, Division of Market Regulation (''Division''), *et al.*, on April 21, 2004.

the current resting orders and quotes on the BOX Book during the Pre-Opening Phase. The TOP is that price at which the Opening Match would occur at the current time, if that time were the opening, according to the Opening Match procedures described in paragraph (e) below. The quantity that would trade at this price is also calculated. The TOP is re-calculated and disseminated every time a new order or quote is received, modified or cancelled and where such event causes the TOP price or quantity to change.

A TOP can only be calculated if an opening trade is possible. An opening trade is possible if: (i) The BOX Book is crossed (highest bid is higher than the lowest offer) or locked (highest bid equals lowest offer), or ii) there are *Market or* Market-on-Opening Orders in the BOX Book and at least one order or quote on the opposite side of the market.

(c) Broadcast Information During Pre-Opening Phase. The BOX Trading Host will disseminate information to all BOX Participants about resting orders in the BOX Book that remain from the prior business day and any orders or quotes sent in before the Opening Match. This information will be disseminated in the usual BOX format of five best limits and associated quantity, aggregating all orders and quotes at each price level. This broadcast will also include the TOP and the quantity associated with the TOP. Any orders or quotes which are at a price better i.e. bid higher or offer lower) than the TOP, as well as all *Market and* Market-on-Opening orders will be shown only as a total quantity on the BOX Book at a price equal to the TOP.

(d) Market Maker Obligations During Pre-Opening Phase. BOX Market Makers holding an assignment on a given options class are obliged, as part of their obligations to ensure a fair and orderly market, to provide continuous two-sided quotes according to the BOX minimum standards commencing with the minute preceding the scheduled opening of the market for the underlying security.

(e) Opening Match.

(i) Complex Orders and contingency orders do not participate in the Opening Match or in the determination of the opening price. The BOX Trading Host will establish the opening price at the time of the Opening Match. The opening price is the TOP at the moment of the Opening Match. The BOX Trading Host will process the series of a class in a random order, starting at the first round minute after the opening for trading of the underlying security in the primary market, and at each round minute thereafter. If the opening of a particular class is to occur within 15 seconds of the next round minute, the opening of that class will take place at the next subsequent round minute after the round minute that is 15 or less seconds away (i.e. within 75 seconds). The TOP/opening price of a series is the ''market-clearing'' price which will leave bids and offers which cannot trade with each other. In determining the priority of orders to be filled, the BOX Trading Host will give priority *to Market Orders first, then* to Market-on-Opening orders [first], then to Limit Orders whose price is better than the opening price, and then to resting orders on the BOX Book at the opening price. One or more series of a class may not open because of conditions cited in paragraph (f) of this Section 9.

(ii) The BOX Trading Host will determine a single price at which a particular option series will be opened. BOX will calculate the optimum number of options contracts that could be matched at a price, taking into consideration all the orders on the BOX Book.

(1) The opening match price is the price which will result in the matching of the highest number of options contracts.

(2) Should two or more prices satisfy the maximum quantity criteria, the price which will leave the fewest resting contracts in the BOX Book will be selected as the opening match price.

(3) Should there still be two or more prices which meet both criteria in subparagraphs (1) and (2), the price which is closest to the previous day's closing price will be selected as the opening match price. For new classes in which there is no previous day's closing price, BOX will utilize the price assigned to the class by BOX at the time the class was created (''reference price'').

(f) As the Opening Match price is determined by series, the BOX Trading Host will proceed to move the series from the Pre-Opening Phase to the continuous or regular trading phase and disseminate to OPRA and to all Options Participants the opening trade price, if any. At this point, the BOX trading system is open for trading and all orders and quotes are accepted and processed according to the BOX trading rules. When the BOX Trading Host cannot determine an opening price, but none of the reasons exist for delaying an opening as outlined in paragraph (g) of this Section 9, below, the series will nevertheless move from Pre-Opening Phase to the continuous trading phase.

(g) The BOX Trading Host will not open a series if one of the following conditions is met:

i. The opening price is not within an acceptable range as determined by the MRC, and will be announced to all BOX Participants via the Trading Host. (In making this determination the MRC will consider, among other factors, all prices that exceed a variance greater than [of] either $.50 or 20% to the previous day's closing price.)

ii. There is a *Market Order,* Market-on-Opening order or quote with no corresponding order or quote on the opposite side.

(h) If one of the conditions in paragraph (g) of this Section 9 is met, the MRC will not open the series but will send a RFQ. MRC will delay the opening of the series until such time as responses to the RFQ from the BOX Market Makers assigned to the class, or other interested trading parties, have been received and booked by the BOX Trading Host and the consequent opening price is deemed compatible with an orderly market.

(i) MRC may order a deviation from the standard manner of the opening procedure, including delaying the opening in any option class, when it believes it is necessary in the interests of a fair and orderly market.

(j) The procedure described in this Section 9 may be used to reopen a class after a trading halt.

* * * * *

Sec. 14 Order Entry

(a) through (b) No change.

(c) The following types of orders may be submitted to the Trading Host:

i. through iii. No change.

*iv. Market Order. Market Orders submitted to BOX are executed at the best price obtainable for the total quantity available when the order reaches the BOX market. Any remaining quantity is executed at the next best price available for the total quantity available. This process continues until the Market Order is fully executed. Prior to execution at each price level, Market Orders are filtered pursuant to the procedures set forth in Chapter V, Section 16(b) of these Rules to avoid trading through the NBBO.*

*At the opening, Market Orders have priority over Market-on-Opening Orders and Limit Orders. In the case where the lowest offer for any options contract is $.05, and an Options Participant enters a Market Order to sell that series, any such Market Order shall be considered a Limit Order to sell at a price of $.05.*

(d) Where no order type is specified, the Trading Host will reject the order.

i. The following designations can be added to one or both of the order types referred to in paragraph (c) above:

(1) through (3) No change.

(4) Minimum Volume (MV). An MV designation can be added to [both] Limit Orders, [and] BOX Top Orders, *and Market Orders.* MV orders will only be executed if the specified minimum volume is immediately available to trade (at the specified price or better in the case of Limit Orders). If this is not the case the order will be automatically cancelled by the Trading Host. In the case of Limit Orders, where a volume equal to or greater than the specified minimum volume of an MV order trades, the residual volume will be filtered against trading through the NBBO according to the procedures set forth in Section 16(b) of this Chapter V and, if applicable, placed on the BOX Book. In the case of BOX-Top Orders, where a volume equal to or greater than the specified minimum volume of an MV order trades, the residual volume will be converted to a Limit Order at the price at which the BOX-Top Order was executed pursuant to Section 14(c)(ii) of this Chapter V and will be filtered against trading through the NBBO according to the procedures set forth in Section 16(b) of this Chapter V and, if applicable, placed on the BOX Book. In the case of Market Orders, where a volume equal to or greater than the specified minimum volume of an MV order trades, the residual volume will be filtered against trading through the NBBO according to the procedures set forth in Section 16(b) of this Chapter V and, if applicable, executed with any orders on the BOX Book.

(e) through (i) No change.

* * * * *

Sec. 16 Execution and Price/Time Priority

(a) No change.

(b) Filtering of BOX In-Bound Orders to Prevent Trade-Throughs.

i. No change.

ii. If the order is a BOX-Top Order, the Trading Host will handle the order in the following manner:

(1) In the case where the best price on the BOX Book on the opposite side of the market from the BOX-Top order is equal to the NBBO, the BOX-Top Order will be executed for all the quantity available at this price. Any remaining quantity will be converted to a Limit Order at this execution price pursuant to Section 14(c)(ii) of this Chapter V and filtered as described in subparagraph b(iii) below.

(2) In the case where the best price on the BOX Book on the opposite side of the market from the BOX-Top Order is not equal to the NBBO, the BOX-Top Order will be converted to a Limit Order for its total quantity at the then current NBBO pursuant to Section 14(c)(ii) of this Chapter V and filtered as described in subparagraph b(iii) below.

*If the Order is a Market Order, the Trading Host will handle the order in the following manner:*

*(1) In the case where the best price on the BOX Book on the opposite side of the market is equal to the NBBO, the Market Order will be executed for all the quantity available at this price. Any remaining quantity will be filtered as described in subparagraph b(iii) below.*

*(2) In the case where the best price on the BOX Book on the opposite side of the market from the Market Order is not equal to the NBBO, the Market Order will be filtered as described in subparagraph b(iii) below.*

iii. The Trading Host will filter the relevant orders as follows:

The filter will determine if the order is executable against the NBBO (an order is deemed ''executable against the NBBO'' when, in the case of an order to sell(buy), its limit price is equal to or lower(higher) than the best bid(offer) across all options exchanges. By definition, a BOX-Top Order *or a Market Order* is executable against the NBBO).

(1) If the order is not executable against the NBBO, the order will be placed on the BOX Book. However, if the order is a P or P/A Order, and not executable against the NBBO, it will be immediately cancelled pursuant to Chapter XII of these Rules.

(2) If the order is executable against the NBBO, the filter will determine whether there is a quote on BOX that is equal to the NBBO.

a. If there is a quote on BOX that is equal to the NBBO, then the order will be executed against the relevant quote. Any remaining quantity of the order is exposed on the BOX Book at the NBBO for a period of three seconds. If the order is not executed during the three second exposure period, then the order will *be* handled by the Trading Host pursuant to subparagraph b(iii)(2)(c) below. Pursuant to Chapter XII, Section 2(c)–(d) of these Rules, in the case of a P/A Order, if the size of the P/A Order is larger than the Firm Customer Quote Size, or, in the case of a P Order, if the size of the P Order is larger than the Firm Principal Quote Size, and any quantity remains after execution against the relevant quote, then such remaining quantity is exposed on the BOX Book at the NBBO for a period of three seconds. Any quantity remaining on the BOX Book after the three second exposure period will be cancelled. BOX will inform the sending Participant Exchange of the amount of the order that was executed and the amount, if any, that was cancelled; or

b. If there is not a quote on BOX that is equal to the NBBO, then the order is exposed on the BOX Book at the NBBO for a period of three seconds, unless such order is a P or P/A Order. If the order is a P or P/A order it will be immediately cancelled pursuant to the Chapter XII of these Rules. If the order is not executed during the three second exposure period, then the order will be handled by the Trading Host pursuant to subparagraph b(iii)(2)(c) below.

c. At the end of the three second exposure period, any unexecuted quantity will be handled by the Trading Host in the following manner:

1. If the best BOX price is now equal to the NBBO, the remaining unexecuted quantity will be placed on the BOX Book and immediately executed against that quote. Any remaining quantity will be i) in the case of Public Customer orders, sent as P/A order(s) to the exchange displaying the NBBO, or ii) in the case of market maker or proprietary broker-dealer orders, returned to the submitting Options Participant; or

2. If the best BOX price is not equal to the NBBO, then any remaining unexecuted quantity will be (i) in the case of Public Customer orders, sent as P/A Order(s) to the exchange displaying the NBBO, or (ii) in the case of market maker or proprietary broker-dealer orders, returned to the submitting Options Participant.

*iv. Notwithstanding the foregoing, if an Order is submitted while a PIP is in progress, and the Order is in the same series and on the opposite side of the Customer Order submitted to the PIP (the ''PIP Order''), under the circumstances set forth in Section 18(i) of this Chapter V, the Order will be immediately executed against the PIP Order up to the lesser of (a) the size of the PIP Order, or (b) the size of the Order, at a price equal to either (i) one penny better than the NBBO or (ii) the NBBO. The remainder of the Order, if any, continues to be filtered as set forth in this Section 16(b).*

* * * * *

Sec. 18 The Price Improvement Period (''PIP'')

(a) through (d) No change.

(e) Options Participants, both OFPs and Market Makers, executing agency orders may designate BOX-Top *Orders, Market Orders,* and marketable limit Customer Orders for price improvement and submission to the PIP. Customer Orders designated for the PIP (*PIP Orders*) shall be submitted to BOX with

a matching contra order, the ''Primary Improvement Order'', equal to the full size of the [Customer] *PIP* Order. The Primary Improvement Order shall be on the opposite side of the market than that of the [Customer] *PIP* Order and represent a higher bid (lower offer) than that of the National Best Bid Offer (NBBO) at the time of the commencement of the PIP. BOX will not permit a PIP to commence unless at least three (3) Market Makers were quoting in the relevant series at the time an Options Participant submits a Primary Improvement Order to initiate a PIP. BOX will commence a PIP by broadcasting a message to Participants that (1) states that a Primary Improvement Order has been processed; (2) contains information concerning series, size, price and side of market, and; (3) states when the PIP will conclude (''PIP Broadcast'').

i. No change.

ii. The Options Participant who submitted the Primary Improvement Order is not permitted to cancel or to modify the size of its Primary Improvement Order or the [Customer] *PIP* Order at any time during the PIP, and may modify only the price of its Primary Improvement Order by improving it. The subsequent price modifications to a Primary Improvement Order are treated as new Improvement Orders for the sake of establishing priority in the PIP process. Market Makers, except for a Market Maker that submits the relevant Primary Improvement Order, may: (1) Submit competing Improvement Order(s) for any size up to the size of the [Customer] *PIP* Order; (2) submit competing Improvement Order(s) for any price equal to or better than the Primary Improvement Order; (3) improve the price of their Improvement Order(s) at any point during the PIP; and (4) decrease the size of their Improvement Order(s) only by improving the price of that order.

iii. At the conclusion of the PIP, the [Customer] *PIP* Order shall be matched against the best prevailing order(s) on BOX, in accordance with price/time priority as set forth in Section 16 of this Chapter V, whether Improvement Order(s), including CPO(s) and PPO(s), or unrelated order(s) received by BOX during the PIP *(excluding unrelated orders that were immediately executed during the interval of the PIP).* Such unrelated orders may include agency orders on behalf of Public Customers, market makers at away exchanges and non-*BOX*[Box] Participant broker-dealers, as well as non-PIP proprietary orders submitted by Options Participants.

iv. No change.

(f) through (h) No change.

(i) In cases where an [executable] unrelated order is submitted to BOX on the same side as the [Customer] *PIP* Order, such that it would cause an execution to occur prior to the end of the PIP, the PIP shall be deemed concluded and the [Customer] *PIP* Order shall be matched pursuant to paragraph (e)(iii) of this Section 18, above.

*Specifically, the submission to BOX of a BOX-Top Order or Market Order on the same side as a PIP Order will prematurely terminate the PIP when, at the time of the submission of the BOX-Top Order or Market Order, the best Improvement Order is equal to or better than the NBBO. (If a BOX-Top Order or Market Order is a buy order, the best Improvement Order is better than the NBBO when the price of the best Improvement Order is lower than the National Best Offer. If a BOX-Top Order or a Market Order is a sell order, the best Improvement Order is better than the NBBO when the price of the best Improvement Order is higher than the National Best Bid.) Following the execution of the PIP Order, any remaining Improvement Orders are cancelled and the BOX-Top Order or Market Order is filtered pursuant to Section 16(b) of this Chapter V.*

*In cases where an unrelated order is submitted to BOX on the opposite side of the PIP Order, such that it would cause an execution to occur prior to the end of the PIP as set forth below, the unrelated order shall be immediately executed against the PIP Order up to the lesser of (a) the size of the PIP Order, or (b) the size of the unrelated order, at a price equal to either (i) one penny better than the NBBO, if the best BOX price on the opposite side of the market from the unrelated order is equal to the NBBO at the time of execution, or (ii) the NBBO. The remainder of the unrelated order, if any, shall be filtered pursuant to Section 16(b) of this Chapter V. The remainder of the PIP Order, if any, shall be executed at the conclusion of the PIP auction pursuant to Paragraph (e)(iii) of this Section 18, above.*

*Specifically, a BOX-Top Order or a Market Order on the opposite side of a PIP Order will immediately execute against the PIP Order when, at the time of the submission of the BOX-Top Order or Market Order, the best Improvement Order is equal to or better than the NBBO. (If a BOX-Top Order or Market Order is a buy order, the best Improvement Order is better than the NBBO when the price of the best Improvement Order is lower than the National Best Offer. If a BOX-Top Order or a Market Order is a sell order, the best Improvement Order is better than the NBBO when the price of the best Improvement Order is higher than the National Best Bid.)*

It shall be considered conduct inconsistent with just and equitable principles of trade for any Participant to enter unrelated orders into BOX for the purpose of disrupting or manipulating the Improvement Period process.

(j) through (k) 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, the Exchange included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

### *A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change*

1. Purpose

The purpose of the proposed rule change is to allow Market Orders to trade on BOX. BSE notes that all of the other options exchanges trade market orders.[6] Currently, BOX has two order types which are similar to the proposed Market Order: Market-on-Opening Orders, which are valid only during the pre-opening and opening match phases, and BOX-Top Orders, which may be submitted only during the continuous trading phase. The majority of BOX's current (and prospective) order flow providers (''OFPs'') have requested the ability to trade market orders on BOX because their technology is designed for the use of market orders and their customers prefer market orders over BOX-Top Orders. BOX wishes to accommodate and attract order flow from these OFPs. Indeed, many OFPs are reluctant to send their Customer Orders to BOX without this order type, thereby depriving many investors of the possibility of price improvement through BOX's price improvement

[6] *See* American Stock Exchange Rule 950(b), Chicago Board Options Exchange Rule 6.53(a), International Securities Exchange Rule 715(a), Pacific Exchange Rule 6.62, and Philadelphia Stock Exchange Rule 1066(a).

mechanism, formally referred to as the Price Improvement Period (''PIP'').

BOX's Market-on-Opening Orders are executed on the market opening at the best price available in the market until all volume (required to fill the order) on the opposite side of the market has been traded or the order quantity has been exhausted. Any residual volume left after part of a Market-on-Opening Order has been executed is automatically converted to a limit order at the price at which the original Market-on-Opening Order was executed.

BOX-Top Orders are executed at the best price available in the market for the total quantity available from any contra bid (offer). In general, any residual volume left after part of a BOX-Top Order has been executed is automatically converted to a limit order at the price at which the original BOX-Top Order was executed.

Similar to these order types, Market Orders would be executed at the best price available in the market for the total quantity available from any contra bid (offer). If the full quantity of a Market Order could not be executed at the initial execution price, the remaining quantity of the Market Order would then execute at the next best price available from any contra bid (offer), and so on, until the Market Order was fully executed. To avoid trading through the national best bid or offer (''NBBO''), Market Orders would be filtered prior to execution at each price level pursuant to the procedures set forth in Chapter V, Section 16(b) of the BOX Rules.

During the opening, Market Orders will have priority over Market-on-Opening and Limit Orders.

BSE wishes to clarify how Market Orders would be treated in the following situations:

*Market Order Entered When the Lowest Offer Is $.05*

In the case where the lowest offer for any options contract is $.05, and a BOX participant enters a Market Order to sell that series, any such Market Order shall be considered a Limit Order to sell at a price of $.05.

*Market Order Designated as a Minimum Volume Order*

A Market Order could be designated as a minimum volume (MV) order and would only be executed if the specified minimum volume is immediately available to trade. If a volume equal to or greater than the specified minimum volume of an MV order trades, the residual volume would be filtered against trading through the NBBO according to the procedures set forth in Section 16(b) of Chapter V of the BOX Rules and, if applicable, executed with any orders on the BOX Book.

*Market Order Entered During a PIP*

In general, the BOX PIP is a three-second auction starting at a price better than the current NBBO during which BOX Participants compete to participate in the execution of the Customer Order submitted to the PIP (''PIP Order'') by submitting specially designated orders called Improvement Orders in one penny increments that are valid only in the PIP process. If a Market Order is submitted to BOX during a PIP that is in the same series as the PIP Order, under certain circumstances the submission of the Market Order may prematurely terminate the PIP, or the Market Order may immediately execute against the PIP Order at the NBBO or better. In this regard, Market Orders are treated like BOX-Top Orders, and BSE is taking this opportunity to clarify in the BOX Rules the treatment of BOX-Top Orders in the same circumstances.

*Premature Termination*

The submission to BOX of a Market Order on the same side as a PIP Order will prematurely terminate the PIP when, at the time of the submission of the Market Order, the best Improvement Order is equal to or better than the NBBO. If a Market Order is a buy order, the best Improvement Order is better than the NBBO when the price of the best Improvement Order is lower than the National Best Offer. If a Market Order is a sell order, the best Improvement Order is better than the NBBO when the price of the best Improvement Order is higher than the National Best Bid. When the PIP is terminated, the PIP Order is matched against the best prevailing orders on BOX (whether Improvement Orders or unrelated orders received by BOX during the PIP [7]), pursuant to Paragraph (e)(iii) of Section 18 of Chapter V of the BOX Rules. Then the Market Order is filtered pursuant to Paragraph (b) of Section 16 of the BOX Rules.

Under these circumstances, allowing the PIP to continue would violate BOX's priority rules. For example, assume the NBBO and the best BOX price in the relevant series is $2.00 bid—$2.10 offer and the PIP Order is a buy order for 20 contracts. The PIP starts at $2.09 (one penny better than the National Best Offer). During the PIP interval, Improvement Orders are submitted to the PIP until the price of the best Improvement Order is $2.07. Then a Market Order to buy 20 contracts is submitted to BOX. If the PIP continued, the Market Order would have been executed at $2.10, a price that would have violated BOX's priority rules because the best Improvement Order at $2.07 is at a better price than $2.10. On BOX, even though Improvement Orders may only execute against PIP Orders, the priority rules still apply, and no order can be executed at a price worse than the best price available to another order. Therefore, the PIP must terminate, the PIP Order must be executed in full, and any left over Improvement Orders must be cancelled immediately before the Market Order is executed. The result would be the same regardless if the Market Order was to buy 10 contracts or to buy 30 contracts.

To demonstrate a different scenario, assume the NBBO and the best BOX price in the relevant series is $2.00 bid—$2.10 offer and the PIP Order is a buy order for 20 contracts. The PIP starts at $2.09 (one penny better than the National Best Offer). During the PIP interval, Improvement Orders are submitted to the PIP until the price of the best Improvement Order is $2.07. Then the NBBO changes to $2.00 bid—$2.05 offer, but the BBO stays the same. Then a Market Order to buy 20 contracts is submitted to BOX. Pursuant to BOX's NBBO filter, the Market Order would be exposed internally on BOX for three seconds at $2.05, and become the best BOX bid. Currently, there is no order on BOX that the Market Order could execute against, including the PIP Order, since they are on the same side. Therefore, the PIP may continue. However, if the price of the best Improvement Order had been $2.05 (or lower) when the NBBO changed, the submission of a Market Order would cause the PIP to prematurely terminate because the submission of any additional Improvement Orders at better prices would result in a trade-through of the best BOX bid (the exposed Market Order) when the PIP Order was executed at the end of the PIP.

*Immediate Execution*

A Market Order on the opposite side of a PIP Order will immediately execute against the PIP Order when, at the time of the submission of the Market Order, the best Improvement Order is equal to or better than the NBBO. If a Market Order is a buy order, the best Improvement Order is better than the NBBO when the price of the best Improvement Order is lower than the National Best Offer. If a Market Order is a sell order, the best Improvement Order is better than the NBBO when the price

[7] Excluding unrelated orders that were immediately executed during the interval of the PIP, as described below.

of the best Improvement Order is higher than the National Best Bid. The Market Order immediately executes against the PIP Order up to the lesser of (a) the size of the PIP Order, or (b) the size of the Market Order, at a price equal to either (i) one penny better than the NBBO, if the best BOX price on the opposite side of the market from the Market Order is equal to the NBBO at the time of the execution, or (ii) the NBBO. The remainder of the Market Order, if any, is filtered pursuant to Section 16(b) of Chapter V of the BOX Rules. The remainder of the PIP Order, if any, continues in the PIP process.[8]

Under these circumstances, allowing the PIP to continue without immediately executing the Market Order against the PIP Order would violate BOX's priority rules. For example, assume the NBBO and the best BOX price in the relevant series is $2.00 bid—$2.10 offer and the PIP Order is a buy order for 20 contracts. The PIP starts at $2.09 (one penny better than the National Best Offer). During the PIP interval, Improvement Orders are submitted to the PIP until the price of the best Improvement Order is $2.07. Then, assume a Market Order to sell 20 contracts is submitted to BOX. If the Market Order did not immediately execute against the PIP Order, it would have been executed at $2.00 with the best BOX bid which would violate BOX's priority rules because the PIP Order, not the best BOX bid, has priority for the best price. Furthermore, the Market Order would not be available to execute against the PIP Order at the end of the PIP. The PIP Order could have missed the opportunity to receive an execution at $2.01.

Assume the same situation as described above, except that a Market Order to sell 30 contracts is submitted to BOX. The Market Order would be partially executed against the PIP Order at $2.01 and the remainder of the Market Order (10 contracts) would be filtered pursuant to Section 16(b) of Chapter V of the BOX Rules. If the Market Order was a Market Order to sell 10 contracts, the Market Order would be executed in full against the PIP Order at $2.01, and the remainder of the PIP Order would continue in the PIP process.

To demonstrate a different scenario, assume the NBBO in the relevant series is $2.05 bid—$2.10 offer, the best BOX price is $2.00 bid—$2.10 offer and the PIP Order is a buy order for 20 contracts. The PIP starts at $2.09 (one penny better than the National Best Offer). During the PIP interval, Improvement Orders are submitted to the PIP until the price of the best Improvement Order is $2.07. Then, assume a Market Order to sell 20 contracts is submitted to BOX. If the Market Order did not immediately execute against the PIP Order, it would have been exposed internally on BOX for three seconds at $2.05. If the Market Order was executed at $2.05 during this three second exposure period against any order other than the PIP Order, this would violate BOX's priority rules because the PIP Order has priority and is entitled to the better price. Therefore, the Market Order immediately executes against the PIP Order at $2.05. However, if the price of the best Improvement Order is $2.04, the option of immediately executing the Market Order against the PIP Order at $2.05 is not available because the PIP Order is already guaranteed a better execution at $2.04, pursuant to the best Improvement Order, and therefore the PIP continues.

*Related Amendments*

Currently, the BOX Rules address the treatment of unrelated orders on the same side as a PIP Order, but do not address the treatment of unrelated orders on the opposite side of a PIP Order. BSE proposes to add subparagraph (b)(iv) to Section 16 of Chapter V of the BOX Rules and to amend Paragraph (i) of Section 18 of Chapter V of the BOX rules to address the treatment of unrelated orders on the opposite side of a PIP Order, as described above. BSE also proposes to eliminate the term ''executable'' from Paragraph (i) of Section 18 of Chapter V of the BOX rules because this term is not clearly defined. BSE proposes to specify when a Market Order (or BOX-Top Order) would immediately execute against a PIP Order, or cause the PIP to prematurely terminate.[9]

Paragraph (b) of Section 16 of Chapter V of the BOX Rules describes how inbound orders to BOX are filtered to avoid trading-through the NBBO. BOX proposes to add subparagraph (iv) to clarify that at each step in the filtering process, under certain circumstances if an order (including a Market Order) is an unrelated order on the opposite side of a PIP Order, the order will be immediately executed against the PIP Order as described above, and that any remaining quantity will continue in the filtering process as set forth in Paragraph (b) of Section 16 of Chapter V of the BOX Rules.

BSE also proposes to amend Paragraph (e)(iii) of Section 18 of Chapter V of the BOX Rules to specifically exclude unrelated orders that were immediately executed during the interval of a PIP from the list of orders that PIP Orders are matched against at the conclusion of the PIP.

2. Statutory Basis

The Exchange believes that the proposal, as amended, is consistent with the requirements of Section 6(b) of the Act,[10] in general, and Section 6(b)(5) of the Act,[11] in particular, in that the proposal is designed to promote just and equitable principles of trade, to prevent fraudulent and manipulative acts, to remove impediments to and perfect the mechanism of a free and open market and a national market system and, in general, to protect investors and the public interest.

*B. Self-Regulatory Organization's Statement on Burden on Competition*

The Exchange does not believe that the proposed rule change will impose any burden on competition 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 comments on the proposed rule change.

## III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 35 days of the date of publication of this notice in the **Federal Register** or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding, or (ii) as to which the Exchange consents, the Commission will:

(A) By order approve such proposed rule change, or

(B) Institute proceedings to determine whether the proposed rule change should be disapproved.

## IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and

[8] BSE believes these execution prices are consistent with BOX's priority rules. When the best BOX price on the opposite side of the market from the Market Order is equal to the NBBO at the time of execution, executing the Market Order at the NBBO would violate the time priority of the order on the BOX book with the best BOX price.

[9] BSE intends to file a proposal to clarify when Limit Orders would immediately execute against a PIP Order, or cause the PIP to prematurely terminate.

[10] 15 U.S.C. 78f(b).

[11] 15 U.S.C. 78f(b)(5).

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–BSE–2004–51 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–BSE–2004–51. 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 Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-BSE–2004–51 and should be submitted on or before May 19, 2005.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[12]

**Margaret H. McFarland,**

*Deputy Secretary.*

[FR Doc. E5–2044 Filed 4–27–05; 8:45 am]

**BILLING CODE 8010–01–P**

[12] 17 CFR 200.30–3(a)(12).

## SECURITIES AND EXCHANGE COMMISSION

**[Release No. 34–51590; File No. SR–CBOE–2005–10]**

## Self-Regulatory Organizations; Chicago Board Options Exchange, Inc.; Order Approving Proposed Rule Change To Revise Certain Membership Rules Related to the Testing and Orientation Requirements for Nominees of Member Organizations Approved Solely as Clearing Members

April 21, 2005.

On January 25, 2005, the Chicago Board Options Exchange, Inc. (''CBOE'' 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 revise membership rules related to the testing and orientation requirements for certain members and to make other non-substantive changes. The proposed rule change was published for comment in the **Federal Register** on March 17, 2005.[3] The Commission received no comments on the proposal. This order approves the proposed rule change.

Pursuant to the proposed rule change, the Exchange will revise Exchange Rule 3.8(a)(iii) to provide that nominees of a member organization approved solely as a Clearing Member are not required to have an authorized trading function. The effect of the rule change is to eliminate the requirement that nominees of Clearing Members attend the Exchange's Member Orientation Program and pass the Exchange's Trading Member Qualification Exam. Clearing Members who wish to engage in trading activities on the Exchange will still be required to designate a nominee who has an authorized trading function. The proposed rule change also makes certain other technical changes to internal Exchange procedures for categorizing its members.

The Commission finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange and, in particular, the requirements of Section 6(b)(5) of the Act,[4] which requires that the rules of the exchange be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, and in general, to protect investors and the public interest. The Commission finds that removing the requirements that nominees of member organizations approved solely as Clearing Members attend the Exchange's Member Orientation Program and pass the Exchange's Trading Member Qualification Exam is consistent with the requirements of Section 6(b)(5) of the Act because the exemption only applies to the nominees of member organizations that are not engaged with trading with the public.

*It is therefore ordered,* pursuant to Section 19(b)(2) of the Act,[5] that the proposed rule change (SR–CBOE–2005–10) be, and it hereby is, approved.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[6]

**Margaret H. McFarland,**

*Deputy Secretary.*

[FR Doc. E5–2042 Filed 4–27–05; 8:45 am]

**BILLING CODE 8010–01–P**

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 51361 (March 11, 2005), 70 FR 13058.

[4] 15 U.S.C. 78f(b)(5).

[5] 15 U.S.C. 78s(b)(2).

[6] 17 CFR 200.30–3(a)(12).

## SECURITIES AND EXCHANGE COMMISSION

**[Release No. 34–51598; File No. SR–NASD–2004–185]**

## Self-Regulatory Organizations; Notice of Filing of Proposed Rule Change and Amendment Nos. 1 and 2 Thereto by the National Association of Securities Dealers, Inc. To Establish a Unitary Fee Schedule for Distribution of Real Time Data Feed Products Containing Nasdaq Market Center Data

April 21, 2005.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on December 14, 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. On February 17, 2005, Nasdaq filed Amendment No. 1 to the original filing.[3] Nasdaq filed Amendment No. 2 on April 14, 2005.[4] The Commission is publishing this notice to solicit

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] Amendment No. 1 replaced and superseded the original proposed rule change in its entirety.

[4] Amendment No. 2 replaced and superseded the original proposed rule change, as amended.

comments on the proposed rule change, as amended, from interested persons.

## I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

Nasdaq is filing a proposed rule change to modify NASD Rule 7010 to establish a unitary fee schedule for the distribution of Nasdaq Market Center real time data feed products.

The text of the proposed rule change is below.[5] Proposed new language is *italicized*; proposed deletions are in [brackets].[6]

* * * * *

**Rule 7010. System Services**

(a)–(k) No change

(l) Market Data Distributor [or Vendor Annual Administrative] Fee*s*

*(1)* Nasdaq Market Data Distributors [or Vendors] shall be assessed the following annual administrative fee:

| | |
|---|---|
| Delayed distributor | $250[.00] |
| 0–999 real-time terminals | 500[.00] |
| 1,000–4,999 real-time terminals | 1,250[.00] |
| 5,000–9,999 real-time terminals | 2,250[.00] |
| 10,000+ real-time terminals | 3,750[.00] |

The Association may waive all or part of the foregoing charges.

*(2) The charge to be paid by Distributors of the following Nasdaq market center real time data feeds shall be:*

| | Monthly direct access fee | Monthly internal distributor fee | Monthly external distributor fee |
|---|---|---|---|
| Issue Specific Data: | | | |
| Dynamic Intraday | $2,500 | $1,000 | $2,500 |
| Total View | | | |
| Open View | | | |
| Daily | 500 | 0 | 500 |
| MFQS | | | |
| Market Summary Statistics: | | | |
| Intraday | 500 | 50 | 1,500 |
| Real Time Index | | | |

*(3) A ''distributor'' of Nasdaq data is any entity that receives a feed or data file of Nasdaq data directly from Nasdaq or indirectly through another entity and then distributes it either internally (within that entity) or externally (outside that entity). All distributors shall execute a Nasdaq distributor agreement. Nasdaq itself is a vendor of its data feed(s) and has executed a Nasdaq distributor agreement and pays the distributor charge.*

*(4) ''Direct Access'' means a telecommunications interface with Nasdaq for receiving Nasdaq data via a Nasdaq-operated website, system or application, the MCI Financial Extranet, or via an Extranet access provider or other such provider that is fee-liable under Rule 7010(v), but does not include Nasdaq Workstation II/API Service that is fee liable under Rule 7010(f)(1).*

(m)–(p) No Change.

(q) Nasdaq TotalView

(1) TotalView Entitlement. The TotalView entitlement allows a subscriber to see all individual Nasdaq Market Center participant orders and quotes displayed in the system as well as the aggregate size of such orders and quotes at each price level in the execution functionality of the Nasdaq Market Center, including the NQDS feed.

(A) No Change.

[(B) Distributors of individual participant data in the TotalView Entitlement shall pay a charge of $7,500 per month. Distributors of only the aggregate data in the TotalView Entitlement shall pay a charge of $1,000 per month.]

(*B*[C]) 30-Day Free-Trial Offer. Nasdaq shall offer all new individual subscribers and potential new individual subscribers a 30-day waiver of the *user* fees for TotalView. This waiver shall not include the incremental fees assessed for the NQDS-only service, which are $30 for professional users and $9 for non-professional users per month. This fee waiver period shall be applied on a rolling basis, determined by the date on which a new individual subscriber or potential individual subscriber is first entitled by a distributor to receive access to TotalView. A distributor may only provide this waiver to a specific individual subscriber once.

For the period of the offer, the TotalView fee of $[3]*4*0 per professional user and $5 per non-professional user per month shall be waived.

(2) [Definitions.

(A) ]A ''controlled device'' is any device that a distributor of the Nasdaq data entitlement package(s) permits to: (i) access the information in the Nasdaq data entitlement package(s); or (ii) communicate with the distributor so as to cause the distributor to access the information in the Nasdaq data entitlement package(s). If a controlled device is part of an electronic network between computers used for investment, trading or order routing activities, the burden shall be on the distributor to demonstrate that the particular controlled device should not have to pay for an entitlement. For example, in some display systems the distributor gives the end user a choice to see the data or not; a user that chooses not to see it would not be charged. Similarly, in a non-display system, users of controlled devices may have a choice of basic or advanced computerized trading or order routing services, where only the advanced version uses the information. Customers of the basic service then would be excluded from the entitlement requirement.

[(B) A ''distributor'' of a Nasdaq data feed is any firm that receives a Nasdaq data feed directly from Nasdaq or indirectly through another vendor and then distributes it either internally or externally. All distributors shall execute a Nasdaq distributor agreement. Nasdaq itself is a vendor of its data feed(s) and has executed a Nasdaq distributor agreement and pays the distributor charge.]

(3) No Change.

(4) No Change.

(r)–(w) No Change.

* * * * *

[5] With the permission of Nasdaq, the Commission made a typographical, non-substantive correction to the text of the proposed rule change. *See* telephone conversation between Jeff Davis, Associate General Counsel, Nasdaq, and Raymond Lombardo, Attorney, Division of Market Regulation, Commission, April 21, 2005.

[6] The proposed changes are marked from NASD Rule 7010 as it appears in the NASD Manual available at *www.nasd.com*.

**Rule 7030. Special Options**

| | | |
|---|---|---|
| Receive only printer | | $100/month. |
| Local Posting | Permits subscriber to use Nasdaq Level 3 terminals to enter quotations simultaneously into an internal computer system. | $10/month. |
| Dual Keyboard | | $15/month. |
| [Nasdaq Market Index] | [Permits vendor to process Nasdaq Level I and Last Sale data feeds solely for the purpose of supplying subscribers with distribute real-time calculations of the Nasdaq market indexes to all of its subscribers, including those that do not otherwise subscribe to real-time Nasdaq Level 1 or NQDS services.]. | [2,000/month] |
| Non-Continuous Access to Nasdaq Level 1 and Last Sale Information. | Permits vendor to process and distribute Nasdaq Level 1 and Last Sale information to its subscribers on a non-continuous or query-response basis. | $.005/query. |

* * * * *

Rule 7060. Partial Month Charges

*Distributors may elect to have* [T]*t*he charges for the month of commencement or termination of service [will] be *billed on a full month basis or* prorated based on the number of trade days in that month.

* * * * *

Rule 7090. Mutual Fund Quotation Service

(a)–(d) No change.

[(e) Distributors receiving MFQS shall pay a monthly fee of $1,000. For the purposes of this subsection only, the term ''distributor'' shall refer to any firm that receives the MFQS data feed and distributes it to third parties. All such firms must execute a Nasdaq Distributor Agreement.]

* * * * *

**II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change**

In its filing with the Commission, Nasdaq included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. Nasdaq has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

*A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change*

1. Purpose

Nasdaq offers various data products that firms may purchase and redistribute either within their own organizations or to outside parties. Nasdaq assesses ''distributor fees'' that are designed to encourage broad distribution of the data, and allow Nasdaq to recover the relatively high fixed costs associated with supporting connectivity and contractual relationships with distributors. Because the data products and associated fees were established over many years, the method of calculating such fees must be updated. Nasdaq is proposing to establish a revised monthly distributor pricing structure for its real time data feed products that it believes will allocate equitably data fees across the customer base of data distributors and consumers of Nasdaq market data.

Specifically, the current proposal would establish a distributor fee pricing structure for four real time data feed products: TotalView, OpenView, Mutual Fund Quotation Service (''MFQS''), and Real Time Index. The proposed fees will be assessed to distributors of these real time data feed products, those vendors that receive the real time data feeds that can be re-transmitted in an uncontrolled format. The distributor fees do not apply to Nasdaq's web-based historical data products, which are governed by NASD Rule 7010(p), and they do not apply to data feeds that are produced pursuant to the national market system plan governing Nasdaq stocks (''Nasdaq UTP Plan''). The proposed distributor pricing is also distinct from any per display device or per user population fees for data products such as TotalView.

The proposed pricing structure is comprised of two components for each Nasdaq real time data feed product: (1) a Direct Access Fee, and (2) either an Internal Distribution Fee or an External Distribution Fee. The Direct Access Fee will apply to any organization that receives a real time data product directly from Nasdaq via a data feed. Distributors receiving Nasdaq real time data indirectly (*i.e.,* via re-transmission from another entity) are not liable for the Direct Access Fee. This fee allows Nasdaq to recover the fixed costs of establishing and maintaining relationships with direct access distributors.

The Internal Distribution Fee will apply to any organization that receives a real time data feed product (either directly from Nasdaq or through a vendor) and distributes the data solely within its own organization. The External Distribution Fee will apply to any organization that receives a real time data feed product (either directly from Nasdaq or through a vendor) and distributes the data outside its own organization. The External Distribution Fee is higher than the Internal Distribution Fee because external distributors typically have broader distribution of the data than internal distributors. An organization that receives real time data directly from Nasdaq will pay the Direct Access Fee plus the higher of either the Internal Distribution or External Distribution Fee but not both. An organization that only receives real time data feeds indirectly and distributes it within its organization will pay the Internal Distribution Fee; an organization that receives data indirectly and distributes it outside its organization will pay the External Distribution Fee, and an organization that receives real time data feeds indirectly and distributes it both internally and externally will pay the External Distribution Fee.

Nasdaq real time data feed products that are available for distribution would be divided into two categories and each will have a Direct Access Fee, Internal Distribution Fee, and External Distribution Fee assigned. Nasdaq Total View, OpenView, and MFQS will be labeled as ''Issuer Specific Data'' and Nasdaq Real Time Index will be labeled as ''Market Summary Statistics.'' Currently, there is no monthly distribution fee for OpenView and the monthly distribution fee for Nasdaq TotalView (set forth at Rule 7010(q)) is based on whether the data distributor receives the TotalView data in an aggregate or detailed form. The monthly fee for TotalView data in aggregate form is $1,000 per distributor and in detailed form is $7,500 per distributor. Under the proposed fee structure, TotalView and OpenView, whether in aggregate or detailed form, will be labeled as ''Issue Specific Data-Dynamic Intraday'' data for which the proposed monthly fees are $2,500 for Direct Access, $1,000 for Internal Distribution, and $2,500 for

External Distribution.[7] Organizations that currently purchase detailed TotalView information, particularly internal distributors and non-direct connection recipients, will pay less in the future; organizations that currently purchase aggregate TotalView data, particularly those that access the data directly, will pay higher fees.

The current monthly fee for distribution of the MFQS is $1,000 for each external distributor. Under the new fee structure, MFQS data will be labeled as ''Issue Specific Data—Daily'' data for which the proposed monthly fees are $500 for Direct Access, $500 for External Distribution, and no charge for Internal Distribution. The proposed pricing will benefit external distributors that do not take their data directly from Nasdaq. Organizations that take their data directly from Nasdaq but only distribute it internally will pay the Direct Access Fee.

Under the current monthly fee structure set forth in NASD Rule 7030, the fee for Real-Time Index data is $2,000 for external distributors. Under the proposed fee structure, Real-Time Index data will be labeled as ''Market Summary Statistics—Intraday.'' The proposed monthly fees for Market Summary Statistics will involve a Direct Access fee of $500, an Internal Distribution Fee of $50, and an External Distribution fee of $1,500. The proposed pricing will decrease the costs of non-direct connection external distributors, but increase them for organizations that distribute the data internally.

Nasdaq is also proposing a more flexible policy for distributor reporting of, and payment for, market data usage. NASD Rule 7060 currently provides that such reporting be based on a pro-rated accounting of the specific installation and termination dates for service. Because some data distributors prefer to report data usage on a ''full-month'' basis, Nasdaq proposes to offer its market data distributors the option of reporting and paying based on either a pro-rated or full-month basis. The selection of pro-rated or full-month reporting will be the business decision of each market data distributor based on its needs and the needs of its customers.

[7] Nasdaq believes that because OpenView provides the same depth and scope of information for exchange-listed securities as TotalView does for Nasdaq-listed securities, and entails similar costs, it is appropriate to put into place the same distribution fee structure for OpenView at this time. Telephone conversation between Bill O'Brien, Senior Vice President, Market Data Distribution, Nasdaq, and Ira Brandriss, Assistant Director, Division of Market Regulation, Commission, April 21, 2005.

2. Statutory Basis

Nasdaq believes that the proposed rule change is consistent with the provisions of Section 15A of the Act,[8] in general and with Section 15A(b)(5) of the Act,[9] in particular, in that the revised and updated fee schedule provides for the equitable allocation of reasonable charges among the persons distributing and purchasing Nasdaq real time market center data. The proposed pricing structure will enable Nasdaq to respond more rapidly to customer requests for additional or varied dissemination of information. Nasdaq believes that encouraging the redistribution of the Nasdaq real time market center data will improve transparency and thereby benefit the investing public.

*B. Self-Regulatory Organization's Statement on Burden on Competition*

Nasdaq 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

Within 35 days of the date of publication of this notice in the **Federal Register** or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which Nasdaq consents, the Commission will:

(a) By order approve such proposed rule change; or

(b) Institute proceedings to determine whether the proposed rule change should be disapproved.

## IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change, as amended, is consistent with the Act. 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

[8] 15 U.S.C. 78o–3.

[9] 15 U.S.C. 78o–3(b)(5).

- Send an e-mail to *rule-comments@sec.gov.* Please include File Number SR–NASD–2004–185 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–2004–185. 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 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–2004–185 and should be submitted on or before May 19, 2005.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[10]

**Margaret H. McFarland,**

*Deputy Secretary.*

[FR Doc. E5–2041 Filed 4–27–05; 8:45 am]

**BILLING CODE 8010–01–P**

[10] 17 CFR 200.30–3(a)(12).

## SECURITIES AND EXCHANGE COMMISSION

**[Release No. 34–51599; File No. SR–NASD–2005–048]**

## Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change by the National Association of Securities Dealers, Inc. To Modify Pricing for NASD Members Using Nasdaq's Brut Facility

April 22, 2005.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'')[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on April 8, 2005, 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)[3] of the Act and Rule 19b–4(f)(2) thereunder,[4] which renders the proposal effective upon filing with the Commission. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

### I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

Nasdaq proposes to modify the pricing for NASD members using Nasdaq's Brut Facility (''Brut''). Nasdaq states that it will implement the proposed rule change on April 11, 2005. The text of the proposed rule change is available on the NASD's Web site (*http://www.nasd.com*), at the NASD's Office of the Secretary, and at the Commission's Public Reference Room.

### II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, Nasdaq included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. Nasdaq has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

*A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change*

1. Purpose

Nasdaq's proposed rule change contains two modifications to the fees applicable to transactions in exchange-listed securities.

Nasdaq currently charges a fee of $0.004 per share executed with respect to any order to buy or sell exchange-listed securities that is routed by Brut to an exchange using such exchange's proprietary order delivery system (such as the New York Stock Exchange's (''NYSE'') SuperDOT system). This proposed rule change would reduce this fee for some orders and eliminate it entirely for others.

Under the proposal, the fee for orders to buy or sell exchange-listed securities (assuming such securities are subject to the Consolidated Quotations Service and Consolidated Tape Association Plans and are not Exchange Traded Funds listed on the American Stock Exchange) that are routed by Brut to an exchange using the exchange's proprietary order delivery system would be reduced to $0.0004 per share executed. This fee would only be charged, however, if the orders to which it otherwise applies are routed outside Brut and the Nasdaq Market Center (''NMC'') without first attempting to execute within Brut or the NMC. If an order to which this fee would otherwise apply first attempts to execute against the book maintained by Brut or the NMC, then this fee would no longer be applicable.

By lowering (and eliminating in many cases) the routing fees for certain orders for exchange-listed securities received by Brut, Nasdaq states that it seeks to continue to improve Brut's competitiveness in attracting buy and sell orders for exchange-listed securities. Nasdaq believes that its participants would benefit from the increased liquidity in exchange-listed securities that the proposal is designed to stimulate. Furthermore, Nasdaq states that all investors would benefit from increased competition in this area. Finally, Nasdaq believes that the distinction for fee purposes between orders that check the Brut (or NMC) book before routing and those that are designated for routing regardless of available prices in such book would encourage orders to check the Brut book, which it believes would benefit both the particular investor (who, as a result, may find a better execution) and the market as a whole.

At the same time, the proposed rule change seeks to establish a new fee designed to recover the commissions billed by NYSE specialists to Brut for certain types of limit orders. According to Nasdaq, generally, NYSE specialists charge Brut for executions of limit orders that remained unexecuted on the specialists' books for more than 5 minutes. While the specialists' fee schedules vary, Nasdaq states that the proposed Brut fee of $0.009 per share is generally designed to recover for Brut some of the associated cost.[5]

The new fee would apply when a limit order is delivered to the NYSE via the NYSE's proprietary order delivery system and the time to execute such an order exceeds five minutes (measured as the difference between the time of the NYSE's electronic acknowledgment of the order and the time of execution). The new fee would not apply, however, to day orders executed in the specialists' opening and to good-till-cancelled orders if executed in the opening on the day when they were entered. The new fee would also not apply to any on-close orders or market orders.

This filing applies only to fees charged to NASD members. Nasdaq has submitted a separate filing to make the proposed rule changes contained in this filing applicable to non-members.[6]

2. Statutory Basis

Nasdaq believes that the proposed rule change is consistent with the provisions of Section 15A of the Act,[7] in general, and with Section 15A(b)(5) of the Act,[8] in particular, in that the proposed rule change 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.

*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

[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).

[5] Such orders could also incur the $0.0004 per share fee discussed above if they are routed outside Brut and the NMC without first attempting to execute within Brut or the NMC. Telephone conversation between Alex Kogan, Associate General Counsel, Nasdaq, John Roeser, Assistant Director, Division of Market Regulation (''Division''), Commission, and David Liu, Attorney, Division, Commission, on April 20, 2005.

[6] *See* SR–NASD–2005–049.

[7] 15 U.S.C. 78*o*–3.

[8] 15 U.S.C. 78*o*–3(b)(5).

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*

Nasdaq states that written comments were neither solicited nor received.

**III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action**

The forgoing rule change is subject to Section 19(b)(3)(A)(ii) of the Act[9] and subparagraph (f)(2) of Rule 19b–4[10] thereunder because it establishes or changes a due, fee, or other charge imposed by the self-regulatory organization. Accordingly, the proposal is effective upon Commission receipt of the filing. 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.[11]

**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–NASD–2005–048 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–2005–048. 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 the 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–2005–048 and should be submitted on or before May 19, 2005.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[12]

**Margaret H. McFarland,**

*Deputy Secretary.*

[FR Doc. E5–2043 Filed 4–27–05; 8:45 am]

BILLING CODE 8010–01–P

[9] 15 U.S.C. 78s(b)(3)(A)(ii).

[10] 17 CFR 240.19b–4(f)(2).

[11] 15 U.S.C. 78s(b)(3)(C).

[12] 17 CFR 200.30–3(a)(12).

## SECURITIES AND EXCHANGE COMMISSION

**[Release No. 34–51600; File No. SR–NSCC–2005–01]**

## Self-Regulatory Organizations; National Securities Clearing Corporation; Order Granting Approval of a Proposed Rule Change To Amend Its Operational Capability Requirement for Membership

April 22, 2005.

**I. Introduction**

On January 19, 2005, the National Securities Clearing Corporation (''NSCC'') filed with the Securities and Exchange Commission (''Commission'') proposed rule change File No. SR–NSCC–2005–01 pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'').[1] Notice of the proposed rule change was published in the **Federal Register** on March 17, 2005.[2] No comment letters were received. For the reasons discussed below, the Commission is now granting approval of the proposed rule change.

**II. Description**

The proposed rule change amends Section I.A.3. of Addendum B, Section I.A.3. of Addendum I, Section I.3. of Addendum Q, and Section I.2. of Addendum R of NSCC's Rules and Procedures concerning the operational capability requirements of applicants for membership. NSCC's current rules specify that an applicant must ''have adequate personnel capable of handling transactions with the Corporation [NSCC] and adequate physical facilities, books and records and procedures to fulfill anticipated commitments to and to meet the operational requirements of the Corporation [NSCC] * * *.'' NSCC believes that these provisions may be interpreted to impose upon NSCC an obligation to make determinations with respect to these particular aspects of applicants' and members' operational capability. NSCC ordinarily leaves such determinations to the applicants' and members' designated examining authorities. The operational capability that NSCC ordinarily focused upon during the application process is the applicant's ability to appropriately communicate with NSCC; that is, the applicant's ability to input data to NSCC and to receive output from NSCC on a timely and accurate basis.

NSCC believes that it is appropriate to clarify these sections of its Rules and Procedures so that they reflect the practices of NSCC and so that there will be no misunderstandings as to their meaning. The text of the above-referenced sections of NSCC's Rules and Procedures will be amended to delete references to adequate personnel and adequate facilities, books, and records that are extraneous to the ability of applicants to communicate with NSCC. In place, these sections will state that an applicant must ''be able to satisfactorily communicate with the Corporation [NSCC] * * *.'' NSCC will continue to retain the right to examine any aspect of an applicant's or member's business pursuant to the provisions of NSCC Rule 15.

**III. Discussion**

Section 17A(b)(3)(F) of the Act requires among other things that the rules of a clearing agency be designed to assure the safeguarding of securities and funds in its custody or control or for which it is responsible.[3] The Commission finds that NSCC's proposed rule change is consistent with this requirement because it eliminates a

[1] 15 U.S.C. 78s(b)(1).

[2] Securities Exchange Act Release No. 51363 (March 11, 2005), 70 FR 13060.

[3] 15 U.S.C. 78q–1(b)(3)(F).

potential misunderstanding with regard to its membership requirements and therefore helps NSCC better protect itself and its members from undue risk.

## IV. Conclusion

On the basis of the foregoing, the Commission finds that the proposed rule change is consistent with the requirements of the Act and in particular Section 17A of the Act and the rules and regulations thereunder.

*It is therefore ordered,* pursuant to Section 19(b)(2) of the Act,[4] that the proposed rule change (File No. SR–NSCC–2005–01) be and hereby is approved.

For the Commission by the Division of Market Regulation, pursuant to delegated authority.[5]

**Margaret H. McFarland,**

*Deputy Secretary.*

[FR Doc. E5–2003 Filed 4–27–05; 8:45 am]

**BILLING CODE 8010–01–P**

[4] 15 U.S.C. 78s(b)(2).

[5] 17 CFR 200.30–3(a)(12).

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## SECURITIES AND EXCHANGE COMMISSION

**[Release No. 34–51593; File Nos. SR–NYSE–2004–24; SR–NASD–2004–141]**

## Self-Regulatory Organizations; Order Approving Proposed Rule Changes by the New York Stock Exchange, Inc., and the National Association of Securities Dealers, Inc., To Prohibit Participation by a Research Analyst in a Road Show Related to an Investment Banking Services Transaction and To Require Certain Communications About an Investment Banking Services Transaction To Be Fair, Balanced and Not Misleading

April 21, 2005.

## I. Introduction

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Exchange Act'' or ''Act'')[1] and Rule 19b–4 thereunder,[2] on April 22, 2004 the New York Stock Exchange (''NYSE'' or the ''Exchange''), and on September 20, 2004, the National Association of Securities Dealers, Inc. (''NASD''), filed with the Securities and Exchange Commission (''SEC'' or ''Commission'') proposed rule changes including proposals to prohibit participation by a research analyst in a road show related to an investment banking services transaction and to require certain communications about an investment banking services transaction to be fair, balanced and not misleading. On February 11, 2005, NYSE filed Amendment No. 1 to its proposed rule change, which replaced the original rule filing in its entirety. On February 4, 2005, NASD filed Amendment No. 1 to its proposed rule change, which replaced the original rule filing in its entirety.[3] The proposed rule changes, as amended, were published for comment in the **Federal Register** on March 17, 2005.[4] The comment period expired on April 7, 2005. The Commission received one comment letter in response to the Notice, which supported the proposed rule changes.[5] This order approves the proposed rule changes, as amended.

## II. Background

On May 10, 2002, the Commission approved rule changes filed by the NYSE and NASD (the ''SROs'') governing research analyst conflicts of interest.[6] Those rules took considerable steps towards promoting greater independence of research analysts and significantly enhanced the disclosure of actual and potential conflicts of interest to investors.

On July 30, 2002, President Bush signed into law the Sarbanes-Oxley Act of 2002 (''SOA''), which required, among other things, that the Commission, or upon authorization and direction of the Commission, a registered securities association or national securities exchange, adopt rules governing analyst conflicts.[7] Certain of the SOA's mandates were satisfied by NASD and NYSE rule provisions existing at the time of the enactment of the SOA. Other of the SOA's mandates necessitated amendments to the then existing rules. Thus, the Commission directed the NASD and NYSE to amend their analyst conflicts rules to fulfill the mandates of the SOA.[8] The Commission approved these rules on July 29, 2003.[9]

In the order approving the Round I rules, the Commission directed the SROs to prepare a report on the operation and effectiveness of the rules by November, 2003. The Commission later postponed requiring the SROs to submit the report in light of the SOA and the approval of the Round II rules.[10] The Round II rules have now been fully implemented since April 26, 2004 and the SROs have been instructed to jointly submit a report on the operation and effectiveness of all of the analyst rules by November 4, 2005.[11] It is possible that the report may indicate additional areas for rulemaking.

On April 28, 2003, the Commission, along with other regulators, announced a global settlement of enforcement actions against certain investment firms that followed joint investigations by regulators of allegations of undue influence of investment banking interests on securities research at brokerage firms.[12] The Global Settlement was approved by the court on October 31, 2003. On September 24, 2004, the court approved amendments to the Global Settlement, which, among other things, amended the Addendum to provide additional, more specific guidelines relating to analyst communications with members of a settling firm's sales force and prospective investors in the context of certain investment banking transactions, and were intended to avoid research analysts becoming, or being perceived as, part of the investment banking team or otherwise promoting a particular transaction.[13]

### *A. Current NYSE and NASD Rules Governing Disclosure of Conflicts of Interest*

The SROs' research analyst conflicts of interest rules were designed to foster greater public confidence in securities research and to protect the objectivity and independence of securities analysts.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] On March 9, 2005, NASD filed with the Commission Amendment No. 2 to its proposed rule change, which clarified that Amendment No. 1 replaced the original filing in its entirety.

[4] *See* Securities Exchange Act Release No. 51358 (March 10, 2005), 70 FR 13061 (the ''Notice'').

[5] *See* Letter to Jonathan G. Katz, Secretary, Commission, from the Ohio Public Employees Retirement System (April 1, 2005).

[6] *See* Securities Exchange Act Release No. 45908, 67 FR 34968 (May 16, 2002) (the ''Round I'' rules).

[7] *See* Pub. L. 107–204, 116 Stat. 745 (2002). The SOA amended the Exchange Act by adding Section 15D. *See* 15 U.S.C. 78a *et seq.*; 15 U.S.C. 78*o*–6.

[8] *See* Letter from Annette Nazareth, Director, Division of Market Regulation, Commission, to Mary Schapiro, Vice Chairman and President, Regulatory Policy and Oversight, NASD, and Richard Grasso, Chairman and Chief Executive Officer, NYSE (March 13, 2003).

[9] *See* Securities Exchange Act Release No. 48252, 68 FR 45875 (August 4, 2003) (the ''Round II'' rules).

[10] *Id.*

[11] *See* Letter from Annette Nazareth, Director, Division of Market Regulation, Commission, to Mary Schapiro, Vice Chairman and President, Regulatory Policy and Oversight, NASD, and Richard Ketchum, Chief Regulatory Officer, NYSE (April 8, 2005).

[12] The terms of the settlement are available at *http://www.sec.gov/litigation/litreleases/finaljudgadda.pdf* (''Global Settlement'').

[13] The SROs note that the proposed rule changes are similar in certain aspects to provisions found in the Global Settlement. The SROs have stated that the proposed rule changes have not been proposed for the purpose of conforming to the Global Settlement, or addressing differences between the Global Settlement and SRO rules. Rather, the SROs believe that the proposed rules are appropriate in that they would facilitate the goal of more objective and reliable research.

The rules contain a number of elements, including:

- Structural reforms to increase analyst independence, including a prohibition on investment banking personnel supervising analysts or approving research reports and limiting the compensatory evaluation of analysts to officials employed by the broker or dealer who are not engaged in investment banking activities;
- A prohibition on tying analyst compensation to a specific investment banking services transaction;
- Restrictions on personal trading by analysts;
- A prohibition on retaliation by members and employees of members involved with investment banking activities against analysts as a result of an adverse, negative, or otherwise unfavorable research report or public appearance; and
- A prohibition on offering favorable research to induce investment banking business.

*B. Proposed Changes to NYSE and NASD Rules*

The proposed SRO rule changes further define the types of communications that are inappropriate for research analysts and investment banking personnel. Thus the rules further insulate analysts from investment banking pressure, thereby promoting the integrity of, not only research reports and public appearances, but all communications by research analysts to customers as well as internal personnel. The Commission provides here a general overview of the proposed rule changes.

First, the proposals would prohibit a research analyst from directly or indirectly participating in a road show related to an investment banking services transaction, or otherwise communicating with customers in the presence of investment banking personnel or company management about an investment banking services transaction. Therefore, such ''three-way'' communications between research, customers and banking, as well as those involving research, customers and issuers, are prohibited.

Second, the proposals would prohibit investment banking personnel from directly or indirectly directing a research analyst to engage in sales and marketing efforts or other communications with a current or prospective customer related to an investment banking services transaction.

Finally, the proposals would require that research analyst written and oral communications relating to an investment banking services transaction with a current or prospective customer or with internal personnel, must be fair, balanced and not misleading, taking into consideration the overall context in which the communication is made. Thus, the proposals preserve the ability of research analysts to educate investors and internal personnel about investment banking services transactions, provided such communications are fair, balanced and not misleading, considering the overall context in which the communication is made.

**III. Discussion**

The Commission received one comment letter on the proposed rule changes, which supported the approval of the proposals. After careful review, the Commission finds, as discussed more fully below, that the proposed rule changes, as amended, are consistent with the requirements of the Exchange Act and the rules and regulations thereunder applicable to the NYSE and NASD.[14] In particular, the Commission believes that the proposals are consistent with Sections 6(b)(5) and 6(b)(8) of the Exchange Act,[15] and Sections 15A(b)(6) and 15A(b)(9) of the Exchange Act.[16]

Section 6(b)(5) requires, among other things, that the rules of an exchange be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of free trade, to remove impediments to and perfect the mechanism of a free and open market, and to protect investors and the public interest. Section 6(b)(5) also requires that the rules of an exchange not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers. Section 6(b)(8) of the Exchange Act prohibits the rules of an exchange from imposing any burden on competition not necessary or appropriate in furtherance of the purposes of the statute.

Section 15A(b)(6) requires that the rules of a registered national securities association be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest.

Section 15A(b)(9) requires that the rules of an association not impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Exchange Act.

Section 3(f) of the Exchange Act directs the Commission to consider, in addition to the protection of investors, whether approval of a rule change will promote efficiency, competition, and capital formation.[17] In approving the proposed rule changes, the Commission has considered their impact on efficiency, competition, and capital formation.

The Commission believes the rule changes, as amended, promote the independence of research analysts and the objectivity of the views analysts communicate to customers and internal personnel.

*A. Prohibition on Research Analyst Participation in Road Shows and Certain Three-Way Communications [NASD Rule 2711(c)(5) and NYSE Rule 472(b)(6)(i)]*

The proposals prohibit research analysts from participating in road shows related to investment banking services transactions, or otherwise communicating with customers in the presence of investment banking personnel or company management about an investment banking services transaction.

NASD believes that by prohibiting research analyst participation in road shows, the proposed rule change will further reduce the pressure on research analysts to give an overly optimistic assessment of a particular transaction. Further, NYSE believes that the proposed provisions to prohibit analysts from engaging in any communication regarding investment banking services with current or prospective customers in the presence of investment banking personnel or company management also will reduce the pressure on research analysts to give overly optimistic assessments of investment banking services transactions.

We believe that it is appropriate that the SROs prohibit research analysts from participating in road shows, as well as from engaging in communications with investors in the presence of investment banking personnel or issuer management. In addition, we believe that the prohibition on research analyst communications with customers in the presence of investment banking or company management will guard against research analysts being, or being perceived as, part of the sales and marketing team for

[14] *See* 15 U.S.C. 78c(f).

[15] 15 U.S.C. 78f(b)(5) and (b)(8).

[16] 15 U.S.C. 78*o*–3(b)(6) and (b)(9).

[17] 15 U.S.C. 78c(f).

a transaction, rather than as independent sources of information.

We also note that the Round II rules included a prohibition on research analyst involvement in efforts to solicit investment banking, which were designed to further the goals of research objectivity and investor confidence by eliminating all participation by research analysts in solicitation efforts, which could suggest a promise of favorable research in exchange for underwriting business.

Likewise, the proposed prohibition on research analyst participation in road shows would seek to provide for greater analyst objectivity and guard against analysts becoming part of the investment banking team for a transaction. The Commission finds that the rule changes to prohibit research analyst involvement in road shows related to investment banking transactions and three way communications between research, customers, and issuers or investment banking personnel, are consistent with the Exchange Act, particularly Sections 6(b)(5), 6(b)(8), 15A(b)(6), and 15A(b)(9).

*B. Investment Banking Directed Communications With Customers [NASD Rule 2711(c)(6) and NYSE Rule 472(b)(6)(ii)]*

The proposals would prohibit investment banking department personnel from directing a research analyst to engage in sales or marketing efforts and any other communication with a current or prospective customer about an investment banking services transaction.

NASD believes this proposal is important to eliminate attempts by investment banking personnel to pressure a research analyst to engage in communications related to an investment banking services transaction, thereby further insulating research analysts from influences that could affect their objectivity. Further, the NYSE believes the proposal preserves the traditional function of research analysts (providing analysis of securities and transactions), while placing further limitations on the ability of investment banking personnel to influence and/or compromise the objectivity of research analyst analyses. The NYSE believes that it is important for investor protection that research analyst views be objective, unbiased, and not the result of pressure on an analyst.

The Commission believes it is appropriate for the SROs to prohibit investment banking personnel from directing research analysts to engage in sales and marketing efforts or to engage in customer communications relating to an investment banking services transaction. We believe that these provisions will further insulate research analysts from investment baking pressure by cutting off the ability of investment banking personnel to directly, or indirectly (*e.g.* through other parties), direct research analysts to engage in sales or marketing efforts, or otherwise communicate with customers about a transaction. Thus, we believe the proposals would promote analyst objectivity and independence and find that the proposed rules are consistent with the Exchange Act, particularly Sections 6(b)(5), 6(b)(8), 15A(b)(6), and 15A(b)(9).

*C. Fair and Balanced Requirement [NASD Rule 2711(c)(7) and NYSE Rule 472(b)(6)(iii)]*

The proposed rule changes require that all research analyst communications (written and oral) with current or prospective customers or with internal personnel relating to an investment banking services transaction, must be fair, balanced and not misleading, taking into consideration the overall context in which the communications are made.

NASD believes that the primary role of a research analyst is to provide unbiased analysis of companies and transactions and to value securities accurately. Therefore, NASD and NYSE note that the proposed rule changes permit research analysts to educate investors and member personnel about investment banking services transactions, so long as such permissible communications to investors and internal personnel are fair, balanced and not misleading, taking into account the overall context in which such communications are made. Thus, NYSE notes that, while the proposed rule should insulate research analysts from potential undue influence of investment bankers and company management, it would not interfere with legitimate activities.

The Commission believes that the SRO proposals are designed to promote the objectivity and independence of research analysts by explicitly requiring that all research analyst written and oral communications with customers, as well as with internal firm personnel, must be fair, balanced and not misleading, considering the context of the communications. These requirements build on existing SRO standards for research analyst communications with the public and provide additional safeguards for research communications with personnel within the broker-dealer.[18] The Commission further believes that the SROs' determination to require that such communications be fair, balanced and not misleading is consistent with Sections 6(b)(5), 6(b)(8), 15A(b)(6) and 15A(b)(9).

*D. Implementation*

The SROs suggest that the proposed rule changes become effective 45 days after approval by the Commission and the Commission believes that this is reasonable.

**IV. Conclusion**

*It is therefore ordered,* pursuant to Section 19(b)(2) of the Exchange Act,[19] that the proposed rule changes (SR–NYSE–2004–24; SR–NASD 2004–141), as amended, are approved.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[20]

**Margaret H. McFarland,**

*Deputy Secretary.*

[FR Doc. E5–2002 Filed 4–27–05; 8:45 am]

**BILLING CODE 8010–01–P**

[18] See NASD Rule 2210 (''Communications with the Public'') and NYSE Rule 472 (''Communications with the Public'').

[19] 15 U.S.C. 78s(b)(2).

[20] 17 CFR 200.30–3(a)(12).

## OFFICE OF SPECIAL COUNSEL

### Agency Information Collection Activities; Request for Comment

**AGENCY:** Office of Special Counsel.

**ACTION:** Notice.

**SUMMARY:** In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35), and implementing regulations at 5 CFR part 1320, the U.S. Office of Special Counsel (OSC), plans to request approval from the Office of Management and Budget (OMB) for use of a previously approved information collection consisting of a customer survey form.

OSC is required by law to conduct an annual survey of those who seek its assistance. The information collection is used to carry out that mandate. The current OMB approval for this collection of information expires on July 31, 2005.

Current and former Federal employees, employee representatives, other Federal agencies, state and local government employees, and the general public are invited to comment on this information collection. Comments are invited on: (a) whether the proposed collection ofinformation is necessary for the proper performance of OSC

functions, including whether the information will have practical utility; (b) the accuracy of OSC's estimate of the burden of the proposed collections of information; (c) ways to enhance the quality, utility, and clarity ofthe 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.

**DATES:** Comments should be received by June 27, 2005.

**ADDRESSES:** Roderick Anderson, Director of Management and Budget, U.S. Office of Special Counsel, 1730 M Street, N.W., Suite 218, Washington, DC 20036–4505.

**FOR FURTHER INFORMATION CONTACT:** Roderick Anderson, Director of Management and Budget at the address shown above; by facsimile at (202) 254–3715. The survey form for the collection of information is available for review by calling OSC, or on OSC's Web site, at http://www.osc.gov/reading.htm.

**SUPPLEMENTARY INFORMATION:** OSC is an independent agency responsible for, among other things, (1) investigation of allegations of prohibited personnel practices defined by law at 5 U.S.C. 2302(b), protection of whistleblowers, and certain other illegal employment practices under titles 5 and 38 of the U.S. Code, affecting current or former Federal employees or applicants for employment, and covered state and local government employees; and (2) the interpretation and enforcement of Hatch Act provisions on political activity in chapters 15 and 73 of title 5 of the U.S. Code.

OSC is required to conduct an annual survey of individuals who seek its assistance. Section 13 of Public Law 103–424 (1994), codified at 5 U.S.C. 1212 note, states, in part: ''[T]he survey shall--(1) determine if the individual seeking assistance was fully apprised of their rights; (2) determine whether the individual was successful either at the Office of Special Counsel or the Merit Systems Protection Board; and (3) determine if the individual, whether successful or not, was satisfied with the treatment received from the Office of Special Counsel.'' The same section also provides that survey results are to be published in OSC's annual report to Congress. Copies of prior years' annual reports are available on OSC's Web site, at http://www.osc.gov/library.htm (at the ''Annual Reports to Congress'' link), or by calling OSC at (202) 254–3600.

OSC plans to enhance the effectiveness of this survey by revising the questions asked, adding a section dealing with the Uniform Services Employment and Reemployment Rights Act (USERRA), limiting questions asked to only those areas where an individual had rights before the MSPB under 5 U.S.C. 1212, and by converting to an online survey. The form has been edited to make the survey clearer (e.g., by re-ordering questions and possible answers). The estimated response time has been reduced due to the survey's automation.

*Title of Collection:* OSC Survey--Prohibited Personnel Practice or Other Prohibited Activity (Agency Form Number OSC–48a; OMB Control Number 3255–0003)

*Type of Information Collection Request:* Approval of a previously approved collection of information that expires on July 31, 2005, with revisions.

*Affected public:* Current and former Federal employees, applicants for Federal employment, state and local government employees, and their representatives, and the general public.

*Respondent's Obligation:* Voluntary.

*Estimated Annual Number of Respondents:* 600.

*Frequency:* Annual.

*Estimated Average Amount of Time for a Person to Respond:* 12 minutes.

*Estimated Annual Burden:* 120 hours.

*Abstract:* This form is used to survey current and former Federal employees and applicants for Federal employment who have submitted allegations of possible prohibited personnel practices or other prohibited activity for investigation and possible prosecution by OSC, and whose matter has been closed or otherwise resolved during the prior fiscal year, on their experience at OSC. Specifically, the survey asks questions relating to whether the respondent was: (1) apprised of his or her rights; (2) successful at the OSC or at the Merit Systems Protection Board; and (3) satisfied with the treatment received at the OSC.

Dated: April 20, 2005.

**Scott J. Bloch,**

*Special Counsel.*

[FR Doc. 05–8532 Filed 4–27–05; 8:45 am]

**BILLING CODE 7405–01–S**

## DEPARTMENT OF THE TREASURY

### Internal Revenue Service

### Proposed Collection; Comment Request for Form 2678

**AGENCY:** Internal Revenue Service (IRS), Treasury.

**ACTION:** Notice and request for comments.

**SUMMARY:** The Department of the Treasury, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995, Pub. L. 104–13 (44 U.S.C. 3506(c)(2)(A)). Currently, the IRS is soliciting comments concerning Form 2678, Employer Appointment of Agent.

**DATES:** Written comments should be received on or before June 27, 2005 to be assured of consideration.

**ADDRESSES:** Direct all written comments to Glenn Kirkland, Internal Revenue Service, room 6512, 1111 Constitution Avenue, NW., Washington, DC 20224.

**FOR FURTHER INFORMATION CONTACT:** Requests for additional information or copies of the form and instructions should be directed to Larnice Mack at Internal Revenue Service, room 6512, 1111 Constitution Avenue NW., Washington, DC 20224, or at (202) 622–3179, or through the Internet at *(Larnice.Mack@irs.gov).*

**SUPPLEMENTARY INFORMATION:**

*Title:* Employer Appointment of Agent.

*OMB Number:* 1545–0748.

*Form Number:* 2678.

*Abstract:* Internal Revenue Code section 3504 authorizes a fiduciary, agent or other person to perform acts of an employer for purposes of employment taxes. Form 2678 is used to empower an agent with the responsibility and liability of collecting and paying the employment taxes including backup withholding and filing the appropriate tax return.

*Current Actions:* There are no changes being made to the form at this time.

*Type of Review:* Extension of a currently approved collection.

*Affected Public:* Businesses or other for-profit organizations, not-for-profit institutions, farms and the Federal Government.

*Estimated Number of Respondents:* 95,200.

*Estimated Time Per Respondent:* 3 minutes.

*Estimated Total Annual Burden Hours:* 47,600.

The following paragraph applies to all of the collections of information covered by this notice:

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid OMB control number. Books or records relating to a collection of information must be retained as long

as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

*Request For Comments:* Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval. All comments will become a matter of public record. Comments are invited on: (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Approved: April 20, 2005.

**Glenn Kirkland,**

*IRS Reports Clearance Officer.*

[FR Doc. E5–2001 Filed 4–27–05; 8:45 am]

**BILLING CODE 4830–01–P**

## DEPARTMENT OF THE TREASURY

### Internal Revenue Service

### Open Meeting of the Area 4 Taxpayer Advocacy Panel (Including the States of Illinois, Indiana, Kentucky, Michigan, Ohio, Tennessee, and Wisconsin)

**AGENCY:** Internal Revenue Service (IRS) Treasury.

**ACTION:** Notice.

**SUMMARY:** An open meeting of the Area 4 Taxpayer Advocacy Panel will be conducted (via teleconference). The Taxpayer Advocacy Panel is soliciting public comment, ideas, and suggestions on improving customer service at the Internal Revenue Service.

**DATES:** The meeting will be held Tuesday, May 24, 2005, at 11 a.m., eastern time.

**FOR FURTHER INFORMATION CONTACT:** Mary Ann Delzer at 1–888–912–1227, or (414) 297–1604.

**SUPPLEMENTARY INFORMATION:** Notice is hereby given pursuant to Section 10(a)(2) of the Federal Advisory Committee Act, 5 U.S.C. App. (1988) that a meeting of the Area 4 Taxpayer Advocacy Panel will be held Tuesday, May 24, 2005, at 11 a.m., Eastern time via a telephone conference call. You can submit written comments to the panel by faxing the comments to (414) 297–1623, or by mail to Taxpayer Advocacy Panel, Stop 1006MIL, 310 West Wisconsin Avenue, Milwaukee, WI 53203–2221, or you can contact us at *http://www.improveirs.org.* This meeting is not required to be open to the public, but because we are always interested in community input, we will accept public comments. Please contact Mary Ann Delzer at 1–888–912–1227 or (414) 297–1604 for dial-in information.

The agenda will include the following: Various IRS issues.

Dated: April 20, 2005.

**Martha Curry,**

*Acting Director, Taxpayer Advocacy Panel.*

[FR Doc. E5–2000 Filed 4–27–05; 8:45 am]

**BILLING CODE 4830–01–P**

## DEPARTMENT OF VETERANS AFFAIRS

**[OMB Control No. 2900–0014]**

### Proposed Information Collection Activity: Proposed Collection; Comment Request

**AGENCY:** Veterans Benefits Administration, Department of Veterans Affairs.

**ACTION:** Notice.

**SUMMARY:** The Veterans Benefits Administration (VBA), Department of Veterans Affairs (VA), is announcing an opportunity for public comment on the proposed collection of certain information by the agency. Under the Paperwork Reduction Act (PRA) of 1995, Federal agencies are required to publish notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension of a currently approved collection, and allow 60 days for public comment in response to the notice. This notice solicits comments for information needed to determine to claimants training program attendance.

**DATES:** Written comments and recommendations on the proposed collection of information should be received on or before June 27, 2005.

**ADDRESSES:** Submit written comments on the collection of information to Nancy J. Kessinger, Veterans Benefits Administration (20M35), Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420 or e-mail: *irmnkess@vba.va.gov.* Please refer to ''OMB Control No. 2900–0014'' in any correspondence.

**FOR FURTHER INFORMATION CONTACT:** Nancy J. Kessinger at (202) 273–7079 or FAX (202) 275–5947.

**SUPPLEMENTARY INFORMATION:** Under the PRA of 1995 (Pub. L. 104–13; 44 U.S.C. 3501–3521), Federal agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. This request for comment is being made pursuant to section 3506(c)(2)(A) of the PRA.

With respect to the following collection of information, VBA invites comments on: (1) Whether the proposed collection of information is necessary for the proper performance of VBA's functions, including whether the information will have practical utility; (2) the accuracy of VBA's estimate of the burden of the proposed collection of information; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or the use of other forms of information technology.

*Title:* Authorization and Certification of Entrance or Reentrance into Rehabilitation and Certification of Status, VA Form 28–1905.

*OMB Control Number:* 2900–0014.

*Type of Review:* Extension of a currently approved collection.

*Abstract:* VA case managers use VA Form 28–1905 to identify program participants and provide specific guidelines on the planned program of course to facilities providing education, training, or other rehabilitation services. Facility officials certify that the claimant has enrolled in the planned program of course and submit the form to VA. VA uses the information collected to ensure that claimants do not receive benefits for periods for which they did not participate in any rehabilitation, special restorative or specialized vocational training programs.

*Affected Public:* Not-for-profit institutions, individuals or households, business or other for-profit, farms, Federal government, and State, local or tribal government.

*Estimated Annual Burden:* 6,833 hours.

*Estimated Average Burden Per Respondent:* 5 minutes.

*Frequency of Response:* Twice a year.

*Estimated Number of Respondents:* 41,000.

*Estimated Total Annual Responses:* 82,000.

Dated: April 13, 2005.

By direction of the Secretary:

**Cindy Stewart,**

*Program Analyst, Records Management Service.*

[FR Doc. E5–1996 Filed 4–27–05; 8:45 am]

BILLING CODE 8320–01–P

## DEPARTMENT OF VETERANS AFFAIRS

**[OMB Control No. 2900–0368]**

## Proposed Information Collection Activity: Proposed Collection; Comment Request

**AGENCY:** Veterans Benefits Administration, Department of Veterans Affairs.

**ACTION:** Notice.

**SUMMARY:** The Veterans Benefits Administration (VBA), Department of Veterans Affairs (VA), is announcing an opportunity for public comment on the proposed collection of certain information used by the agency. Under the Paperwork Reduction Act (PRA) of 1995, Federal agencies are required to publish notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension of a currently approved collection, and allow 60 days for public comment in response to the notice. This notice solicits comment on information needed to determine the correct rate of subsistence allowance and wages payable to a trainee in an approved on-the-job training or apprenticeship program.

**DATES:** Written comments and recommendations on the proposed collection of information should be received on or before June 27, 2005.

**ADDRESSES:** Submit written comments on the collection of information to Nancy J. Kessinger, Veterans Benefits Administration (20M35), Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420 or e-mail: *irmnkess@vba.va.gov.* Please refer to ''OMB Control No. 2900–0368'' in any correspondence.

**FOR FURTHER INFORMATION CONTACT:** Nancy J. Kessinger at (202) 273–7079 or FAX (202) 275–5947.

**SUPPLEMENTARY INFORMATION:** Under the PRA of 1995 (Pub. L. 104–13; 44 U.S.C. 3501–3521), Federal agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. This request for comment is being made pursuant to Section 3506(c)(2)(A) of the PRA.

With respect to the following collection of information, VBA invites comments on: (1) Whether the proposed collection of information is necessary for the proper performance of VBA's functions, including whether the information will have practical utility; (2) the accuracy of VBA's estimate of the burden of the proposed collection of information; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or the use of other forms of information technology.

*Title:* Monthly Statement of Wages Paid to Trainee (Chapter 31, Title 38, U.S.C.), VA Form 28–1917.

*OMB Control Number:* 2900–0368.

*Type of Review:* Extension of a currently approved collection.

*Abstract:* Employers providing on-job or apprenticeship training to veterans use VA Form 28–1917 to report each veteran's wages during the preceding month. VA uses the information to determine whether the veteran is receiving the appropriate wage increase and correct rate of subsistence allowance. Employers also use the form to document any training difficulties the veteran may be experiencing making it possible for VA's case manager to intervene to assist the veteran in a timely manner.

*Affected Public:* Business or other for-profit, Individuals or households, Not-for-profit institutions.

*Estimated Annual Burden:* 1,800 hours.

*Estimated Average Burden Per Respondent:* 30 minutes.

*Frequency of Response:* Monthly.

*Estimated Number of Respondents:* 300.

*Estimated Total Annual Responses:* 3,600.

Dated: April 13, 2005.

By direction of the Secretary.

**Cindy Stewart,**

*Program Analyst, Records Management Service.*

[FR Doc. E5–1997 Filed 4–27–05; 8:45 am]

BILLING CODE 8320–01–P

## DEPARTMENT OF VETERANS AFFAIRS

**[OMB Control No. 2900–0621]**

## Agency Information Collection Activities Under OMB Review

**AGENCY:** Veterans Health Administration, Department of Veterans Affairs

**ACTION:** Notice.

**SUMMARY:** In compliance with the Paperwork Reduction Act (PRA) of 1995 (44 U.S.C. 3501–21), this notice announces that the Veterans Health Administration (VHA), Department of Veterans Affairs, has submitted the collection of information abstracted below to the Office of Management and Budget (OMB) for review and comment. The PRA submission describes the nature of the information collection and its expected cost and burden and includes the actual data collection instrument.

**DATES:** Comments must be submitted on or before May 31, 2005.

**FOR FURTHER INFORMATION OR A COPY OF THE SUBMISSION CONTACT:** Denise McLamb, Records Management Service (005E3), Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420, (202) 273–8030, FAX (202) 273–5981 or e-mail: *denise.mclamb@mail.va.gov.* Please refer to ''OMB Control No. 2900–0621.''

Send comments and recommendations concerning any aspect of the information collection to VA's OMB Desk Officer, OMB Human Resources and Housing Branch, New Executive Office Building, Room 10235, Washington, DC 20503 (202) 395–7316. Please refer to ''OMB Control No. 2900–0621'' in any correspondence.

**SUPPLEMENTARY INFORMATION:**

*Title:* National Practitioner Data Bank Regulation.

*OMB Control Number:* 2900–0621.

*Type of Review:* Extension of a currently approved collection.

*Abstract:* The National Practitioner Data Bank, authorized by the Health Care Quality Improvement Act of 1986 and administered by the Department of Health and Human Services, was established for the purpose of collecting and releasing certain information concerning physicians, dentists, and other licensed health care practitioners. The Act requires VA to obtain information from the Data Bank on health care providers who provide or seek to provide health care services at VA facilities and report information regarding malpractice payments and adverse clinical privileges action to the Data Bank.

VA Form 10–0376a is used to collect data to determine healthcare professionals qualifications and suitability for employment in VA's healthcare facilities.

An agency may not conduct or sponsor, and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number. The **Federal Register** Notice with a 60-day comment period

soliciting comments on this collection of information was published on December 1, 2004, at pages 69992–69993.

*Estimated Average Burden Per Respondent:*

a. National Practitioner Data Bank Regulations—5 hours.

b. Credentials Transfer Brief, VA Form 10–0376a—1 hour.

*Frequency of Response:* On occasion.

*Estimated Number of Respondents:*

a. National Practitioner Data Bank Regulations—350.

b. Credentials Transfer Brief, VA Form 10–0376a—1,000.

Dated: April 13, 2005.

By direction of the Secretary:

**Cindy Stewart,**

*Program Analyst, Records Management Service.*

[FR Doc. E5–1998 Filed 4–27–05; 8:45 am]

**BILLING CODE 8320–01–P**

## DEPARTMENT OF VETERANS AFFAIRS

**[OMB Control No. 2900–0394]**

## Agency Information Collection Activities Under OMB Review

**AGENCY:** Veterans Benefits Administration, Department of Veterans Affairs.

**ACTION:** Notice.

**SUMMARY:** In compliance with the Paperwork Reduction Act (PRA) of 1995 (44 U.S.C. 3501–21), this notice announces that the Veterans Benefits Administration (VBA), Department of Veterans Affairs, has submitted the collection of information abstracted below to the Office of Management and Budget (OMB) for review and comment. The PRA submission describes the nature of the information collection and its expected cost and burden and includes the actual data collection instrument.

**DATES:** Comments must be submitted on or before May 31, 2005.

**FOR FURTHER INFORMATION CONTACT:** Denise McLamb, Records Management Service (005E3), Department of Veterans Affairs, 810 Vermont Avenue, NW., or e-mail *denise.mclamb@mail.va.gov.* Please refer to ''OMB Control No. 2900–0394.'' Send comments and recommendations concerning any aspect of the information collection to VA's OMB Desk Officer, OMB Human Resources and Housing Branch, New Executive Office Building, Room 10235, Washington, DC 20503 (202) 395–7316. Please refer to ''OMB Control No. 2900–0394'' in any correspondence.

**SUPPLEMENTARY INFORMATION:** Under the PRA of 1995 (Pub. L. 104–13; 44 U.S.C. 3501–3521), Federal agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. This request for comment is being made pursuant to section 3506(c)(2)(A) of the PRA.

With respect to the following collection of information, VBA invites comments on: (1) Whether the proposed collection of information is necessary for the proper performance of VBA's functions, including whether the information will have practical utility; (2) the accuracy of VBA's estimate of the burden of the proposed collection of information; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or the use of other forms of information technology.

*Title:* Certification of School Attendance—REPS, VA Form 21–8926.

*OMB Control Number:* 2900–0394.

*Type of Review:* Extension of a currently approved collection.

*Abstract:* VA Form 21–8926 is used to verify beneficiaries receiving REPS benefits based on schoolchild status are in fact enrolled full-time in an approved school and is otherwise eligible for continued benefits. The program pays benefits to certain surviving spouses and children of veterans who died in service prior to August 13, 1981 or who died as a result of a service-connected disability incurred or aggravated prior to August 13, 1981. Child beneficiaries over age 18 and under age 23 must be enrolled full-time in an approved post-secondary school at the beginning of the school year to continue receiving REPS benefits.

An agency may not conduct or sponsor, and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number. The **Federal Register** Notice with a 60-day comment period soliciting comments on this collection of information was published on November 18, 2004, at pages 67626–67627.

*Affected Public:* Individuals or households.

*Estimated Annual Burden:* 300 hours.

*Estimated Average Burden Per Respondent:* 15 minutes.

*Frequency of Response:* Annually.

*Estimated Number of Respondents:* 1,200.

Dated: April 13, 2005.

By direction of the Secretary.

**Loise Russell,**

*Director, Records Management Service.*

[FR Doc. E5–1999 Filed 4–27–05; 8:45 am]

**BILLING CODE 8320–01–P**

## DEPARTMENT OF VETERANS AFFAIRS

## Advisory Committee on Prosthetics and Special Disabilities Programs; Notice of Meeting

The Department of Veterans Affairs (VA) gives notice under Pub. L. 92–463 (Federal Advisory Committee Act) that a meeting of the Advisory Committee on Prosthetics and Special Disabilities Programs will be held May 17–18, 2005, in Room 830, VA Headquarters, 810 Vermont Avenue, NW., Washington, DC 20420. Meeting sessions will convene at 8:30 a.m. on both days and will adjourn at 4:30 p.m. on May 17, and at 2 p.m. on May 18. The meeting is open to the public.

The purpose of the Committee is to advise the Secretary of Veterans Affairs on VA's prosthetic programs designed to provide state-of-the-art prosthetics and the associated rehabilitation research, development, and evaluation of such technology. The Committee also provides advice to the Secretary on special disability programs which are defined as any program administered by the Secretary to serve veterans with spinal cord injury, blindness or vision impairment, loss of or the use of extremities, deafness or hearing impairment, or other serious incapacities in terms of daily life functions.

On the morning of May 17, the Committee will review and discuss the Blind Rehabilitation Services and Seamless Transition and the Fiscal Year 2003 Capacity Report. In the afternoon, the Committee will have briefings by the Chief Consultants, Rehabilitation Strategic Healthcare Group, Prosthetics and Sensory Aids, and Spinal Cord Injury. On the morning of May 18, the Committee will be briefed by the Vocational Rehabilitation and Employment Service and the General Counsel's staff (on federal ethics standards).

No time will be allocated for receiving oral presentations from the public. However, members of the public may direct questions or submit written statements for review by the Committee in advance of the meeting to Ms. Cynthia Wade, Designated Federal Officer, Veterans Health Administration, Patient Care Services, Rehabilitation Strategic Healthcare Group (117),

Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420. Any member of the public wishing to attend the meeting should contact Ms. Wade at (202) 273–8485.

Dated: April 19, 2005.

By Direction of the Secretary.

**E. Philip Riggin,**

*Committee Management Officer.*

[FR Doc. 05–8462 Filed 4–27–05; 8:45 am]

BILLING CODE 8320–01–M

Federal Register

Thursday,
April 28, 2005

# Part II

# Department of the Interior

## Bureau of Indian Affairs

## 25 CFR Part 30, et al.
## Implementation of the No Child Left Behind Act of 2001; Final Rule

**DEPARTMENT OF THE INTERIOR**

**Bureau of Indian Affairs**

**25 CFR Parts 30, 37, 39, 42, 44, and 47**

**RIN 1076–AE49**

## Implementation of the No Child Left Behind Act of 2001

**AGENCY:** Bureau of Indian Affairs, Interior.

**ACTION:** Final rule.

**SUMMARY:** This final rule addresses six areas involving Indian education: Defining adequate yearly progress; establishing geographic attendance areas for Bureau of Indian Affairs-funded schools (Bureau-funded schools); establishing a formula for the minimum amount necessary to fund Bureau-funded schools; establishing a system of uniform direct funding and support for Bureau-operated schools; providing guidelines to ensure the Constitutional and civil rights of Indian students; and establishing a method for administering grants to tribally controlled schools. The rule implements the provisions of the No Child Left Behind Act of 2001.

**DATES:** *Effective Date:* May 31, 2005.

**FOR FURTHER INFORMATION CONTACT:** Catherine Freels, DOI Office of the Solicitor, 505 Marquette Avenue NW., Suite 1800, Albuquerque, NM 87102, phone 505–248–5600.

**SUPPLEMENTARY INFORMATION:** Contents of the **SUPPLEMENTARY INFORMATION** section:

I. Background
II. Public Comments—General
III. Comments on Part 30—Adequate Yearly Progress
IV. Comments on Part 37—Geographic Attendance Boundaries
V. Comments on Part 39—Indian School Equalization Program
VI. Comments on Part 42—Student Rights
VII. Comments on Part 44—Geographic Boundaries
VIII. Comments on Part 47—Uniform Direct Funding and Support for Bureau-funded Schools
IX. Procedural Matters

## I. Background

### *A. What Information Does This Section Address?*

This section addresses:

—Requirements of the Act.
—Overview of Negotiated Rulemaking Process.
—How public comments were handled.

### *B. What Are the Negotiated Rulemaking Requirements of the No Child Left Behind Act of 2001?*

Under 25 U.S.C. 2018 , the Secretary of the Interior (Secretary) established the No Child Left Behind Negotiated Rulemaking Committee (Committee) to develop proposed rules to implement several sections of the Act relating to the Bureau-funded school system. (In this preamble and rule we use the term ''the Act'' to refer to the No Child Left Behind Act, Pub. L. 107–110, enacted January 8, 2002. The No Child Left Behind Act reauthorizes and amends the Elementary and Secondary Education Act (ESEA) and amends the Education Amendments of 1978.) The Act required that the Committee be comprised only of representatives of tribes served by Bureau-funded schools and the Federal government. It also required that, to the maximum extent possible, the tribal representative membership should reflect the proportionate share of students from tribes served by the Bureau-funded school system.

The requirements of the Act that are the subject of this negotiated rulemaking process are:

(1) *20 U.S.C. 6316(g):* Develop a definition of ''Adequate Yearly Progress'' for the Bureau-funded school system;

(2) *25 U.S.C. 2004:* Attendance boundaries for Bureau-funded schools;

(3) *25 U.S.C. 2007:* A determination of the funds needed to sustain Bureau-funded schools and a formula to allocate the current funds;

(4) *25 U.S.C. 2010:* The direct funding and support of Bureau-funded schools;

(5) *25 U.S.C. 2016:* The rights of students in the Bureau-funded school system; and

(6) *25 U.S.C. 2501, et seq., the Tribally Controlled Schools Act (TCSA) of 1988, as amended by the Act:* Discharge of the Secretary's responsibilities under this Act through which tribes and tribal school boards can operate Bureau-funded schools under the grant mechanism established in the Tribally Controlled Schools Act.

### *C. What Was the Negotiated Rulemaking Process?*

Under the Act, in August and September, 2002, the Secretary conducted regional consultation meetings with tribes on the six areas of the Act to be negotiated. Following consultation and under the Act and the Negotiated Rulemaking Act (subchapter III of chapter 5, title 5, United States Code), in November, 2002, the Secretary published a Notice of Intent To Form a Negotiated Rulemaking Committee (67 FR 75828, December 10, 2002) and requested nominations for tribal representatives for the Committee.

The Secretary reviewed tribal nominations for tribal representatives and announced selection of 19 tribal representatives and 6 Federal representatives from the Department of the Interior (68 FR 23631, May 5, 2003). Tribal membership on the Committee represented, to the maximum extent possible, the proportionate share of students from tribes served by Bureau-funded schools. The Secretary chartered the No Child Left Behind Negotiated Rulemaking Committee under the Federal Advisory Committee Act (5 U.S.C. Appendix) on May 1, 2003.

The Committee held its first meeting in June, 2003. It agreed on protocols to govern the meetings and selected three tribal representatives and two Federal representatives as co-chairs. A third party neutral approved by the Committee served as lead facilitator for all Committee meetings. The Committee met five times, from June 2003, through October 2003, to develop recommendations for six proposed rules. The Committee divided the areas subject to regulation among four work groups: funding and funding distribution; student rights and geographic boundaries; administration of grants; and adequate yearly progress. These work groups prepared written products for review, revision, and approval by the full Committee.

The Committee operated by consensus and recommendations for proposed rules were consensus decisions. All Committee and work group meetings were open to the public, and members of the public were afforded the opportunity to make oral comments at each session and to submit written comments. **Federal Register** notices stating the location and dates of the meetings and inviting members of the public to attend were published prior to each meeting. In addition, Committee information including meeting locations and dates and meeting agendas and summaries were provided on the Office of Indian Education Program Web site at: *http://www.oiep.bia.edu.*

The Department published a proposed rule in the **Federal Register** on February 25, 2004 (69 FR 8752), with a 120-day comment period. (The Department subsequently reopened the comment period for an additional 10 days.) In August 2004, following the public comment period, the Committee reconvened to review public comments and make recommendations for final rules to the Secretary.

### *D. How Were Public Comments Handled?*

The Notice of Proposed Rulemaking for parts 30, 37, 39, 42, 44, and 47, published February 25, 2004, provided

for a 120-day public comment period. We also reopened the public comment period for an additional 10 days at the end of the 120-day public comment period. We received 47 comments from individuals, tribal leaders, schools, education associations, school boards, and the U.S. Department of Education. Because the proposed rules were the result of negotiated rulemaking, the Committee reconvened to review public comments at the end of the public comment period.

The Committee was provided the full text of each comment and summaries of each comment for review. The Committee operated by consensus in reviewing comments to determine whether to accept a comment and make suggested changes to a rule, accept a comment and modify suggested changes, or acknowledge a comment and make no changes. Comments were handled as follows.

—Where comments referred to issues that are beyond the scope of this rule, such as inadequate funding or disproportionate allocations, or to issues that were not relevant to this rule, such as tribal recognition or comments on the Paperwork Reduction Act requirements (the comment period ended on PRA items in March, 2004), the Committee acknowledged the comments, but took no action on them.
—Where comments agreed with the proposed rules, the Committee acknowledged the comments.
—Where comments disagreed with the proposed rules, the Committee acknowledged the comments. The disposition of these comments and the reasons that they were accepted or not accepted are treated in the detailed discussions that follow.
—Where the Committee did not have consensus to reopen a particular section to consider comments suggesting changes, the Department reviewed the comments and made changes where it deemed necessary. These changes are noted in the response to comments section for each part.

Following receipt of the Committee's recommendations for the final rules, the Secretary reviewed the public comments and made changes as noted for each part. Changes that are purely grammatical are not discussed. Public comments and responses are noted below under the applicable part.

*E. How Were Oversights in the Proposed Rule Corrected?*

When the proposed rule was published, there was an oversight in the wording of the amendatory language for part 39. Rather than stating that the entire subpart was proposed for revision, the amendatory language should have stated that only subparts A through H were proposed for revision. Our intention, and that of the negotiated rulemaking Committee, was to leave subparts I through L in place with no revisions. This final rule corrects that oversight.

*F. How Were Conforming Amendments to Parts 31 and 36 Handled?*

Additional changes are required in order to eliminate conflicts between the amendments in these regulations and existing regulations in other parts of 25 CFR. In a rule published elsewhere in today's **Federal Register** and identified by the RIN 1076–AE54, the Department is deleting provisions in parts 31 and 36 of 25 CFR that conflict with the amendments published in this rule.

**II. Public Comments—General**

We received the following general comments referring to all parts:

*Comment:* The proposed rules may go against tribal culture and affect tribal sovereignty and do not ensure fair and equal treatment for tribes.

*Response:* We noted the comment and did not make any changes to the rules based on these comments. Congress mandated that we promulgate rules relating to certain sections of the Act.

*Comment:* Other provisions of the Act should be included in this rulemaking.

*Response:* We noted the comment and did not make any changes based on this comment. The comment is beyond the scope of these rules. The Secretary determined which sections of the Act to include in this negotiated rulemaking.

*Comment:* The Act provides no additional funding for education. Funding is insufficient. Redistribute funding to improve the concentration where it is needed.

*Response:* We noted the comment and did not make any changes based on this comment. The comment is beyond the scope of these rules.

**III. Comments on Part 30—Adequate Yearly Progress**

For purposes of adequate yearly progress (AYP), the Bureau of Indian Affairs is considered the State Educational Agency (SEA) for the Bureau-funded school system.

20 U.S.C. 6311(b) requires each State to submit a plan to the Secretary of Education which demonstrates that the State, through its SEA, has adopted challenging academic content standards and challenging student academic achievement standards applicable to all schools in the State, and to develop assessment devices through which student achievement will be measured.

The Act requires each SEA to define the AYP that schools and local educational agencies (LEAs) must attain toward the goal of all students reaching the proficient level on reading/language arts and mathematics assessments by school year 2013–2014. Each State's AYP definition must include a starting point and intermediate goals for student improvement in reading/language arts and mathematics; if a school or LEA does not meet the intermediate goals for two consecutive years or more, it is identified as in need of improvement and must implement an improvement plan and take certain other actions under the Act.

The Act requires a State and the Bureau of Indian Affairs to define AYP in a manner that achieves the following requirements:

—Applies the same high standards of academic achievement to all schools;
—Is statistically valid and reliable;
—Results in continuous and substantial academic improvement for all students;
—Measures progress of the SEA (BIA) and schools based primarily of the academic assessments; and
—Includes separate measurable annual goals for continuous and substantial improvement in the academic achievement of all students in the school; economically disadvantaged students; students from major racial and ethnic groups; students with disabilities; and students with limited English proficiency.

The AYP definition must also include ''additional indicators.'' For high schools, the additional indicator must be graduation rates. The SEA must select one additional academic indicator applicable to elementary and middle schools. An SEA may also identify additional optional indicators of student progress to include in its definition of AYP.

To define Adequate Yearly Progress (AYP) for Bureau-funded schools, the Committee first had to master an understanding of all of the components of Adequate Yearly Progress under the Act and how they interrelate with a final definition of AYP. While the workgroup had to look at the curriculum, standards, and assessments that Bureau-funded schools were using, the Committee did not negotiate these items. The negotiation was limited to the definition of AYP.

A detailed procedure for submission of an alternative AYP definition by a tribe or school board, and for review/

approval of that definition by the Secretary of the Interior is included in §§ 30.106—30.108. The Department is required by § 30.109 to provide technical assistance for development of an alternative definition upon the request of a tribe or school board.

The consequences of failing to make AYP are described in § 30.117. While the remedial statuses of ''school improvement,'' ''corrective action,'' and ''restructuring'' applicable to public schools are also applicable to Bureau-funded schools, the latter are exempt from two requirements—school choice and supplemental educational services—that apply to public schools (see § 30.120). These exemptions are expressly stated in the regulation. The regulation also reiterates in § 30.119 the tribally operated school board's responsibility to implement remedial actions, while the Bureau is responsible for implementing these remedial actions at Bureau-operated schools.

The rule specifies in § 30.121 the Bureau's responsibilities under the Act to provide funding and technical assistance to schools who fail to make AYP, and in § 30.122 the Bureau's responsibility to provide ongoing support to all schools to assist them in making AYP. The proposed regulation also details the Bureau's reporting responsibilities in § 30.126.

Only major, substantive public comments are discussed below. In some instances, we have combined several similar or identical comments and replied to them in one response. Grammatical changes, minor wording revisions, and other purely style-oriented comments are not discussed; however, changes to the final rule reflect such public comment. The Secretary reviewed the final rule and made the changes as noted below.

*A. Comments the Committee Considered That Resulted in No Change to the Rule*

*Comment:* There were several comments supporting the proposed definition of adequate yearly progress for Bureau-funded schools. These comments included:

—Agreement with the proposed definition of adequate yearly progress being that of the State in which a Bureau-funded school is located;
—Agreement with allowance for a tribe's submission of its own set of alternatives; and
—Agreement with the language describing the Secretary's trust responsibility, the sovereign rights of Indian Tribes, and the State's lack of jurisdiction over Bureau-funded schools.

*Response:* These comments were considered, appreciated, and, because they were in agreement with the rule, no action was taken.

*Comment:* Several commenters suggested that:

—The regulations should require that a school's alternative definition of adequate yearly progress (AYP) ''identify'' what is from the State's definition and what is not; and
—The Department of the Interior should establish a system of rewards and sanctions.

*Response:* These comments were considered and no action was taken because the Committee had already considered this in drafting the proposed rule.

*Comment:* Change § 30.119(b), to make it more specific and state that:

—The school board has the sole authority and responsibility for determining the nature and implementation of remedial actions in accordance with the Act; and
—In implementing any remedial actions the Board is not subject to an approval process from the Bureau, but may request and receive technical assistance concerning remedial actions.

*Response:* The comment was considered and no action was taken. The Committee determined that the suggested change is unnecessary as section 20 U.S.C. 6316(g)(4) is clear.

*Comment:* There are several references in the rule to various parts of section 1116 of the Act, so section 1116 should be included in the rule.

*Response:* This comment was considered and no action was taken because the Committee believed that this would not improve the rule.

*Comment:* Language should be added to § 30.122 to say that providing funding and technical assistance to schools that fail to make AYP is not just a responsibility, but a priority to the Bureau.

*Response:* This comment was considered and no action was taken.

*Comment:* Section 30.126 should be modified to match section 1116(g) and to:

—More clearly state that the Bureau collects information from grant and school boards to enable its reporting requirement, but that the Bureau does not make the determination of school improvement, corrective action or restructuring status for Bureau-funded grant and contract schools; and
—Include language implementing section 1116(g) for tribally controlled school boards to identify the factors that led to any determination of remedial actions for the school and for those factors to be reported to the Department of Education.

*Response:* This comment was considered and no action was taken because the Committee felt the statutory language was clear.

*Comment:* Rewards and sanctions should be the responsibility of the Bureau.

*Response:* This comment was considered and no action was taken.

*B. Comments the Committee Considered That Resulted in Changes to the Rule*

*Comment:* Delete the reference to ''curriculum'' since adoption of the definition of AYP used by the State in which the school is located would not mean a school needs to use the State curriculum. Instead add the phrase ''academic content and student achievement'' before ''standards.''

*Response:* This change was made and is reflected in § 30.104(a).

*Comment:* Delete the reference to ''curriculum'' and add ''solely for the purpose of using the State's academic contents and student performance standards, assessments, and definition of AYP.''

*Response:* This change was made and is reflected in § 30.104(a)(2).

*Comment:* Insert the term ''trust'' before responsibility for Indian education.

*Response:* This change was made and is reflected in § 30.104(a)(3).

*Comment:* Insert that the proposal must meet the requirement of section 1111(b) of the Act and 34 CFR 200.13–200.20, taking into account the unique circumstances and needs of the school or schools and students served.

*Response:* This change was made in part. The term ''to be consistent with section'' was removed and, ''must meet the requirements of 20 U.S.C. 6311(b), taking into account the unique circumstances and needs of the school or schools and the students served'' was added, as reflected in § 30.106.

*Comment:* The reference to the ''State's definition'' of AYP is in error. It should be a reference to the Bureau's definition of AYP.

*Response:* The word ''State's'' was changed to ''Secretary's'' as reflected in § 30.108.

*Comment:* The language should be changed to say ''By the 2005–2006 school year, a Bureau-funded school must measure the achievement of all students enrolled in grades three through eight, and once for all students enrolled in grades 10–12. Until that time, the Bureau-funded schools must measure the achievement of all students

at least once during grades three through five, six through nine and 10–12.''

*Response:* Revised § 30.114 states an assessment is required for all students in grades three through eight and at least once for all students in grades ten through twelve.

*Comment:* The rule must be revised to clarify that a school fails to meet AYP if it is deficient in any of the measurements in § 30.107(b)(6)(i) or (ii) as recommended in an earlier comment.

*Response:* The change was made and is reflected in § 30.116.

*C. Comments the Committee Considered That Resulted in No Consensus With No Change to Rule*

*Comment:* There were several comments suggesting the Department of the Interior, Office of Indian Education Programs should develop its own definition of AYP based on Bureau-wide standards and assessments.

*Response:* The Committee consensus was to define the Secretary of the Interior's definition of AYP as each State's definition of AYP, since the Department lacks an independent set of standards and assessments necessary to establish a definition of AYP. Although the Committee received very few comments on this decision, some Committee members commented on this issue. When the comments were being reviewed, some of the tribal members of the Committee decided to withhold consensus on keeping the proposed definition of AYP. Since the Committee failed to reach consensus in recommending a final AYP rule, it is left for the Secretary to determine the rule.

The Secretary has decided to keep the definition of AYP as published in the Notice of Proposed Rulemaking published on February 25, 2004 with certain clarifying changes as described in the preceding section. Since the Department did not receive comments that had not already been considered when the Committee made the difficult choice to recommend the definition found in the NPRM, the Secretary decided to adopt the NPRM's definition. Thus, the definition of AYP remains that of the State in which a school is located until the school has received a waiver of that definition from the Secretary of the Interior.

The AYP workgroup of the negotiated rulemaking Committee initially considered a definition that would require all Bureau-funded schools to show that a set percentage of students (*e.g.*, 11 percent) progressed annually from the ''basic'' achievement level to the ''proficient'' or ''advanced'' achievement levels. This idea was abandoned, however, because the Department of Education, which supplied resource consultants to the Committee, advised that this methodology would not be statistically reliable. The Department of Education notes that aggregating Bureau-funded school assessment data to make AYP determinations is not statistically reliable because each school uses a different assessment system and because, collectively, the assessments in use do not meet the requirements of the Act in 20 U.S.C. 6311(b)(3)(C)(ii). Therefore, the Committee needed to develop a uniform assessment system. As the Committee discovered, Bureau had abandoned requiring uniform curriculum and assessments and had instead allowed schools to align their curriculum with the State in which the school was located. Thus, the Committee appeared to be left with two options:

—Selecting a single State's system with one set of curriculum, academic content and student achievement standards and assessments; or

—Allowing each Bureau-funded school to follow the definition of the State in which it is located.

After Congress passed the Goals 2000 Act (Pub. L. 103–227), States had to set standards for student achievement. The Bureau chose to adopt national standards, but most schools chose to align with the standards of the State where they were located. The Committee found that the Bureau of Indian Affairs has traditionally allowed tribes to follow State curricula, academic content and student achievement standards and assessments. Originally, the Bureau had attempted to create a system in which all of the tribes would follow one set of curriculum, standards, and assessments. Some tribes expressed concern over this approach. Tribes suggested that the students of Bureau-funded schools would be better served by allowing the schools to follow the State's curriculum, standards, and assessments because the Bureau-funded school students are traditionally more transient and sometimes move between Bureau-funded schools and public schools. Therefore, Bureau-funded schools began aligning their curriculum, standards, and assessments with the State in which they were located.

In light of this history, the Committee revised its initial plan and decided to adopt as the Secretary's definition of AYP the definition of the State in which a school is located. However, a tribal governing body or school board may develop an alternative AYP definition and submit it to the Secretary for approval. This decision implements 20 U.S.C. 6316(g) of the Act, which expressly permits a tribe or school board to waive the Bureau's AYP definition and develop its own, subject to the Secretary's approval in consultation with the Secretary of Education.

During our initial negotiations, Tribal representatives on the Committee expressed serious objection to adopting State AYP definitions as the Secretary's definition instead of establishing a Bureau-specific definition, which some tribes and school boards might prefer. There was concern that requiring use of a State's definition would imply that Bureau-funded schools were subject to State jurisdiction, would signal abandonment of the Federal Government's trust responsibility for Indian education, and could diminish tribal sovereignty. In recognition of these concerns, the Committee developed language for the proposed rules that expressly states that nothing in the rules diminishes the Secretary's trust responsibility for Indian education or any statutory rights, affects in any way the sovereign rights of an Indian tribe, or subjects Bureau-funded schools to State jurisdiction.

*D. Comments the Committee Considered That Resulted in No Consensus With Changes to the Rule*

The Committee also had no consensus regarding comments made by the Department of Education on the proposed definition of AYP. The Department of Education did not provide these comments during the original public comment period.

Since the Department of Education is a Federal agency, the Department of the Interior believed that it could nevertheless consider Education's comments. However, to ensure fairness to any member of the public who had not yet provided comment, the Department of the Interior formally reopened the public comment period for receipt of comments from Education and any member of the public. During review of the comments, the Federal Committee members believed that some of Education's comments should be accepted and the proposed changes be made to the rule. Some tribal Committee members objected that the Federal Committee members would not negotiate whether to consider Education's comments. Therefore, the Committee could not reach consensus on whether to accept Education's comments. Since there was no Committee recommendation, the Secretary in adopting the final rule has accepted certain Department of Education comments.

*Comment:* The rule should clarify in §§ 30.104 and 30.105 that any Bureau-funded school that uses the Bureau's definition of AYP must also use the academic, content, and student achievement standards and State assessments of the State in which the school is located. Standards and assessments are a necessary part of an accountability system.

*Response:* The Committee could not reach consensus to change the proposed rule based on this comment from the Department of Education. Since there was no consensus Committee recommendation, the Secretary accepted the Department of Education's comment and changed the rule to read: ''Yes. A tribal governing body or school board may waive all or part of the Secretary's definition of academic content and student achievement standards and assessments and AYP. However, until the alternative definition is approved under § 30.113 the school must use the Secretary's definition of academic content and student achievement standards, assessments, and AYP.''

*Comment:* The rule should revise § 30.107 to:

—Use the same language as section 1111(b) of the Act to take into account the unique circumstances and needs of the school or schools and the students served;
—Add a citation to 34 CFR 200.13–20; and
—State that a waiver request will include an explanation of what standards and assessments will be used, as required by section 1111(b).

*Response:* Since there was no consensus Committee recommendation on whether to accept this comment from the Department of Education, the Secretary accepted the comment and made the following changes:

—Changed the term ''curriculum'' as recommended in several comments;
—Removed science from the areas that require a measurement of progress as recommended in several comments; and
—Added ''academic contents and achievement standards'' as recommended throughout the document.

The Secretary also added the Department of Education's language suggestions to the Department's final rule in § 30.107 to read:

**§ 30.107 What must a tribal governing body or school board include in its alternative definition of AYP?**

(a) An alternative definition of AYP must meet the requirements of 20 U.S.C. 6311(b)(2) and 34 CFR 200.13–200.20, taking into account the unique circumstances and needs of the school or schools and the students served.

(b) In accordance with 20 U.S.C. 6311(b) and 34 CFR 200.13–200.20, an alternative definition of AYP must:

(1) Apply the same high standards of academic achievement to all students;

(2) Be statistically valid and reliable;

(3) Result in continuous and substantial academic improvement for all students;

(4) Measure the progress of all students based on a high-quality assessment system that includes, at a minimum, academic assessments in mathematics and reading or language arts;

(5) Measure progress separately for reading or language arts and for mathematics;

(6) Unless disaggregation of data cannot yield statistically reliable information or reveals personally identifiable information, apply the same annual measurable objectives to each of the following:

(i) The achievement of all students; and

(ii) The achievement of economically disadvantaged students, students from major racial or ethnic groups, students with disabilities, and students with limited English proficiency;

(7) Establish a starting point;

(8) Create a timeline to ensure that all students are proficient by the 2013–2014 school year;

(9) Establish annual measurable objectives;

(10) Establish intermediate goals;

(11) Include at least one other academic indicator which, for any school with a 12th grade, must be graduation rate; and

(12) Ensure that at least 95 percent of the students enrolled in each group under § 30.107(b)(6) are assessed.

(c) If a Bureau-funded school's alternative definition of AYP does not use a State's academic content and student achievement standards and academic assessments, the school must include with its alternative definition the academic standards and assessment it proposes to use. These standards and assessments must meet the requirements in 20 U.S.C. 6311(b) and 34 CFR 200.1–200.9.

(d) The measurement must include graduation rates and at least one other academic indicator for schools that do not have a 12th grade (but may include more than one other academic indicator).

*Comment:* There is substantial concern about a regulation that requires the Secretary and the Secretary of the Department of Education, regardless of the complexity of a particular waiver request, to approve or disapprove all alternative definitions of AYP within 90 days of receiving a completed alternative definition. The suggestion was made to include an exception for unusual circumstances that may require additional time. A notification provision should also be added to inform a school that seeks a waiver what additional time will be needed.

*Response:* Section 30.113(d) now states that the Secretaries will, ''review the proposed definition to determine whether it is consistent with the requirements of 20 U.S.C. 6311(b) of the Act.'' It does not specify a time within which the Secretaries will act. While the Secretaries will handle each situation expeditiously, the revised wording of the regulation allows flexibility in processing individual cases and ensures that extra time can be taken where necessary.

*Comment:* Merely providing the Department of Education with notification of the Department of the Interior's receipt of a completed proposed alternative definition of AYP is insufficient. The last phrase in the Elementary and Secondary Education Act (ESEA) section 1111(g)(1)(B) provides for the Department of Education's Secretary to have the information needed to determine whether a request of an alternative AYP definition should take into account the unique circumstances and needs of school or schools and the students served. This statutory sentence makes no sense if interpreted to mean that the Secretary of Education may only disapprove an alternative definition that the Secretary chooses to make the subject of a consultation with the Department of Education—which is all that § 30.113 would require. The Act surely did not mean to create opportunities for inconsistencies in the Federal government's overall approach to approving alternative AYP definitions. Nor should the Executive Branch do so as a matter of interpretative choice.

The words of the statute in 1116(g) state that the Secretary of the Interior, ''in consultation with the Secretary if the Secretary of the Interior requests the consultation, shall approve such alternative definition unless the Secretary determines that the definition does not meet the requirements of section 1111(b), that takes into account the unique circumstances and needs of such school or schools and the students served.'' While this language is admittedly cumbersome, three fundamental principles compel the approach we strongly request DOI to take:

—The Secretary of the Department of Education expresses statutory responsibility for determining that, as a part of consultation with DOI, alternative definitions do not meet the statutory requirements (in keeping with the Department of Education's overall title I, part A statutory responsibility to administer the title I, part A requirements governing systems of accountability);

—The Executive Branch's need to avoid inconsistencies in application of section 1111(g)(1)(B); and
—Take into account Interior's and Education's differing expertise in assessing whether an alternative AYP definition meets the requirements of ESEA section 1111(b) and applicable regulations, taking into account the unique circumstances and needs of the school or schools and the students served.

*Response:* The Committee could not reach consensus to change the rule based on this comment. The Notice of Proposed Rulemaking provided that the Secretary of the Interior made the final determination on whether to grant an AYP waiver. The Committee believed that the statute could be read to mean that the Secretary of the Interior has the final decision-making power. During the public comment period, the Federal team members engaged in discussion within the Department of the Interior and with the Department of Education. The Departments tried to find a compromise that would provide for consistency in Federal decision-making and ensure that the Departments work together, using their collective expertise, to make a decision regarding whether an alternate definition of AYP meets the requirements of statute and regulations. The result of the discussion was the Department of Education's comment that the decision on the waiver should be a joint decision by the Secretary of the Interior and the Secretary of Education.

When the Committee convened to review the comments, tribal members expressed concerns that the Federal members engaged in this dialogue with the Department of Education and that the Federal team was prepared to withhold consensus for any other result. Consequently, the Committee could not reach consensus on whether to consider the Department of Education's comments. Thus, the final rule has adopted certain Department of Education comments and revised § 30.113(d) through (h) to read:

(d) The Secretaries review the proposed alternative definition of AYP to determine whether it is consistent with the requirements of 20 U.S.C. 6311(b). This review must take into account the unique circumstances and needs of the schools and students.

(e) The Secretaries shall approve the alternative definition of AYP if it is consistent with the requirements of 20 U.S.C. 6311(b), taking into consideration the unique circumstances and needs of schools and students.

(f) If the Secretaries approve the alternative definition of AYP:

(1) The Secretary shall promptly notify the tribal governing body or school board; and

(2) The alternate definition of AYP will become effective at the start of the following school year.

(g) The Secretaries will disapprove the alternative definition of AYP if it is not consistent with the requirements of 20 U.S.C. 6311(b). If the alternative definition is disapproved, the tribal governing body or school board will be notified of the following:

(1) That the definition is disapproved; and

(2) The reasons why the proposed alternative definition does not meet the requirements of 20 U.S.C. 6311(b).

(h) If the Secretaries deny a proposed definition under paragraph (g) of this section, they shall provide technical assistance to overcome the basis for the denial.

*Comment:* The proposed rule needs to be revised to more closely reflect the ED–DOI agreement in 20 U.S.C. 7824.

*Response:* The Committee did not reach consensus to change the proposed rule based on this comment from the Department of Education. Since the Committee provided no recommendation on this comment, the Secretary has decided to delete this section of the rule, as it is specifically provided for in the Act.

## IV. Comments on Part 37—Geographic Attendance Boundaries

The Act requires designated separate geographic boundaries for all Bureau-funded schools and provides for tribes to have input into the process. This part provides guidance and clarifies what roles tribes have in establishing and revising geographic attendance boundaries for schools. It also clarifies some of the limitations on the Secretary's ability to change school boundaries. It recognizes distinctions for different boundary determinations for day schools, on-reservation boarding schools, and peripheral dorms and for off-reservation boarding schools. The rule provides guidance applicable to both types of schools, where appropriate (subpart A) and provides separate guidance for each type of school, where appropriate (day schools, on-reservation boarding schools, and peripheral dorms—subpart B and off-reservation boarding schools B subpart C). This part is intended to give tribes the opportunity to meaningfully participate in all decisions regarding attendance boundaries and related policies where not statutorily prohibited.

### *General Comments Requesting No Change*

Several commenters approve of provisions of the rule that allow tribal entities to work collaboratively with Bureau-funded schools when geographic boundaries are determined or revised and that provide for assistance from the Department if tribes need assistance. Several commenters agree with the rule provision that tribes have ongoing authority to suggest changes to and participate in the revision of geographic attendance boundaries for schools. Some comments support the flexibility for allowing students to attend schools outside their geographic attendance boundaries. One commenter noted that rights in the rule are rights recognized pursuant to reserved tribal authority stemming from treaties between the United States and tribes. Some commenters to this part in the NPRM preamble disagree with allowing parental choice (which was not included in the final rule). One commenter stated that the Bureau can and must withhold payment from a school when a student who does not live within the school geographic attendance boundary has not received a waiver in accordance with tribal law.

*Comment:* Funding should not be withheld solely because a student is attending a school outside his or her attendance area.

*Response:* No change was made because a student is funded at the school they are attending.

*Comment:* Revise § 37.110 to state that a change of school is the decision of the parents and/or the student.

*Response:* No change was made because the Act requires the Secretary to promulgate regulations for school boundaries.

*Comment:* Revise the term ''geographic attendance area'' in § 37.101 to clarify that it may include off-reservation areas, particularly off-reservation boarding schools.

*Response:* No change was made because the rule states that geographic attendance areas include off-reservation boarding schools.

*Comment:* If parental choice is included in the rule, geographic boundaries have no meaning.

*Response:* No change was made because parental choice is not included in the rule.

*Comment:* Revise § 37.111 to state that tribes have input on authorizing transportation funds for students attending schools outside their geographic attendance boundaries.

*Response:* The Committee acknowledged this comment, considered it, and made no change.

*Comment:* Revise § 37.111 to reflect that a Bureau-funded school may enroll eligible Indian students who are not members of the tribe.

*Response:* We revised § 37.111(b) and added paragraph (c) to clarify that a

Bureau-funded school may enroll eligible Indian students who are not members of the tribe. The section authorizes ISEP-eligible students residing within the tribe's jurisdiction to receive transportation funding to attend schools outside the geographic attendance area in which the student lives. The section also authorizes tribal member students who are ISEP-eligible and not residing within the tribe's jurisdiction to receive transportation funding to attend schools outside the geographic attendance area in accordance with a tribal resolution issued by the tribe in which the student is enrolled.

*Comment:* Revise § 37.122 to include a deadline for the Secretary to accept or reject a proposed geographic boundary change; a time period for publishing the **Federal Register** notice of an accepted change; and a time frame for informing a tribe why a suggested boundary change is not accepted.

*Response:* The Committee acknowledged this comment, considered it, and made no change.

*Comment:* Revise § 37.131 to clarify that all off-reservation boarding schools will have separate, non-overlapping boundaries, or, if parental choice is applied, delete this section as unnecessary.

*Response:* No change was made because the rule does not need clarification and the section is necessary to the rule.

## V. Comments on Part 39—The Indian School Equalization Program

### *A. General Comments on the Indian School Equalization Program*

*Comment:* Several comments stated that data for actual transportation costs incurred by Bureau-funded schools should:

—Take into account costs of gas and additional wear and tear that vehicles incur in isolated, remote locations; and

—Reflect two school years' worth of transportation information.

The commenters also felt that, after collecting this data:

—The Committee should reconvene to review the data and develop a proposed regulation; and

—The Secretary should then publish a proposed rule for notice and comment before a final recommendation is made.

*Response:* The Committee acknowledged and considered this comment, however no change was made to the funding formula. The Committee agrees that it needs more information to develop an improved transportation funding formula. It therefore recommended to the Secretary that another negotiated rulemaking Committee convene after the Department and the Bureau-funded schools have gathered additional transportation information in order to develop a more accurate and fair transportation funding regulation.

*Comment:* In the preamble, the Committee had asked for comments on the determination of an isolation factor. Several commenters acknowledged the effects of severe isolation that results in expenses above and beyond the norm. Some commenters felt that all schools were isolated and should qualify for an isolation adjustment and others suggested that even schools that have paved highways should be considered, as the areas surrounding some Bureau schools are underdeveloped.

*Response:* The Committee acknowledged and considered these comments; however, there was no change made to the rule, as the comments did not give any specific indicators or suggestions on how to determine isolation factors.

*Comment:* Also in the preamble, the Committee had asked if the funding formula should be left in the body of the rule or if it should be placed in the appendix. Commenters responded that the formula should be in the body of the rule.

*Response:* The Committee recommends that the ''minimum amount of funding to sustain each Bureau-funded school formula'' be placed in the body of the rule and not in the appendix.

*Comment:* The proposed rules may in practice contravene the culture of the Micoosukee Tribe and impinge on Tribal sovereignty. Due to the unique cultural aspects of Indian Tribes, the standards applied to non-Indians cannot be applied to Indians. The result would be to infringe on tribal culture, violate laws designed to protect tribes, and take away the right of tribes to live according to their customs and beliefs. The proposed rules do not ensure fair and equal treatment for tribes.

*Response:* The comment was acknowledged and considered. No action was taken because the Committee's charge was to develop regulations to implement the Act and, therefore, the Committee had no authority to address this comment.

*Comments:* Several commenters discussed the need for additional funding. One commenter did not support using general funds to redistribute in the base program categories arguing that the proposed items could pose a huge financial impact on schools. Several commenters suggested more funding is required for general education of students. Another comment was that the Act will provide no additional funding but merely reallocate current funding.

Several commenters shared the concern that current Bureau funding is insufficient in many areas, and that merely revising the distribution method is inadequate. What should have happened was a redistribution to concentrate funding where it is needed combined with additional funding to support the Act's mandates.

Another commenter suggested providing recurring funding to support educational services to pre-K students. One Commenter suggested that special circumstances, such as the therapeutic dormitory pilot project, should be included in the ISEP base. These comments also included a comment that another funding mechanism is needed to fund non-ISEP eligible students for distance and alternative learning and expressed disappointment that the funding formula did not take into account greater lengths of service of employees. Schools incur increased costs with employees who have greater lengths of service. Several commenters also were disappointed that the formula does not provide funding for after school programs.

*Response:* These comments were acknowledged and considered and no action was taken because the Committee's charge was to develop regulations to implement the Act but it was not authorized to make funding recommendations.

*Comment:* Several commenters discussed Off-Reservation Boarding Schools (ORBS) and suggested that ORBS should not receive an additional weighted unit in the funding formula. Others felt that ORBS should receive an additional weighted unit in the funding formula because their needs are unique as some of their students have legal and behavioral problems.

*Response:* The Committee acknowledged and considered this comment; however, no change was made to the funding formula because the commenters did not present any additional arguments that had not already been considered by the Committee in drafting the proposed rules.

*Comment:* Several commenters recommended that the funding formula be revised to provide a supplemental weight for students with disabilities because the mandatory 15 percent set aside may cause economic hardship on

a school and the part B process is cumbersome.

*Response:* The Committee did not have consensus to open this issue for discussion. The current regulations and the proposed regulations mandate that each school set aside 15 percent of their basic instruction allotment to meet the needs of students with disabilities. If the 15 percent is inadequate to fund services necessary for eligible students with disabilities, schools may still apply for part B funding.

The Federal team decided that additional information is needed to determine if modifications are necessary to the 15 percent set-aside. The Committee recommends that additional information be gathered regarding the number of ISEP eligible students who are identified as disabled and who are receiving special education services, and other related information. If the information collected reveals that the 15 percent set-aside does not accurately reflect the percentage of ISEP eligible students with disabilities in the Bureau-funded school system, then the Committee recommends that a negotiated rulemaking committee negotiate revised special education funding regulations.

*Comment:* The proposed rules will allow school districts to use Federal funds in a manner more consistent with their own reform strategies and priorities. It is important to note that these rules allow flexibility in adopting assessment systems composed entirely of locally developed and administered tests.

*Response:* The comment was acknowledged and considered and no action was taken since no change was necessary based on this comment.

*B. Section-Specific Comments*

Section 39.2 What are the Definitions of Terms Used in This Part?

*Comment:* There is no need for a definition of ISEP student count week.

*Response:* The Committee acknowledged and considered this comment and made this change.

*Comment:* The definition of school bus includes a definition of the operator, including the requirement that the driver be State qualified.

*Response:* The Committee acknowledged and considered this comment and changed the definition of school bus to include ''. . . operated by an operator in the employ of, or under contract to, a Bureau-funded school, who is qualified to operate such a vehicle under Tribal, State, or Federal regulations governing the transportation of students.''

*Comment:* Why does the definition of tribally operated contract school include grant schools?

*Response:* The Committee acknowledged and considered this comment and changed the definition to read ''Tribally operated school means an elementary school, secondary school, or dormitory that receives financial assistance for its operations under a contract, grant or agreement with the Bureau under section 102, 103(a), or 208 of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450 *et seq.*), or under the Tribally Controlled Schools Act of 1988.''

*Comment:* Bureau-funded school and Bureau school should be defined.

*Response:* The Committee acknowledged and considered this comment and added a definition of Bureau-funded school and Bureau school.

*Comment:* Is the definition of ISEP count week still needed in view of the proposal to convert a 3-year rolling average for identifying the student count? The count period used for residential students is not the last full week in September. As only the transportation mileage count would be taken the last full week of September, the term could be changed to ''transportation mileage count week.''

*Response:* The Committee acknowledged and considered this comment and took out the definition of ISEP count week, but kept the definition as part of the definition of transportation.

*Comment:* The following corrections are needed in the definition of ''Limited English Proficient'': ''(1) * * * means a child from a language background other than English who needs language assistance in his/her language or in English in school,'' (2) ''the child comes from an environment [where a language] other than English is dominant.''

*Response:* The Committee acknowledged and considered this comment and adopted the suggested language changes to the definition of ''Limited English Proficient.''

*Comment:* The terms ''Bureau-operated or -funded schools'' used here is redundant. The term should be ''Bureau-funded,'' and that term should be defined, as suggested above.

*Response:* The Committee acknowledged and considered this comment and took out the term ''Bureau-operated'' because it was redundant.

*Comment:* The opening sentence of the definition for Special Education does not seem broad enough to cover the numbered items listed. Some special education students, especially those who are physically handicapped, require personal aides and other such accommodations that are customarily provided through special education programs and paid for with special education funds. Consider using the definition of ''special education'' in the IDEA regulations at 34 CFR 300.26.

*Response:* The Committee acknowledged and considered this comment and adopted the definition of ''special education'' in the IDEA regulations at 34 CFR 300.26.

*Comment:* The definition of ''supervisor'' requires clarity. Perhaps in a Bureau-operated school the individual in the position of ultimate authority is called ''superintendent,'' but that is not the term used in all contract and grant schools. Furthermore, the ''ultimate authority'' in a contract or grant school is the school board. The purpose of this term should be determined and the definition clarified accordingly.

*Response:* The Committee acknowledged and considered this comment and the term ''supervisor'' was removed as a definition.

*Comment:* The definition of ''transported student'' does not match the term. A ''transported student'' is not ''the average number of students.'' Either the term should be revised or the definition should be revised.

*Response:* The Committee acknowledged and considered this comment and removed the definition of ''transported student.''

*Comment:* The definition of ''three year rolling average'' should expressly state that all supplemental weights should be included in the average. That is, the 3-year average should actually be an average of WSU count.

*Response:* The Committee acknowledged and considered this comment and changed the definition to add the current year of operation in academic programs and residential programs.

*Comments:* There were several comments on this section that did not result in a change to the rule. They include comments that:

(1) The definition of ''agency'' should be changed so it reflects what an agency does because it does not always provide services to governing bodies;

(2) The definition of ''agency school board'' is not necessary because they have no duties or responsibilities under ISEP;

(3) The definitions need to clarify whether a school counts non-ISEP students for ADM;

(4) The definition of ''Individual Supplemental Services'' should include SPED since schools are required to spend ISEP funds for SPED services and

since SPED is a non-base academic service;

(5) The ''Limited English Proficiency'' definition is too lengthy and should consist only of paragraph (3) because ISEP only deals with American Indians;

(6) The definition of ''eligible Indian student'' should be revised to establish an upper age limit for eligibility for ISEF funding;

(7) The ''homebound'' definition should require enrollment in a Bureau school, since a homebound student can qualify for ISEF and ADM count if he/she received the minimum level of contact hours; Suggested definition: ''Homebound'' means a student who is enrolled in a Bureau-funded school and is educated outside the classroom''; and

(8) The definition of ''Local School Board'' does not track the definition of that term in the Act and should read: ''Local School Board,'' when used with respect to a Bureau school, means a body chosen in accordance with the laws of the tribe.''

*Response:* These comments were acknowledged and considered by the Committee, but the Committee determined that the comments did not raise concerns that the Committee had not already considered in the proposed rule and therefore no action was taken.

Section 39.102 What Is Academic Base Funding?

*Comment:* The term ''base funding'' should be clarified to distinguish between ''academic base funding'' and ''residential base funding.''

*Response:* The Committee acknowledged and considered this comment, and made this change throughout the funding section.

*Comment:* The question should be revised to state, ''What is included in base academic funding?''

*Response:* The Committee acknowledged and considered this comment, and changed the question to read, ''What is academic base funding?''

*Comment:* The answer to § 102(a) in the proposed rule is incorrect because it states that base funding includes all available funding for educational services.

*Response:* The Committee acknowledged and considered this comment, and changed the answer to more accurately reflect that base funding is the average daily membership times the weighted student unit.

Section 39.103 What Are the Factors Used To Determine Base Funding?

*Comment:* The answer is inaccurate, as it states, ''base funding factors'' when really it is the weighted unit factor for base academic and base residential funding.

*Response:* The Committee acknowledged and considered this comment, and changed the chart (contained in the answer) to more accurately illustrate what the base academic and base residential funding is for the appropriate grade levels.

*Comment:* In the question the words ''use'' and ''must'' are transposed.

*Response:* The Committee acknowledged and considered this comment, and modified the sentence so that these two words are transposed into their correct positions.

Section 39.104 How Must a School's Base Funding Provide for Students With Disabilities?

*Comment:* Is it necessary for a school to comply with the Individuals with Disabilities Act (IDEA) if the school does not have enough students to qualify for part B funding?

*Response:* The Committee did not reach consensus to discuss this issue as it is clear that any student identified as disabled must be provided special education services under IDEA.

*Comment:* This section needs to be revised to select one term to refer to the students being described and use it consistently.

*Response:* The Committee acknowledged and considered this comment, and modified the rule to read ''students with disabilities'' throughout the document.

*Comment:* This section contains several inaccuracies and needs revision. Specifically, the term ''academic base funding'' should be used in place of ''ISEP funds.'' What is meant by ''all components'' of IDEA?. Also, paragraph (b) should address only the circumstances under which a school may use some or all of the 15 percent reserved in paragraph (a)(1) for a schoolwide program.

*Response:* The Committee acknowledged and considered this comment and modified the paragraph to refer to ''academic base funding'' instead of ''ISEP funds.'' The Committee rewrote the paragraph to state that a school may spend all or part of the 15 percent academic base funding reserved under paragraph (a)(1) on school-wide programs to benefit all students (including those without disabilities) only if:

(1) The school can document that it has met all needs of students with disabilities with those funds; and

(2) After having done so, there are unspent funds remaining from the funds.

Section 39.105 Are Additional Funds Available for Special Education?

*Comment:* In paragraph (a) the term ''base funding'' should be ''base academic funding'' and a reference to the 15 percent reserve should be inserted.

*Response:* The Committee acknowledged and considered this comment, and changed the paragraph to read, ''a school may supplement the 15 percent base academic funding reserved under § 39.104, for special education with funds available under part B of the Individuals with Disabilities Education Act (IDEA).''

*Comment:* Revise paragraph (b)(2) to read, ''provide training to staff to improve delivery of part B funds.''

*Response:* The Committee acknowledged and considered this comment and revised the section to read, ''providing training to Bureau staff to improve the delivery of part B funds.''

Comments: A commenter suggested clarification was needed on who makes the determination that schools have demonstrated that the reserved ISEP funds are inadequate to pay for additional SPED services and what criteria are used.

*Response:* The comment was acknowledged and considered and no action was taken, as the Committee felt the rule was clear.

Section 39.106 Who Is Eligible for Special Education Funding?

*Comments:* There were two comments on this section suggesting that clarification was needed as to whether the minimum age requirement only applies to ISEP SPED and if so why. The answer to the question of who is eligible for special education funding is not unique to special education. Rather it establishes age limits applicable to all students in the Bureau-funded system. It should be moved to the definition section.

*Response:* The comment was acknowledged and considered and no action was taken as this section only refers to who is eligible for Special Education Funding.

Section 39.107 Are Schools Allotted Supplemental Funds for Special Student and/or School Costs?

*Comment:* The Committee should take a serious look at categorical funding based on the special and unique educational needs of Indian children. The primary consideration seemed to be based on the distribution of available funds instead of the needs of children. The categorical funding must be based

on the actual services provided to student through a weighted student unit.

*Response:* The Committee did not reach consensus on this item. The Federal team could not consider going back to a categorical system of basing the funding to a student on the type of disability that student may have.

*Comment:* The answer to this question is inconsistent with the definition of the term ''school-wide supplemental funds.'' In that definition four conditions applicable to a school generate supplemental funds. By contrast, in the § 39.107 chart, a mix of both student conditions and school conditions that generate supplemental funding appear. The weights shown in the chart are not consistent.

*Response:* The Committee acknowledged and considered this comment and revised the chart.

*Comments:* Several commenters suggested that the Committee missed several categories of funding. One comment suggested serious consideration be given to allowing all schools to offer early childhood programs instead of using discretionary programming such as the FACE program. The funding of FACE should be moved to ISEP and each school should have a weight of at least .5. Another commenter suggested other programs be considered like vocational and technical education, food, summer programming, and electric technologies.

Other commenters suggested that school personnel costs and the cost of living should be taken into consideration and that all children should be funded equally. No child should be funded less than another child. The WSU for K–12 should be the same 1.5 WSU, especially for K's. The young children need more supervision, small classes, and therefore should not be only 1.15 WSU. This grade needs a teacher and an aide. Especially since the proposed WSU for intense bilingual is planned to be decreased to .13 WSU and all children will be eligible, this decrease will greatly impact our kindergarten program if the intense bilingual is decreased and the kindergarten grade WSU is the same. This should also apply to residential; the WSU should be the same for all grades.

*Response:* The comments were acknowledged and considered and no action was taken as the Committee does not have authority to provide funding to early childhood education and because the commenters did not present any additional arguments that had not already been considered by the Committee in the draft proposed rules.

Section 39.110 Can ISEF Funds be Distributed for the Use of Gifted and Talented Students?

*Comments:* There were several comments on the Gifted and Talented program. One commenter suggested that, as the rule is written, gifted and talented programs, apply only to academic programs. The weight for funding is included in ISEP, which is deducted before distribution of funds. Under this scenario, the rule creates a deficit for Residential Programs in boarding schools and major problems for residential dormitories that have absolutely no access to these gifted and talented funds. The gifted and talented program funds should be available to residential programs.

Another commenter suggested that it can be predicted that the gifted and talented program will grow by anywhere from 10–20 percent from current levels and such growth could create an impact in excess of $20 million that will affect only residential programs.

Another commenter suggested that the ''gifted programs have always used the idea of giftedness from the dominant culture, the Native ideas of giftedness have not been readily considered.'' It is important that Bureau schools make the proper assessment of giftedness, but whose definition is being used? Tribal leaders, parents, and the community should be involved in the process of defining gifted. The idea of placing a cap on the number of gifted students is not an option but rather an evaluation of what gifted means to the Native person and how that differs from the mainstream society. It should not be easy to get into the gifted program with the Bureau, but rather the school and community should give a clear demonstration of giftedness and how the school can support and advance the giftedness of the student in whatever ways appropriate.

*Response:* The Committee could not reach consensus on these comments. These comments were acknowledged and considered by the Committee, but the Committee determined that the comments did not raise new concerns not already considered in the proposed rule. The Committee therefore took no action.

*Comment:* Overall, the rules and procedures on Gifted and Talented seem cumbersome and administering the program is difficult due to the potential for abusing the count.

*Response:* The comment was acknowledged and considered and no action was taken.

Section 39.112 What Is the Limit on the Number of Students Who Are Gifted and Talented?

*Comment:* Although the rule states there is no cap on the number of gifted and talented students a school can have, there is a cap of 15 percent in Leadership and Visual and Performing Arts. Critical Thinking as a specific category has been eliminated. There should not be a cap on Gifted and Talented and the six specific categories should be restored.

*Response:* The comment was acknowledged and considered and no action was taken. This is because the Committee felt they did not limit the number of students who can be classified as gifted and talented, but limited the number of students that would receive ISEP funding as a gifted and talented student.

*Comment:* In order to better correspond to the answer provided, this question should be revised to read: ''Is there a limit on the number of students a school can identify for the gifted and talented program?''

*Response:* The comment was acknowledged and considered and no action was taken.

*Comment:* The proposed funding formula appears to be very cumbersome, complicated and an unrealistic method upon which schools would be dependent for funds to operate programs. A simpler formula needs to be established that would guarantee some degree of stability regarding operating funds for the entire year.

*Response:* The comment was acknowledged and considered and no action was taken because the Committee determined that the comments did not raise concerns that the Committee had not already considered in the proposed rule and therefore no action was taken.

Section 39.113. What are the Special Accountability Requirements for the Gifted and Talented Program?

*Comment:* No outcome state is provided for what happens if a school does not meet the two requirements in this section.

*Response:* The comment was acknowledged and considered and no action was taken.

Section 39.114 What Characteristics May Qualify a Student as Gifted and Talented for Purposes of Supplemental Funding?

*Comment:* This question is awkwardly worded. (The question as published in the proposed rule read, ''How does a school receive funding for gifted and talented students?'') Consider

revising the question to read, ''what characteristics may qualify a student as gifted and talented for purposes of supplemental funding?''

*Response:* The Committee acknowledged and considered this comment and revised the question as suggested.

*Comment:* In (e) strike ''determined by.''

*Response:* The Committee acknowledged and considered this comment and struck the term ''determined by.''

*Comments:* Several commenters suggested changing the caps on specific gifted and talented funding. One commenter suggested that a cap of 25 percent of the student body for gifted and talented should be used. Another believed that the 15 percent cap on leadership and visual and performing arts will have a significant impact on schools as many Native American students fall into these categories. Restricting the number of Indian students that can be identified as gifted or talented in any given school setting can stifle the talents of countless students. Indian students who qualify for this program should not be left out simply because the quota has been filled. Several commenters suggested they would like the rule reconsidered to require documentation to identify all students who truly qualify for the gifted and talented program.

*Response:* The comment was acknowledged and considered and no action was taken as the Committee felt they did not limit the number of students who can be classified as gifted and talented, but limited the number of students that would receive ISEP funding as a gifted and talented student.

*Comment:* Paragraphs (a) and (b) do not identify the measuring tool, and paragraph (c) provides an option of NRT or CRT assessment. One commenter suggested that only norm-referenced tests (NRTs) or IQ tests be used for gifted and talented categories in § 39.114(a)–(c). Schools should develop their own criteria for placement in categories (d) and (e).

*Response:* The comment was acknowledged and considered and no action was taken as the Committee felt the language was clear and the Committee did not want to limit schools' options.

*Comment:* This section does not specify what it is the student has to score in the top 5 percent of in order to be eligible. Does it mean the top 5 percent of students tested nationwide or just the school or some other group of students? ''Intellectual Ability'' is differentiated from ''academic aptitude/achievement'' even though it would seem that these might identify essentially the same students.

*Response:* The comment was acknowledged and considered and no action was taken as the Committee felt the language was clear.

*Comment:* Several commenters suggested that the criteria for gifted and talented students were overly inclusive. One commenter suggested the ''Leadership'' and ''Visual and Performing Arts'' criteria are quite subjective and will probably result in the schools simply identifying 15 percent of their student body for each category. For these students, special services will need to be available that will not be available to other students. This may cause implementation problems for students and schools alike. Another commenter suggested that their agency restrict the school to a maximum of 10 percent of enrollment in gifted and talented.

Other commenters suggested that the weighted student unit (WSU) for the gifted and talented program should be the same for all grades K–12 at .5 or .62 WSU. One commenter suggested that a discrepancy exists because of the low cap placed on measurable giftedness and the high cap on subjective giftedness. Nationwide, gifted talented student identification averages between 10–15 percent. In the recommended rules, giftedness can easily run in excess of 50 percent. Anything categorized above 50 percent should be considered the base program and curriculum should be adjusted accordingly.

Several commenters also suggested imposing a cap on gifted and talented that is no greater than the national average in any given year.

*Response:* These comments were acknowledged and considered but no action was taken, as the 15 percent enrollment number was the result of several days of negotiations in which these issues were discussed at length.

*Comment:* The proposed regulation does not indicate what grade levels are eligible for gifted and talented designations. The commenter objects to proving gifted and talented services before third grade.

*Response:* The Committee acknowledged and considered this comment and no change was made as the grade level was left to the discretion of the schools.

*Comment:* What is the purpose of screening annually and is only annual screening permitted?

*Response:* The Committee acknowledged and considered this comment and no change was made as the Committee felt the language was clear.

Section 39.115 How Are Eligible Gifted and Talented Students Identified and Nominated?

*Comment:* This question should be revised so that the term ''gifted and talented'' appears in the question. (In the proposed rule, the question read: How are eligible students identified and nominated?) Suggested rewording: ''How may students can be nominated for gifted and talented designation?''

*Response:* The Committee acknowledged and considered this comment and changed the question to include the term ''gifted and talented.''

*Comment:* The second sentence of paragraph (a) should be edited as follows: ''A student may be nominated for gifted and talented designation using the criteria in § 39.114 by any of the following: * * * (5) The student himself or herself.''

*Response:* Paragraph (a) was changed to read, ''(a) Screening can be completed annually to identify potentially eligible students. A student may be nominated for gifted and talented designation using the criteria in § 39.114 by any of the following: * * * (5) The student himself or herself.''

*Comment:* In paragraph (b) the word ''child's'' should be changed to ''student's.''

*Response:* The Committee acknowledged and considered this comment and changed the term ''child's'' to ''student's.''

*Comment:* The school is concerned with the proposed removal of the intensive residential guidance program. If the program is eliminated it will be easier to eliminate the services and the funding that are needed to meet these students' needs.

*Response:* The comment was acknowledged and considered and no action was taken because the Committee intended all students to receive these services.

Section 39.117 How Does a School Provide Gifted and Talented Services for a Student?

*Comment:* Neither the answer to this question nor any other proposed gifted and talented regulation describes the level of gifted and talented services that must be provided. A provision should be developed that includes the level of services requirements.

*Response:* The comment was acknowledged and considered and no change was made to the rule because the comment did not present any additional argument that had not already been

considered by the Committee in drafting the proposed rules.

Section 39.118 How Does a Student Receive Gifted and Talented Services in Subsequent Years?

*Comment:* The two sentences of paragraph (a) are contradictory. If a student does not have to reapply for a gifted and talented designation, why must the student be retested every 3 years? The second sentence should be deleted.

*Response:* The Committee acknowledged and considered this comment and changed the last sentence of paragraph (a) to read, ''However, the student must be reevaluated at least every 3 years through the 10th grade to verify eligibility for funding.''

*Comment:* There were several comments suggesting in paragraph (b), the cross-reference to § 39.114 should read ''(d) or (e)'' rather than ''(e) or (f).''

*Response:* The Committee acknowledged and considered this comment and changed the cross reference to read ''(d) or (e).''

Section 39.119 When Must a Student Leave a Gifted and Talented Program?

*Comment:* It is recommended that no student be tested out of gifted and talented and therefore this section should be revised to the extent it calls for testing out. If the section remains, how can a school comply with paragraph (b)? Would the student have to be tested and found to no longer qualify? If this remains, it should be limited to students identified under leadership and visual performing arts only. If the purpose of the testing required in paragraph (b) is evaluation and testing of gifted and talented students' progress, this is acceptable.

*Response:* The comment was acknowledged and considered and no action was taken as the Committee felt the language in the proposed rule was clear.

Section 39.130 Can ISEF Funds Be Used for Language Development Programs?

*Comment:* The rules acknowledge the presence of students who are not proficient in any language, but do not provide any means for identifying them. While there is a test at § 39.134 for testing English ability, there is seemingly no measure for identifying the skill of students in their Native language.

*Response:* The comment was acknowledged and considered and no action was taken as the purpose of this section is to determine whether a student has limited proficiency in English.

*Comment:* Several commenters supported this section of the proposed rule. One tribal commenter agrees with the recommended special cost factor of .13 for language programs. Not only has that been a concern for many years, but it has not always been clear if Bureau schools had permission to teach Native languages.

Another commenter suggested that the tribe supports the proposed rule on Language Development programs, particularly the parts that seek to ensure the goal of infusing Native language and culture in to school curricula. However, the tribe does not agree with using ISEP funds to support Language Development programs for Native students who are predominantly ELL learners or are limited English language proficient as ISEP funds should be used generally for all school programs. Instead, funding for Language Development and ELL students should be provided for separately and the WSU be appropriated at 0.25 based on this new definition. The tribe expects Bureau to seek specific appropriations from Congress to support Native Language development curricula.

*Response:* The comment was acknowledged and considered and no action was taken as these regulations have no affect on the amount of current or future appropriations.

Section 39.131 What Is a Language Development Program?

*Comment:* Paragraphs (d) and (e) of this section seem to describe the same student. If there was a different intent, one or both of the paragraphs should be revised.

*Response:* The comment was acknowledged and considered and no action was taken as the Committee felt the language was clear.

*Comment:* The School Board is afraid that the English proficiency assessment will remove students from their Native Language program. If the intent is to have all Native American students taught their Native Language, more funding will be required to sustain the effort as the funding will be subtracted from the general pool.

*Response:* The comment was acknowledged and considered and no action was taken as these regulations have no effect on the amount of current or future appropriations.

Section 39.132 Can a School Integrate Language Development Programs Into Its Regular Instructional Program?

*Comment:* We strongly support the concept of the integration of Native language programs into the regular curriculum.

*Response:* The comment was acknowledged and considered and no action was taken.

Section 39.134 How Does a School Identify a Limited English Proficient Student?

*Comment:* Since the proposed rules for AYP include using the definition from the State Accountability Workbook in which the tribally funded school is located, it would be appropriate to provide an option for using the LEP assessment instrument approved for use within the State in which the tribally funded school operates.

*Response:* The comment was acknowledged and considered and no action was taken because the Committee felt this option was already available to tribes.

Section 39.135 What Services Must Be Provided to an LEP Student?

*Comment:* The language indicating that services are to assist LEP students become proficient in English and to the extent possible their Native language seems too vague and ambiguous.

*Response:* The comment was acknowledged and considered and no action was taken as the Committee felt the language was clear.

*Comment:* We support the .13 weight for the Language Development Programs, so as not to adversely impact a school's ISEF allotment that would occur if the current .2 weight for intense bilingual were retained.

*Response:* The comment was acknowledged and considered and no action was taken.

Section 39.137 May Schools Operate a Language Development Program Without a Specific Appropriation From Congress?

*Comment:* The citation regarding Native Language curriculum is incorrect. It should read 25 U.S.C. 2007(C)(1)(E).

*Response:* The Committee acknowledged and considered this comment and the citation was changed to read 25 U.S.C. 2007(C)(1)(E).

*Comments:* Several commenters made suggestions on future appropriations. One commenter suggested if Congress does not provide additional ISEP funding for Native Language curriculum, Native Language programs for restoration and enhancement should be funded solely out of the new appropriation, and the ''Language Development Program'' described in these regulations should be altered accordingly. That is, the ''Language

Development Program'' should be restored to the focus of teaching English to students not proficient in that language and the weight for these students should be restored to the current level of .2.

Another commenter suggested this section places a limit on the amount of future Congressional appropriations that can be appropriated for Native language programs. The statute on which this section is based also seems indecipherable. It is not clear that this rule captures the meaning of the statutory provision, whatever it may be.

*Response:* The comment was acknowledged and considered and no action was taken as these regulations have no effect on current or future appropriations.

Section 39.141 What Is the Amount of the Small School Adjustment?

*Comment:* The definition of small schools in the Proposed Rule needs to be expanded slightly to include mores schools not accomplishing economies of scale, and funding should take into account costs of accreditation.

*Response:* The comment was acknowledged and considered and no action was taken because the comment did not present any additional argument that had not already been considered by the Committee in drafting the proposed rules.

*Comment:* The school board agrees with the small school and small high school adjustment but more funding is required so it does not take away from the general pool.

*Response:* The comment was acknowledged and considered and no action was taken as these regulations have no effect on the amount of current or future appropriations.

*Comment:* Several commenters agreed with the Committee's recommendation to offer an adjustment for schools with smaller school populations.

*Response:* The comment was acknowledged and considered and no action was taken.

Section 39.144 What Is the Small High School Adjustment?

*Comment:* The table that accompanies this section should be edited for clarity. We recommend that the first column heading be phrased in the form of a question because the answers that follow are either ''yes'' or ''no.'' We suggest, ''Does the school receive a small school adjustment under § 39.141?''.

*Response:* The Committee acknowledged and considered this comment and changed the table to read, ''School receives a small school adjustment under § 39.141.''

Section 39.145 Can a School Receive Both a Small School Adjustment and a Small High School Adjustment?

*Comment:* The first sentence of the answer should read, ''A school that meets both of the criteria in § 39.140 can receive both a small school adjustment and a small high school adjustment.''

*Response:* The comment was acknowledged and considered and no action was taken as the Committee felt the language was clear.

*Comment:* The table that accompanies this section should be revised to make it clearer.

*Response:* The Committee acknowledged and considered this comment and changed the table to read 1–50 and 51–98.

Section 39.156 Is There an Adjustment for Small Residential Programs?

*Comment:* We object to this provision and request that it be stricken. Residential programs already attract additional weights for residential students. Residential programs that use commercial forms of transportation receive 100 percent reimbursement for transportation costs and therefore receive transportation funding at a higher rate than schools that only use surface bus transportation.

*Response:* The comment was acknowledged and considered but the Committee decided that the comments did not raise concerns that the Committee had not already considered in the proposed rule and therefore no action was taken.

Section 39.200 What Is the Purpose of the Indian School Equalization Formula?

*Comment:* The tribe would like the ISEP week to be changed to either the prior or subsequent week because the current week is American Indian Week, which is a short week for the school, and because students are allowed to participate in cultural activities taking place outside the school and during that week. As a result, many students do not attend that week, resulting in a loss of funding for the school.

*Response:* The comment was acknowledged and considered and no action was taken, as funding under the new regulations will be based on Average Daily Membership at schools.

Section 39.203 How Does OIEP Calculate ADM?

*Comment:* Paragraph (a) refers to Aperiodic reports' from schools but does not indicate when these reports are to be filed. No provision in part 39 states when ADM reports for academic programs are to be compiled or filed. The frequency must be set out with consideration to technological feasibility and administrative efficiency so that schools are not forced to perform administrative tasks or incur unreasonable expenses that are beyond their resources.

*Response:* The comment was acknowledged and considered and no action was taken.

*Comments:* Several commenters supported the Committee's recommendation to use Average Daily Membership to count students for the purposes of ISEP academic funding. The Tribe also agrees with the 3-year rolling average. The proposed mechanism would enable the school to better plan and budget for the upcoming school year based primarily on a 3-year rolling average of student enrollment.

*Response:* The comment was acknowledged and considered and no action was taken.

Section 39.204 How Does OIEP Calculate ISEF?

*Comment:* Both the question and answer should be edited. OIEP does not calculate ISEF. It calculates the value of a WSU and then each school's allotment under the ISEF. Paragraph (a) says the 3-year average ADM is to be multiplied by ''the weighted student unit that is applicable to eligible students.'' At what point is this multiplication made? Is the 3-year average ADM multiplied by some weight total for the current year? If the latter, how would the 3-year average relate to weights assigned to the students for the current year? The terms ''supplemental units'' and ''supplemental weights'' are used in this section. One term should be selected and referred to consistently throughout the subpart.

*Response:* The Committee acknowledged and considered this comment and added a new question before § 39.203 to read: ''When does OIEP calculate a school's allotment? OIEP Calculates a school's allotment no later than July 1. Schools must submit final ADM enrollment figures no later than June 15.'' The rule then goes on to keep § 39.203 and then changed § 30.204 to read:

How does OIEP calculate a school's total WSU for the school year? OIEP will add the weights obtained from the calculations in paragraphs (1), (2), and (3) of this section to obtain the total weighted student units (WSUs) for each school.

(1) Each year's ADM is multiplied by the applicable weighted student unit for each grade level;

(2) Calculate any supplemental WSU generated by the students; and

(3) Calculate any supplemental WSU generated by the schools.

The total WSU for the school year is the sum of (1), (2), and (3). The method for calculating the three-year averages WSU is illustrated in a table.

*Comment:* Funding should be based on prior year student ADM, so schools will be better able to plan for the upcoming school year regarding calendar days, contract days, and the number of personnel and the budgets they can fund. The 3-year average requirement would make estimating budgets more complicated and confusing.

*Response:* The comment was acknowledged and considered but the Committee decided that the comments raised concerns that the Committee had already considered in the proposed rule and therefore no action was taken.

*Comment:* The Tribe recognizes the intent of the Committee to ensure that schools are funded up front using the Average Daily Membership method; however, the Tribe proposes using both Average Daily Attendance and ADM in the funding formula. For example, students are counted on the 40th and 100th days, while the ADM formula remains the same.

*Response:* The comment was acknowledged and considered but the Committee decided that the comments did not raise concerns that the Committee had not already considered in the proposed rule and therefore no action was taken.

Section 39.206 How Does OIEP Determine a School's Funding for the Upcoming School Year?

*Comment:* The term ''upcoming school year'' should probably read ''current school year.'' The term ''this year's'' appears in paragraph (f).

*Response:* The Committee acknowledged and considered this comment and deleted the term ''upcoming year's'' from the question and replaced it with ''current school year's,'' for clarity.

*Comment:* The 7-step process outlined here is incomplete and in some places incorrect. A full re-write of the provision is needed. There were also several comments on the terms and references used in this section.

*Response:* The Committee acknowledged and considered this comment and changed the process (now located in § 39.207) to read as follows:

To determine a school's funding for the school year, OIEP uses the following seven-step process:

(a) *Step 1.* Multiply the appropriate base academic and/or residential weight from § 39.103 by the number of students in each grade level category.

(b) *Step 2.* Multiply the number of students eligible for supplemental program funding under § 39.107 by the weights for the program.

(c) *Step 3.* Calculate the school-based supplemental weights under § 39.107.

(d) *Step 4.* Add together the sums obtained in steps 1 through 3 to obtain each school's total WSU.

(e) *Step 5.* Add together the total WSUs for all Bureau-funded schools.

(f) *Step 6.* Calculate the value of a WSU by dividing the current school year's funds by the average total WSUs as calculated under step 5 for the previous 3 years.

(g) *Step 7.* Multiply each school's WSU total by the base value of one WSU to determine funding for that school.

*Comment:* The cross-reference in paragraph (a) should be to § 39.103.

*Response:* The Committee acknowledged and considered this comment and changed the cross-reference to § 39.103.

Section 39.207 How Are ISEP Funds Distributed?

*Comment:* Paragraph (b) states that the Act requires the second payment to be made ''no later than December 1'' and the regulation should reflect this command. As written, the sentence could be interpreted as allowing the December 21 payment to be made after the two recited actions are completed—verification of the school count'' and any appeals for the prior year—which could be sometime after December 1. If the second payment were delayed to accommodate these actions the regulation would conflict with the Act. The confusion should be resolved by redrafting. What ''school (student)'' count is to be verified? Schools are to receive payments based on the average of the prior 3 years' student count, not on the count for the current year. Thus, there would be no count to verify for the December 1 payment.

*Response:* The comment was acknowledged and considered, but the Committee decided that it had already considered all of the concerns in the proposed rule. For this reason, no action was taken.

*Comment:* The Tribally Controlled Schools Act requires the first payment of funds to be an amount equal to 80 percent of the amount the school was entitled to in the preceding academic year. This needs to be continued. The integrity of the base academic and residential programs should not be eroded by special cost factors.

*Response:* The comment was acknowledged and considered, but since the Committee had already considered the concerns raised by comment, no action was taken.

Section 39.208 When May a School Count a Student for Membership Purposes?

*Comment:* At the end of the first sentence add ''and shall be counted for ADM purposes.''

*Response:* The Committee acknowledged and considered this comment and changed the first sentence as suggested.

*Comment:* The proposed rules for AYP include using the definitions from the State Accountability Workbook in which the tribally funded school is located. It would be appropriate to provide an option for using the State definition of the term ''enrolled student'' for the State in which the tribally funded school operates.

*Response:* The comment was acknowledged and considered and no action was taken.

*Comments:* There were several comments regarding the transition from count week to ADM. One Commenter suggested that the rule seems to omit from the student count students that are enrolled after the 10th day of school regardless of their attendance after that point. This would seem to include transfer students. Another felt the relationship of ADM to being ''counted as enrolled'' is unclear and as stated does not seem to make sense. It seems that only students who were present during one of the first 10 days of school can be used to calculate ADM no matter how often they are in attendance later on in the year. This does not seem to be true ADM, but is arbitrarily limited. One of the reasons for switching to ADM was to avoid such arbitrary funding calculations.

*Response:* The comment was acknowledged and considered and no action was taken because the Committee did not limit ADM to students enrolled the first 10 days of school. The rule allows for a student to be added to the membership and counted for ADM throughout the year.

*Comment:* The Tribe agrees with the proposal to stop using ''count week'' as the way to distribute funding to Bureau schools.

*Response:* The comment was acknowledged and considered and no action was taken.

Section 39.210 What Other Categories of Students Can a School Count for Membership Purposes?

*Comment:* The physical attendance requirement for alternative, Internet, college, and video courses is not real. Students are in these programs because they struggle with attending school regularly. There needs to be another

way of tracking participation, maybe reimbursement for completed courses.

*Response:* The comment was acknowledged and considered and no action was taken because the Bureau of Indian Affairs is not authorized to fund satellite schools and because the comment did not present any additional argument that had not already been considered by the Committee in the draft proposed rules.

Section 39.211 Can a Student Be Counted as Enrolled in More Than One School?

*Comment:* This section states that a student can be counted in more than one school as long as the student meets the criteria of § 39.208. However, it would seem that the student would be counted as being in two different schools at the same time.

*Response:* The comment was acknowledged and considered and no action was taken because the Committee felt the language of the section was clear.

Section 39.213 What Are the Minimum Number of Instructional Hours Required in Order To Be Considered a Full-time Educational Program?

*Comment:* Each accreditation agency requires different instructional hours. It would be better to state that if a school is accredited it can receive funding.

*Response:* The comment was acknowledged and considered and no action was taken.

Section 39.215 How Does ISEF Fund Residential Programs?

*Comment:* Edit the second sentence to read ''funding for residential programs is based on the average of the 3 previous years'' residential WSUs.

*Response:* The Committee acknowledged and considered this comment and changed the second sentence as suggested.

*Comment:* Residential programs are smaller and have fewer staff than schools. Requiring more documentation and reporting seems overwhelming and discriminating in nature.

*Response:* The comment was acknowledged and considered and no action was taken.

*Comment:* The existing ISEP formula does not provide adequate funding to operate a residential and boarding school program. The regulations as written will effectively eliminate peripheral dormitories and significantly impact the ability of residential boarding schools to financially survive. The regulations should be revisited to make the necessary corrections to raise the residential and boarding school weights to adequately fund the program. The formula should be adjusted to fund all residential and boarding school students at a base weight of 2.0.

*Response:* The Committee acknowledged and considered this comment, however no change was made to the funding formula because the commenters did not present any additional arguments that had not already been considered by the Committee in the draft proposed rules.

Section 39.216 How Are Students Counted for the Purpose of Funding Residential Services?

*Comment:* Paragraphs (b) and (c) should be revised to refer to the ''first full week in October'' in order to be consistent with paragraph (a).

*Response:* The Committee acknowledged and considered this comment and changed the paragraphs to refer to the ''first full week in October.''

*Comment:* While instruction switched to ADM, residential service continues to be funded on a count week; however the average of the previous 3 years would be the count that is used. This decision was probably made due to the wide fluctuations of dormitory attendance due to various factors.

*Response:* The comment was acknowledged and considered and no action was taken because there was no suggested change.

Section 39.217 Are There Different Formulas for Different Levels of Residential Services?

*Comment:* There were several comments suggesting a discrepancy between § 39.217(c) and § 39.218. Section 39.217(c) states that at least 50 percent of the residency levels established during the count period must be maintained every month for the remainder of the school year. Section 39.218 states that schools must maintain 25 percent of its residency each month to avoid severe financial sanctions. The tribe request that § 39.217(c) be changed to 25 percent to retain continuity in the rule.

*Response:* The comment was acknowledged and considered but the Committee decided that the comments did not raise concerns that the Committee had not already considered in the proposed rule and therefore no action was taken.

*Comment:* Section 39.216 establishes a 3-week count period for residential programs. Did the Committee intend to add the weekend before the 3-week period for the purposes of qualifying for residential funding?

*Response:* This comment was acknowledged and considered and no action was taken.

*Comment:* Several commenters suggested changes to the table. One suggestion was that the table should be revised to read (in either table or sentence form): ''If a residential program operates 4 nights per week or fewer, the weight for each residential student shall be obtained by multiplying each student's base residential factor for the appropriate grade, as set out in § 39.103, by 4/7.'' ''If a residential program operates 5, 6 or 7 nights per week, the weight for each residential student shall be obtained by multiplying each student's base residential factor for the appropriate grades, set out in § 39.103 by 7/7.''

Another suggestion asked this question about paragraph (b): This paragraph requires at least 10 percent of the students in a residential program to be in the dormitory 3 of the 4 weekends during the count period. Is this correctly stated or should it read, ''2 of the 3 weekends during the count period?''

*Response:* These comments were acknowledged and considered and no action was taken.

*Comment:* There were several comments seeking clarification of the weekend services. One commenter suggested if a residential program only intends to serve students 4 nights per week and receives funding for only 4 nights, is it nonetheless expected to serve 10 percent of its students over the weekend?

Another commenter suggested the different treatment for dormitories that are open 5, 6, or 7 days from those open 4 nights a week will likely have the effect of more dormitories staying open on weekends or at least, being open on Sunday evening for returning students. The effect of this change will be a shift of funding from day schools to boarding schools. Even within boarding schools, a greater portion of costs will shift to residential programs and away from instruction.

*Response:* The comment was acknowledged and considered but the comments raised concerns that the Committee had already considered in the proposed rule and therefore no action was taken.

Section 39.218 What Happens if a Residential Program Does Not Maintain Residency Levels Required by This Part?

*Comments:* Several commenters had questions pertaining to this section of the rule. One commenter asked, ''the penalty stated for failing to meet the minimum retention requirement each month is the loss of one-tenth of * * *

current year allocations. Since the school year runs for ten months, the penalty is a full month's worth of funding. How can such a program stay in operation for the month if it loses full funding for that month? Does the Committee intend that the dormitory would close? If that occurs, it is unlikely the dorm would reopen in the following month. How is the loss of funding to be implemented? Since the Act requires contract and grant schools to be paid in advance, does the Committee contemplate that the Bureau would send a bill for collection?''

*Response:* The comment was acknowledged and considered, but the Committee decided that the comments raised concerns that the Committee had already considered in the proposed rule and therefore no action was taken.

*Comment:* The requirement that monthly residential reports be filed on the last school day of a month will likely pose an administrative difficulty for OIEP at the end of each year. Many schools do not complete their school year until sometime in June. Even if all residential programs file timely reports for the month of June, it is possible that OIEP will have only a few business days left in June to make the calculations needed to distribute the July 1 payment for the next academic year.

*Response:* The comment was acknowledged and considered and no action was taken because OIEP felt they would be able to make the calculations based on these timeframes.

*Comment:* Provisions should be made for circumstances that might temporarily close all or part of a dorm and prevent that program from meeting the 10 nights/students/month minimum. Examples of these circumstances are: (1) students absent due to an illness or injury and (2) unforeseen circumstances, such as a flu epidemic or health/safety situations.

*Response:* The comment was acknowledged and considered and no action was taken as the Committee felt this issue was addressed in § 39.217(d).

*Comment:* When referencing the use of counts obtained from the current system in the table, the term ''count weeks'' should be used to differentiate from the proposed new system for residential counts, which will occur over a 3-week period. In row (c) of the table ''systems or'' should be replaced with ''residential and academic programs are.''

*Response:* The comment was acknowledged and considered and no action was taken.

Section 39.219 What Reports Must Residential Programs Submit To Comply With This Rule?

*Comment:* A student must be in residence at least 10 nights during each full school month in order to be counted. Does this mean that months such as August, December, and June are not considered a ''full school month'' and would not have to achieve the 10-night minimum? It would be helpful to expressly list in the regulation the calendar months that are considered ''full school months'' for the purpose of the 10-night minimum.

*Response:* The Committee acknowledged and considered this comment and added a new question after § 39.219. The new question reads, ''What is a full school month?'' The answer is ''Each 30-day period following the first day residential services are provided to students based on the school residential calendar.''

Section 39.220 How Will the Provisions of This Subpart Be Phased In?

*Comment:* The answer should be reworded to read ''The calculation of the 3-year rolling average of ADM (WSU) for each school and for the entire Bureau-funded school system will be phased in as shown in the following table.''

*Response:* The Committee acknowledged and considered this comment and changed the answer to the language in the comment.

Section 39.400 What Is the Purpose of This Subpart?

*Comment:* This section, combined with § 39.409, adds more bureaucracy and additional expenses to OIEP. It is not necessary to hire independent auditors because it creates mistrust. Funds are wasted by implementing an external audit on the certified count.

*Response:* The comment was acknowledged and considered but the Committee decided that the comments raised concerns that the Committee had already considered in the proposed rule and therefore no action was taken.

*Comment:* This provision should be edited to read: ''The purpose of this subpart is to establish systematic verification and random independent outside auditing procedures to hold administrative officials and the school board, or tribal officials having responsibility for student count and student transportation expenditures reporting, accountable for accurate and reliable performance of these duties. The subpart establishes systematic verification and random independent outside auditing procedures to accomplish this goal.''

*Response:* The comment was acknowledged and considered and no action was taken.

*Comment:* The School Board wants to know how the Bureau would get a refund from a grant school if the school was overfunded.

*Response:* The comment was acknowledged and considered and no action was taken as the statute clearly outlines how the Bureau is to collect overpayments.

Section 39.403 What Certification Is Required?

*Comments:* Several commenters asked what teacher certification and school accreditation have to do with individual student records. This is not an ISEP requirement.

*Response:* The comment was acknowledged and considered but the Committee decided that the comments raised concerns that the Committee had already considered in the proposed rule and therefore no action was taken.

*Comment:* As written, paragraph (c) is meaningless. It should identify precisely the certifications required for ELO, specialists, and school superintendents so that a competent review of compliance with the requirement to maintain such certifications can be made. In addition, the provision should require that the certifications of personnel be maintained and available for inspection at the office in which they work as well as in a ''central location.''

*Response:* The comment was acknowledged and considered and no action was taken.

*Comment:* It should be clarified that for the purposes of confidentiality that Special Education files may be maintained in a separate location per IDEA and FERPA.

*Response:* The comment was acknowledged and considered and no action was taken because these regulations are subject to IDEA and FERPA, which have their own regulations addressing such issues.

*Comment:* The change in accountability of student eligibility and attendance is a good step. The commenter agrees that all schools should maintain files and certify their accuracy relating to documentation of student eligibility to receive base and supplemental services. The concept of holding each Bureau education line officer accountable for this shows an attempt to improve Bureau's level of service.

*Response:* The comment was acknowledged and considered and no action was taken.

*Comment:* Paragraphs (a) and (b) should specify when the required certifications must be made and submitted. Is this a one-time-per-academic-year requirement? If so, when must the requirement be satisfied? If this certification is a periodic requirement, state the frequency.

*Response:* The comment was acknowledged and considered and no action was taken.

*Comment:* When will the ELOs annual reviews be conducted? At the beginning or end of the academic year? Periodically throughout the year?

*Response:* The comment was acknowledged and considered and no action was taken because the Committee felt that § 39.405 answered this question.

*Comment:* Clarification is needed as to who will pay for the outside audits the Director is to conduct.

*Response:* The comment was acknowledged and considered and no action was taken because the Committee felt the regulation was clear.

Section 39.405 How Will Verifications Be Conducted?

*Comments:* There were several comments on the timing of verification. One commenter suggested the first two sentences seem to address verification of the academic count, and require a minimum of one day per grading period to be included in the verification survey. Does this mean that the verifications cannot be made until the end of the year when all the grading periods have been completed?

Another commented that the last sentence relates to verification of the residential count. Verification of the count for the count period makes sense, but there is no statement when that verification will occur. Since the regulations do not establish a time for submitting the residential count, it is impossible to tell when the verification will take place. Also, what method and frequency will the ELO use to verify residence during the remainder of the year?

*Response:* The comment was acknowledged and considered and no action was taken because the Committee felt that the regulation clarified that this was an ongoing process.

Section 39.406 What Documentation Must the School Maintain for Additional Services It Provides?

*Comment:* Services from certified education personnel should not be required.

*Response:* The comment was acknowledged and considered and no action was taken.

*Comment:* The requirement of physical attendance at the school for at least 3 hours per day may restrict students from fully participating in college-based advanced placement opportunities for more than half of an ordinary school day. This would impede the ability of some highly capable students to receive full dual high school and college credit from the many State programs. An arbitrary restriction of 3 hours per day in physical attendance is not consistent with the Bureau's post-secondary placement goals.

*Response:* The comment was acknowledged and considered but the Committee decided that the comments raised concerns that the Committee had already considered in the proposed rule and therefore no action was taken.

Section 39.407 How Long Must a School Maintain Records?

*Comment:* Records retention should be for only 3 years.

*Response:* The comment was acknowledged and considered and no action was taken because all records are subject to Federal records retention timeframes.

Section 39.409 How Does the OIEP Director Ensure Accountability?

*Comment:* In paragraph (a)(1), the purpose of the audit is clearly intended to be an audit of education line officer performance. But in (b)(1) and (2), the auditor tasks relate to the accuracy of the school's reports, rather than to the integrity of the ELO's review. Paragraph (b) should be revised to make it clear that it is the ELO's performance that is under review.

*Response:* The Committee acknowledged and considered this comment and changed the answer to reflect the language in the comment.

*Comment:* This section, read in conjunction with § 39.400, adds more bureaucracy and additional expenses to OIEP. It is not necessary to hire independent auditors because it creates mistrust. Funds are wasted by implementing an external audit on the certified count.

*Response:* The comment was acknowledged and considered but the Committee decided that the comments raised concerns that the Committee had already considered in the proposed rule and therefore no action was taken.

*Comment:* Paragraph (a)(1): Who will decide which school in each OIEP line office is selected for the random filed audit each year? There should be a method to ensure that contract, grant, and Bureau-operated schools in a line office are selected over time, and that the same school is not ''randomly'' selected for repeated audit. If such were to be permitted, a line offer's model school could be routinely selected.

*Response:* The comment was acknowledged and considered but the Committee decided that the comments raised concerns that the Committee had already considered in the proposed rule and therefore no action was taken.

*Comment:* This section calls for an independent audit of at least one school per line officer per year. This would be over 20 audits per year to be done at Central Office expense. This could become an unfunded mandate, as there has been little or no interest in increasing funding for Bureau education administration. If this is the key to accountability, then it needs to be in the FY 2005 or 2006 budget request.

*Response:* The comment was acknowledged and considered and no action was taken as this regulation has no impact on budget requests.

*Comment:* This section establishes criteria for auditing firms and calls for licensed CPAs who audit under Single Audit Act. This does not seem appropriate since this is not an audit of accounting procedures. This is an audit of student counting and should call for consulting firms that are expert in such procedures and familiar with the classifications that result in student weights.

*Response:* The comment was acknowledged and considered but the Committee decided that the comments raised concerns that the Committee had already considered in the proposed rule and therefore no action was taken.

Section 39.412 What Sanctions Apply for Failure To Comply With This Part?

*Comment:* Paragraph (b) is intended to ensure that Bureau and school administrative officials are held to account for actions described in paragraph (a), but the phrase ''unless prohibited by law'' could defeat the sunlight the provision seeks to ensure. Bureau should provide the Committee with a legal opinion on the question whether Federal law permits or prohibits performance deficiency personnel actions involving Federal employees to be reported to the affected tribal governing body. If Federal law would prohibit such reporting, this provision is meaningless with regard to Federal employees and would apply only to contract and grant school employees. The Committee should determine if such an outcome is supportable.

*Response:* The comment was acknowledged and considered and no action was taken.

Section 39.413 Can a School Appeal the Verification of the Count?

*Comment:* This provision does not state when disallowances would be made nor when they will be communicated to the affected school. Nor does it set out a time period for the appeal.

*Response:* The comment was acknowledged and considered and no action was taken.

Section 39.500 What Emergency and Contingency Funds Are Available?

*Comment:* Paragraph (a) says the reserved amount is to be ''1 percent of funds from the allotment formula.'' This is not a precise description of the funds involved. It should be re-written to reflect the Act (25 U.S.C. 2007).

*Response:* The comment was acknowledged and considered and no action was taken as the Committee felt the language in the proposed rule was sufficient.

Section 39.501 What Is an Emergency or Unforeseen Contingency?

*Comment:* This section requires that all criteria in paragraphs (a) through (e) be met to qualify for contingency funds. Paragraphs (c) and (e) should be revisited by the Committee. Paragraph (c) would eliminate any event that could have been covered by an insurance policy. This is objectionable, as in theory; nearly any event could be covered by an insurance policy if one is willing to pay the premium for the coverage. Paragraph (e) requires someone (OIEP Director) to make a very subjective judgment as to whether the event could have or have not been prevented by prudent action by officials responsible for the education program. The presence of these two provisions in the regulation could prevent any event from qualifying for contingency funds.

*Response:* The Committee acknowledged and considered this comment and changed paragraph (c) to read ''It is not covered by an insurance policy in force at the time of the event.''

*Comment:* The section states the criteria for identifying what the contingency fund can be used for and indicates that the fund cannot be used in cases of mismanagement, malfeasance, or willful neglect. While it is clearly not the intent of the fund to cover such costs, the Bureau needs to be ready for situations where a school has been grossly mismanaged and there has been a resumption or other change in management late in the year and little or no funding remains in the school's budget. There is probably no other source of funds in such a situation.

*Response:* The comment was acknowledged and considered and no action was taken as the comment did not suggest a change to the rule.

Section 39.502 How Does a School Apply for Contingency Funds?

*Comment:* The final sentence must be revised to provide that the Director will respond to the request for contingency funds ''within 30 days or receipt of request.'' The provision should also allow a school to send a request for contingency funds directly to the Director, with a copy to the ELO. This is needed to ensure that a school's request reaches the Director even if the ELO fails to forward it to the Director within 48 hours as required by this section.

*Response:* The comment was acknowledged and considered but the Committee decided that the comments did not raise concerns that the Committee had not already considered in the proposed rule and therefore no action was taken.

Section 39.504 May Contingency Funds be Carried Over to a Subsequent Fiscal Year?

*Comment:* Add a second sentence: ''Contingency funds provided to a contract or grant school shall be available for expenditures without fiscal year limitations.''

*Response:* The comment was acknowledged and considered and no action was taken.

*Comment:* This states that Bureau operated schools may carry over contingency funds to the next fiscal year. Has it been researched and verified that this is possible?

*Response:* The comment was acknowledged and considered but the Committee decided that the comments raised concerns that the Committee had already considered in the proposed rule and therefore no action was taken.

Section 39.600 Are Bureau-Operated School Board Expenses Funded by ISEP Limited?

*Comment:* The school board does not believe money should be used for school board expenses and training because it will take away from student funding.

*Response:* The comment was acknowledged and considered and no action was taken as the school board is authorized by statute to use these funds.

*Comment:* The Tribe agrees with proposed rules on school board training.

*Response:* The comment was acknowledged and considered and no action was taken.

Section 39.602 Can Grant and Contract Schools Spend ISEP Funds for School Board Expenses, Including Training?

*Comment:* There were several comments discussing which funds should be used for school board training.

*Response:* The Committee acknowledged and considered this comment and deleted § 39.602 after determining it was unnecessary.

Section 39.603 Is School Board Training Required for All Bureau-Funded Schools?

*Comment:* The answer to this question is incomplete as it does not reflect the statutory provision at 25 U.S.C. 2007(c)(2)(B)(iii) which recommends, but does not require, training for a tribal council that serves as a school board. The provision should be revised as follows: ''Yes. Any new member of a local board or an agency school board must complete 40 hours to training within one year of appointment, provided that such training is recommended, but is not required, for a tribal governing body that serves in the capacity of a school board.''

*Response:* The Committee acknowledged and considered this comment and changed the answer to read, ''Yes. Any new member of a local school board or an agency school board must complete 40 hours of training within one year of appointment, provided that such training is recommended but is not required, for a tribal governing body that serves in the capacity of a school board.''

Section 39.700 What Is the Purpose of This Part?

*Comment:* Subpart G should be revised to read ''Student Transportation.''

*Response:* The Committee acknowledged and considered this comment and made the suggested change.

*Comment:* This question should be revised to read ''What is the purpose of this subpart?''

*Response:* The Committee acknowledged and considered this comment and made the suggested change.

*Comment:* Paragraph (a) does not expressly state that a school will receive funding for student transportation. Proposed revision: ''(a) The purposes of this subpart are to provide funds to each school for the round trip transportation

of students between home and school, and to describe how transportation mileage and expenses are to be calculated and reported.''

*Response:* The comment was acknowledged and considered and no action was taken.

*Comment:* The tribe supports the proposed rules regarding transportation but recommends that schools be funded for two curricular enrichment activities as a part of the outdoor education programs.

*Response:* The comment was acknowledged and considered but the Committee decided that the comments raised concerns that the Committee had already considered in the proposed rule and therefore no action was taken.

Section 39.701 What Definitions Apply to Terms Used in This Subpart?

*Comment:* ISEP count week is defined but that method for counting students would be replaced with the 3-year rolling average. Perhaps the term and its definition should be changed to ''transportation mileage count week'' since the last full week in September would be used to count mileage only. If this revision is made, the new term must be reflected elsewhere in the subpart.

*Response:* The Committee acknowledged and considered this comment and made the suggested changes.

*Comment:* Is the definition of ''unimproved roads'' consistent with the current usage where ''unimproved roads'' generate additional weight for mileage count? If a road has a drainage ditch but is unpaved, it would not meet the stated definition.

*Response:* The comment was acknowledged and considered, but the Committee decided that the comments raised concerns that the Committee had already considered in the proposed rule and therefore no action was taken.

Section 39.704 Are Schools Eligible for Other Funds To Transport Residential Students?

*Comment:* If this provision is intended to apply only to expenses incurred in transporting residential students by commercial carriers, the question and answer should be revised to so state.

*Response:* The Committee acknowledged and considered this comment changed the question to read, ''Are schools eligible to receive chaperone expenses to transport residential students?''

Section 39.705 Are Schools Eligible for Other Funds To Transport Special Education Students?

*Comment:* The term ''other funds'' in the question is misleading. Suggested rephrase: ''Under what circumstances may a school count mileage incurred in transporting special education students?'' The answer seems to be contradicted with § 39.707(a)(3).

*Response:* The Committee acknowledged and considered this comment and changed the question to read ''Are schools eligible for transportation funds to transport special education students?''

*Comment:* It would be better to identify what school bus transportation is allowable and count all of it and then request appropriations. If you say these are not fundable then Congress will never fund them.

*Response:* The Committee acknowledged and considered this comment and changed the question to read ''Which student transportation expenses are currently not eligible for Student Transportation Funding?'' The answer was also changed to read ''The following transportation expenses are currently not eligible for transportation funding, although the funding will be collected under the provisions in this subpart.''

Section 39.708 Are Non-ISEP Eligible Children Eligible for Transportation Funding?

*Comment:* There were several comments suggesting changing the language of this section to reflect the fact that transportation funding is based on miles, not students. There were also comments on the language referring to the transport of non-ISEP eligible students.

*Response:* The Committee acknowledged and considered these comments and changed this section to read, ''Are miles generated by non-ISEP eligible students eligible for transportation funding? No. Only miles generated by ISEP eligible students enrolled in and attending a school are eligible for student transportation funding.''

Section 39.710 How Does a School Calculate Annual Bus Transportation Miles for Day Students?

*Comment:* When is ISEP count week?

*Response:* The Committee acknowledged and considered this comment and changed this section to refer to ''student transportation count week''.

Sections 39.720–722 [Various Titles]

*Comment:* There were several comments on the limitations of trips outlined in the chart.

*Response:* The Committee acknowledged and considered this comment and deleted the chart.

Section 39.721 What Transportation Information Must Off-reservation Boarding Schools Report?

*Comment:* There were several comments on the need for additional clarity in this section.

*Response:* The Committee acknowledged and considered this comment and changed this section to read as follows:

What transportation information must off-reservation boarding schools report?

(a) Each off reservation boarding school that provides transportation must report annually the information required by this section. The report must:

(1) Be submitted to OIEP by August 1 and cover the preceding school year;

(2) Include a Charter/Commercial and Air Transportation Form signed and certified as complete and accurate by the School Principal and appropriate ELO; and

(3) Include the information required by paragraph (b) of this section.

(b) Each annual transportation report must include the following information:

(1) Fixed vehicle costs, including: the number and type of busses, passenger size and local GSA rental rate and duration of GSA contract;

(2) Variable vehicle costs;

(3) Mileage traveled to transport students to and from school on school days, to sites of special services, and to extra-curricular activities;

(4) Medical trips;

(5) Maintenance and Service costs;

(6) Driver costs; and

(7) All expenses referred to in § 39.707.

Section 39.722 What Transportation Information Must Day Schools or On-reservation Boarding Schools Report?

*Comment:* The question should be edited to read ''What transportation program information must day schools, on reservation boarding schools, and peripheral dormitories report?''

*Response:* The Committee acknowledged and considered this comment and changed the question as suggested.

*Comment:* Paragraph (b) should be edited for clarity. For example, all of the information requested in paragraph (b)(1) is useful, but all elements do not constitute ''fixed vehicle costs.'' Some of the information sought is descriptive of the vehicles used not their costs.

*Response:* The Committee acknowledged and considered this comment and changed paragraph (b) to add the term ''and other costs.''

*Comment:* Paragraph (b)(4) should be revised to read ''mileage driven to student medical trips'' and (b)(5) should be revised to read ''costs of vehicle maintenance and

service, including cost of miles driven to obtain maintenance and service.''

*Response:* The Committee acknowledged and considered this comment and changed these sections to read (b)(4) ''Mileage driven for student medical trips'' and paragraph (b)(5) to read, ''Costs of vehicles maintenance and service costs including cost of miles driven to obtain maintenance and service.''

Section 39.730 Which Standards Must Student Transportation Vehicles Meet?

*Comment:* There were two comments suggesting tribal standards be incorporated into this section.

*Response:* The Committee acknowledged and considered this comment and changed this section to include ''State or tribal motor vehicle safety standards.''

Section 39.732 How Does OIEP Allocate Transportation Funds to Schools?

*Comment:* Change ''OIEP allocates transportation miles'' to ''OIEP allocates transportation funds.''

*Response:* The Committee acknowledged and considered this comment and changed the section to read ''OIEP allocates transportation funds.''

Section 39.801 What Is the Formula to Determine the Amount Necessary to Sustain a School's Academic or Residential Program?

*Comment:* Paragraph (a), ''minimal annual amount'' should read ''minimum annual amount.'' The formula should read ''Student Unit Value × weighted Student Unit = Annual Minimum amount per student.''

*Response:* The Committee acknowledged and considered this comment and changed the sections as suggested.

*Comment:* This would provide useless information for a useless report and should be eliminated.

*Response:* The comment was acknowledged and considered and no action was taken.

Section 39.802 What Is the Student Unit Value in the Formula?

*Comment:* The first sentence should be revised to read ''The student unit value is the dollar value applied to each student in an academic or residential program.''

*Response:* The Committee acknowledged and considered this comment and changed the section as suggested.

*Comment:* Revise to read ''(a) The student unit instructional value (SUIV) applies to a student enrolled in an instructional program. It is an annually established ratio of 1.0 that represents a student in grades 4–6 of an instructional program.''

*Response:* The Committee acknowledged and considered this comment and changed the section as suggested.

Section 39.804 How Is the SUIV Calculated?

*Comment:* Additional instructions are needed to describe the calculation in this part.

*Response:* The Committee acknowledged and considered this comment and made the following changes:

(b) Step 2. Subtract the average specific Federal share per student (title I part A and IDEA, part B) of the total revenue for Bureau-funded elementary schools for the last school year for which data is available as reported by NCES (15 percent)

(c) Step 3. Subtract the administrative cost grant/agency area technical services revenue per student as a percentage of the total revenue and current expenditures of Bureau-funded schools from the last year data that is available

(d) Step 4. Subtract the day transportation revenue per student as a percentage of the total revenue (current revenue) Bureau-funded schools for the last school year, for which the date is available.

Section 39.805 What Was the Student Unit for Instruction Value (SUIV) for the School Year 1999–2000?

*Comment:* What was the student unit for instruction value (SUIV) for the school year 1999–2000? Revise the first sentence to read: ''The process described in § 39.804 looks like this, produces the following results using figures for the 1999–2000 school year: $8,030 ANACE 1205 Average per student specific Federal share of total revenue for Bureau of Indian Affairs-funded schools, 993 Administrative Cost grant/technical services revenue as a percentage of total revenue, 658 Transportation revenue as a percentage of the total revenue, 85 Johnson O'Malley funding 5259 SUIV.''

*Response:* The Committee acknowledged and considered this comment and changed the section to read:

Section 39.805 What Was the Student Unit for Instruction Value (SUIV) for the School Year 1999–2000?

The process described in § 39.804 is illustrated in the table below, using figures for the 1999–2000 school year:

Step 1: $8,030 ANACE

Step 2: −1205 Average specific Federal share of total revenue for Bureau-funded schools

Step 3: −993 Cost grant/technical services revenue as a percentage total revenue

Step 4: −658 Transportation revenue as a percentage of the total revenue

Step 5: 85 Johnson O'Malley funding

Total: $5,259 SUIV

Section 39.806 How Is the SURV Calculated?

*Comments:* There were several comments on this section. Paragraph (b) refers to a procedure but no procedure is set out.

*Response:* The comments were acknowledged and considered and no action was taken.

## VI. Comments on Part 42—Student Rights

25 U.S.C. 2016 requires the Secretary to prescribe rules to ensure the Constitutional and civil rights of Indian students attending Bureau-funded schools, including rights to privacy, freedom of religion and expression, and due process in connection with disciplinary actions, suspension, and expulsion. As was the case with the proposed rule, the intent of this final rule is to provide minimum requirements for fulfilling due process and student rights obligations owed to students while allowing schools to provide for higher requirements and to develop their own processes for handling violations of school policies, including alternative dispute resolution where appropriate. The final rule changes the proposed rule by including a new section on when a formal disciplinary hearing is required.

*General Comments:* Some commenters agreed with the proposed rules in part 42 and one commenter noted with approval the alternative dispute resolution provisions.

*Comment:* Revise part 42.2 to set a threshold for disciplinary actions that require a due process hearing. Limit the hearing requirement to cases where potential disciplinary action is suspension for more than 10 days or expulsion and expressly state it in the rules.

*Response:* We deleted in § 42.2(c) ''for alleged violation of school regulations for which the student may be subjected to penalties'' after ''disciplinary actions.'' In order to set a threshold for requiring disciplinary hearings and to provide for local school policies and procedures, we added a new section: ''When does due process require a formal disciplinary hearing? Unless local school policies and procedures provide for less, at a minimum, a formal disciplinary hearing is required prior to a suspension in excess of 10 days or expulsion.''

*Comment:* Include in part 42.2 information from the Notice of Proposed Rulemaking Preamble to part 42 to provide more information on the purpose of § 42.2.

*Response:* We added a new question and answer setting a threshold for requiring disciplinary hearings and providing for local school policies and procedures which may require more than the minimum set out in § 42.2. (see response above)

*Comment:* Add to part 42 a provision addressing notices of disciplinary action in Native languages and providing for an interpreter at hearings.

*Response:* We did not add a provision addressing notices in Native languages or interpreters at hearings because these issues can be addressed at the local school level as needed.

*Comment:* Revise part 42 to allow schools to set due process procedures that address both tribal and legal precedents and provide for legal counsel only after these processes are completed.

*Response:* We did not make the suggested changes because § 42.7 (now § 42.8) provides for the right to legal counsel only at the formal disciplinary hearing stage, not before it. In addition, § 42.2 provides for use of applicable tribal constitutional and statutory protections and does not preclude use of tribal precedents.

**VII. Comments on Part 44—Grants Under the Tribally Controlled Schools Act**

Part 44 provides rules to comply with 25 U.S.C. 2501 *et seq.*, the Tribally-Controlled Schools Act of 1988 (TCSA). The Act included a new section 25 U.S.C. 2509 which provides that, ''the Secretary is authorized to issue rules relating to the discharge of duties specifically assigned to the Secretary in this part.'' This rule provides that Bureau of Indian Affairs manuals, guidelines, and policy directives apply only if the grantee agrees. This rule provides eligibility requirements and methods for termination. It incorporates subpart E, part 900, 25 CFR for standards on financial, property, and procurement management. The final rule amends the proposed rule provision for method for payment to an annual payment. We said in preamble to NPRM we were changing payments to once a year.

*General Comments:* One commenter states that this part is under-funded. A commenter agrees that the TCSA needs little or no adjustment. A commenter agrees with grant payments in July and December.

*Comment:* Provide for holding grant schools accountable after the annual payment is issued.

*Response:* The Tribally-Controlled Schools Act covers this. We made no changes.

*Comment:* Provide guidance for the Bureau for its role as the responsible Federal agency under the Single Audit Act.

*Response:* No change is necessary. The comment is based on a misunderstanding of the rule.

*Comment:* Clarify the Bureau's significant role with Bureau-funded schools and the Memorandum of Agreement between Bureau and the Department of Education (DOE) for Bureau's administering of funds that come through DOE.

*Response:* No change was made. The comment is based on a misunderstanding of the rule.

*Comment:* Revise § 44.101 to add a new (a): ''The Tribally Controlled Schools Act'' and reformat the remaining paragraphs as (b) and (c).

*Response:* The change was made for clarity.

*Comment:* Revise § 44.101 because the Secretary is bound also by Public Law 100–297 and appropriations laws.

*Response:* No change is necessary. The comment is based on a misunderstanding of the rule.

*Comment:* Revise § 44.104 to change ''resumption'' to ''reassumption'', change ''BIA'' to ''the Secretary'', and change ''tribe'' to ''the tribal governing body.''

*Response:* We changed § 44.104(c) to read as follows:

§ 44.104 How Can a Grant Be Terminated?

A grant can be terminated only by one of the following methods:

(a) Retrocession;

(b) Revocation of eligibility by the Secretary; or

(c) Reassumption by the Secretary.

*Comment:* Revise duplicative portions of § 44.106 and revise to complete statement of requirements of 25 U.S.C. 2505(c).

*Response:* No change is necessary because 25 U.S.C. 2001 covers this issue.

*Comment:* In § 44.106 add a new section to add the conditions for corrective action for a grant school that fails to become accredited by January 8, 2005.

*Response:* No change is necessary because 25 U.S.C. 2001 covers this issue.

*Comment:* In §§ 44.106 and 44.107 include guidance for the Bureau and tribes for dealing with problems grant schools have had regarding eligibility.

*Response:* The comment suggests discussions that are not relevant to this rule. No change was necessary.

*Comment:* Revise the question in § 44.107 to read: ''Under what circumstances may the Secretary reassume a program?''

*Response:* The change was made for clarity.

*Comment:* Revise the answer in § 44.107 to read: ''The Secretary may only reassume a program in compliance with 25 U.S.C. 450m and 25 CFR part 900, subpart P. The tribe or school board shall have a right to appeal the reassumption pursuant to 25 CFR part 900, subpart L.''

*Response:* The answer was revised as suggested for clarity.

*Comment:* In § 44.108 the citation to the Prompt Payment Act needs legal review.

*Response:* No change was made. The comment is based on a misunderstanding of this section.

*Comment:* Revise § 44.108 to include funding available under continuing resolutions.

*Response:* No change was made. The comment is not relevant to the rule.

*Comment:* Revise §§ 44.108 and 47.3 for consistency on date for notification of funding.

*Response:* This cannot be done because the Act includes two different dates.

*Comment:* Revise § 44.109 to include that the grantee should have the right to appeal the assertion that an overpayment occurred and appeal the amount of overpayment claimed.

*Response:* Section 44.109 was revised to delete that the grantee must return the overpayment within 30 days of notification of an overpayment. The grant recipient has 30 days after the final determination that an overpayment occurred to return the amount of the overpayment.

*Comment:* In § 44.109 clarify whether it is procedurally possible for the Bureau to receive the overpayments to grant schools and redistribute them.

*Response:* No change was made. The comment is based on a misunderstanding of the rule.

*Comment:* In § 44.110(a) add a new ''(6)'' to read: ''Subpart L: Appeals.''

*Response:* This change was not made because it was not needed. In (b)(5) ''our'' was changed to ''the Secretary's'' for clarity.

**VIII. Comments on Part 47—Uniform Direct Funding and Support for Bureau-Funded Schools**

25 U.S.C. 2010 requires the Secretary to establish by regulation a system for the direct funding and support of all Bureau-funded schools that allots funds under 25 U.S.C. 2007. The existing rule in 25 CFR 39.50 adequately covered this issue and it was edited for plain language with no substantive changes for the proposed rule. There are no substantive changes to the final rule.

*General Comments:* Some commenters agreed with the proposed rules at part 47. One commenter questioned the allocation percentage mentioned in the Preamble to the proposed part 47.

*Comment:* Standardize use of terms ''local financial plan'' and ''local educational financial plan'' throughout part 47 by using ''local financial plan'' as in 25 U.S.C. 2010(b).

*Response:* We changed ''local financial plans'' to ''local educational financial plans'' in part 47 for clarity.

*Comment:* Delete part 47 as unnecessary because part 47 ignores grant schools, referring only to Bureau-operated and contract schools.

*Response:* We did not delete part 47 because part 47 is necessary to describe uniform direct funding and support for Bureau-funded schools. We changed the title of this part to add ''for Bureau-funded Schools.''

*Comment:* Change ''schools'' in part 47 to ''Bureau-operated schools'' because Bureau-operated schools are the only schools required to prepare local financial plans under the relevant statute, 25 U.S.C. 2010(b).

*Response:* We changed the title of part 47 to ''Uniform Direct Funding and Support for Bureau-Operated Schools'' and changed all references to schools in part 47 to ''Bureau-operated schools'' for clarity. We deleted the definition of ''school'' in the definitions in § 47.2.

*Comment:* Change the October 1 date in § 47.12 because 25 U.S.C. 2010(a)(2)(A)(i) states that funds shall become available July 1 of the fiscal year for which funds are appropriated.

*Response:* We deleted in its entirety § 47.12 on how funds are obligated because it is unnecessary. 25 U.S.C. 2010(a)(2)(A)(i), the Indian Affairs Manual, and 25 CFR part 900 cover the issue.

*Comment:* Change ''school boards'' to ''Bureau-operated school boards'' in the definition of ''Consultation'' in part 47 because Bureau-operated school boards are the only school boards required to prepare local financial plans.

*Response:* We made the suggested change to add ''Bureau-operated'' before ''school boards.''

*Comment:* Add a definition of ''school board'' to refer only to ''Bureau-operated school board'' because only Bureau-operated school boards are the only schools required to prepare local financial plans.

*Response:* We did not add a definition of ''school board'' because we changed references to ''school board'' to ''Bureau-operated school board'' for clarity.

*Comment:* Make dates consistent in § 47.3 and § 44.108 on notification of funding.

*Response:* We made no change because there is no inconsistency.

*Comment:* Change ''all funds'' to ''80 per cent of the funds'' in § 47.4 to comply with 25 U.S.C. and change the reference to which fiscal year funding is available from ''that fiscal year that begins on the following October 1st'' to, ''for the fiscal year that began on the preceding October 1'' because as written it implies that OIEP will distribute funds before they are appropriated.

*Response:* We made the suggested change.

*Comment:* Change the question in § 47.6 to refer to ''records of local financial plans.''

*Response:* We did not make the suggested change because it was not necessary for clarity.

*Comment:* Strike the reference to ''contract schools'' because contract schools are not required to prepare local educational financial plans.

*Response:* We deleted the reference to ''contract schools.'' We also changed the requirement for certification from the ''Agency Superintendent of Education'' to ''Education Line Officer'' to reflect the current designation for that position.

## IX. Procedural Matters

### *Regulatory Planning and Review (E.O. 12866)*

This document is a significant rule and the Office of Management and Budget (OMB) has reviewed this rule under Executive Order 12866.

(1) This rule will not have an effect of $100 million or more on the economy. It will not adversely affect in a material way the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities. The rule deals exclusively with student rights, does not pertain to funding, and is not expected to have an effect on budgets.

(2) This rule will not create a serious inconsistency or otherwise interfere with an action taken or planned by another agency. This rule has been prepared in consultation with the Department of Education.

(3) This rule does not alter the budgetary effects of entitlements, grants, user fees, or loan programs or the rights or obligations of their recipients. This rule spells out student rights, the procedures for their dissemination, and the procedures for implementing them. The rule does not pertain to funding and is not expected to have an effect on budgets.

(4) This rule raises novel legal or policy issues. The rule proposes entirely new procedures related to determining adequate yearly progress, school boundaries, funding, and other issues. It also updates existing procedures addressing student rights and adapts the existing rules to comply with current law and policy.

### *Regulatory Flexibility Act*

The Department of the Interior certifies that this document will not have a significant economic effect on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). Funding for Indian education programs has averaged about $350 million in grants annually over the last ten years. The Act, which these proposed rules are designed to implement, will provide no additional funding, but merely reallocates current funding. Since grants redistribute wealth, they have no impact on aggregate employment and prices unless the allocation of the grant money produces incentives that result in an employment, income, or price effect in excess of $100 million annually. Although the purpose of this rule is to change the formula for distributing grant money, Bureau does not have sufficient information to evaluate the extent to which the proposed regulation may change the incentives associated with new proposed formula. However, based on the new proposed formula, school districts may face incentives to report or count students differently than under the existing formula. Regardless of the extent to which incentives may shift, the Secretary believes that the changes would not result in changes in employment, income, or prices in the economy.

### *Small Business Regulatory Enforcement Fairness Act (SBREFA)*

This rule is not a major rule under 5 U.S.C. 804(2), the Small Business Regulatory Enforcement Fairness Act. This rule:

(1) Does not have an annual effect on the economy of $100 million or more on budgets.

(2) Will not cause a major increase in costs or prices for consumers, individual industries, Federal, State or local government agencies, or geographic regions. The rule proposes new procedures related to determining adequate yearly progress, school boundaries, funding, and other issues. It also updates existing procedures addressing student rights and adapts the existing rules to comply with current law and policy. The rule does not pertain to funding and is not expected to have an effect on budgets. The rule is not expected to have a perceptible effect on costs or prices.

(3) Does not have significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of U.S.-based enterprises to compete with foreign-based enterprises. The rule proposes new procedures related to determining adequate yearly progress, school boundaries, funding, and other issues. It also updates existing procedures addressing student rights

and adapts the existing rules to comply with current law and policy. The rule does not pertain to funding and is not expected to have an effect on budgets.

*Unfunded Mandates Reform Act*

This rule does not impose an unfunded mandate on State, local, or tribal governments or the private sector of more than $100 million per year. The rule proposes new procedures related to determining adequate yearly progress, school boundaries, funding, and other issues. It also updates existing procedures addressing student rights and adapts the existing rules to comply with current law and policy. The procedures for dissemination of student rights through student handbooks are consistent with current practices. The procedures for implementing student rights through hearings and alternative dispute resolution processes are consistent with current practices. The rule is not expected to mandate additional costs on tribal governments.

*Takings (E.O. 12630)*

In accordance with Executive Order 12630, the rule does not have significant takings implications. Nothing in the rule proposes rules of private property rights, constitutional or otherwise, or invokes the Federal condemnation power or alters any use of Federal land held in trust. The focus of this rule is civil rights and due process rights. A takings implication assessment is not required.

*Federalism (E.O. 13132)*

In accordance with Executive Order 13132, the rule does not have sufficient federalism implications to warrant the preparation of a Federalism Assessment. Nothing in this rule has 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. This rule does not implicate State government. Similar to federalist concepts, this rule leaves to local school board discretion those issues of student civil rights and due process that can be left for local school boards to address. A Federalism Assessment is not required.

*Civil Justice Reform (E.O. 12988)*

In accordance with Executive Order 12988, the Office of the Solicitor has determined that this rule does not unduly burden the judicial system and meets the requirements of sections 3(a) and 3(b)(2) of the Order.

*Consultation With Indian Tribes (E.O. 13175)*

In accordance with Executive Order 13175, we have identified potential effects on federally recognized Indian tribes that will result from this rule. This rule will require tribally operated schools to observe student rights and procedures spelled out in the rule. Accordingly:

(1) We have consulted with the affected tribes on a government-to-government basis. The consultations have been open and candid to allow the affected tribes to fully evaluate the potential effect of the rule on trust resources.

(2) We have fully considered tribal views.

(3) We have consulted with the Office of Indian Education Programs and the Office of the Assistant Secretary—Indian Affairs have been consulted about the political effects of this rule on Indian tribes.

*Paperwork Reduction Act*

This rulemaking requires information collection from 10 or more parties and a submission under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*) is required. Accordingly, the Department prepared submissions on these collections for review and approval by OMB. Having reviewed the Department's submissions, along with any comments that were submitted by the reviewing public, OMB has approved the information collection requirements contained in this rulemaking and has assigned the OMB control number 1076–0163. In addition to this number, the information collections in part 39 are also covered by OMB control numbers 1076–0134 and 1076–0122.

The information collected will be used to enable the Bureau to better administer Bureau-funded schools subject to this rulemaking. In all instances, the Department has striven to lessen the burden on the public and ask for only information essential to administering the programs affected and to carrying out the Department's fiduciary responsibility to federally recognized tribes. The public may make additional comments on the accuracy of our burden estimates (which are explained in detail in the preamble to the proposed rule published on February 25, 2004, at 69 FR 8752) and any suggestions for reducing this burden to the OMB Interior Desk Officer, Docket Number 1076–AE49, Office of Information and Regulatory Affairs, 202/395–6566 (facsimile); e-mail: *oira_docket@omb.eop.gov.*

*National Environmental Policy Act*

This rule does not constitute a major Federal action significantly affecting the quality of the human environment. A detailed statement under the National Environmental Policy Act of 1969 is not required.

**List of Subjects**

*25 CFR Parts 30, 37, 39, 44, and 47*

Elementary and secondary education programs, Government programs—education, Grant programs—Indians, Indians—education, Schools.

*25 CFR Part 42*

Elementary and secondary education programs, Indians—education, Schools, Students.

Dated: April 20, 2005.

**Michael D. Olsen,**

*Acting Principal Deputy Assistant Secretary—Indian Affairs.*

■ For the reasons given in the preamble, the Bureau of Indian Affairs amends parts 30, 37, 39, 42, 44, and 47 of title 25 of the Code of Federal Regulations as follows:

■ 1. New part 30 is added to subchapter E to read as follows:

## PART 30—ADEQUATE YEARLY PROGRESS

Sec.
30.100 What is the purpose of this part?
30.101 What definitions apply to terms in this part?

**Subpart A—Defining Adequate Yearly Progress**

30.102 Does the Act require the Secretary of the Interior to develop a definition of AYP for Bureau-funded schools?
30.103 Did the Committee consider a separate Bureau definition of AYP?
30.104 What is the Secretary's definition of AYP?

**Alternative Definition of AYP**

30.105 Can a tribal governing body or school board use another definition of AYP?
30.106 How does a tribal governing body or school board propose an alternative definition of AYP?
30.107 What must a tribal governing body or school board include in its alternative definition of AYP?
30.108 May an alternative definition of AYP use parts of the Secretary's definition?

**Technical Assistance**

30.109 Will the Secretary provide assistance in developing an alternative AYP definition?
30.110 What is the process for requesting technical assistance to develop an alternative definition of AYP?
30.111 When should the tribal governing body or school board request technical assistance?

**Approval of Alternative Definition**

30.113 How does the Secretary review and approve an alternative definition of AYP?

**Subpart B—Assessing Adequate Yearly Progress**

30.114 Which students must be assessed?
30.115 Which students' performance data must be included for purposes of AYP?
30.116 If a school fails to achieve its annual measurable objectives, what other methods may it use to determine whether it made AYP?

**Subpart C—Failure To Make Adequate Yearly Progress**

30.117 What happens if a Bureau-funded school fails to make AYP?
30.118 May a Bureau-funded school present evidence of errors in identification before it is identified for school improvement, corrective action, or restructuring?
30.119 Who is responsible for implementing required remedial actions at a Bureau-funded school identified for school improvement, corrective action or restructuring?
30.120 Are Bureau-funded schools exempt from school choice and supplemental services when identified for school improvement, corrective action, and restructuring?
30.121 What funds are available to assist schools identified for school improvement, corrective action, or restructuring?
30.122 Must the Bureau assist a school it identified for school improvement, corrective action, or restructuring?
30.123 What is the Bureau's role in assisting Bureau-funded schools to make AYP?
30.124 Will the Department of Education provide funds for schools that fail to meet AYP?
30.125 What happens if a State refuses to allow a school access to the State assessment?

**Subpart D—Responsibilities and Accountability**

30.126 What is required for the Bureau to meet its reporting responsibilities?
30.150 Information Collection.

**Authority:** Public Law 107–110, 115 Stat. 1425.

### § 30.100 What is the purpose of this part?

This part establishes for schools receiving Bureau funding a definition of ''Adequate Yearly Progress (AYP).'' Nothing in this part:

(a) Diminishes the Secretary's trust responsibility for Indian education or any statutory rights in law;

(b) Affects in any way the sovereign rights of tribes; or

(c) Terminates or changes the trust responsibility of the United States to Indian tribes or individual Indians.

### § 30.101 What definitions apply to terms in this part?

*Act* means the No Child Left Behind Act, Public Law 107–110, enacted January 8, 2002. The No Child Left Behind Act reauthorizes and amends the Elementary and Secondary Education Act (ESEA) and amends the Education Amendments of 1978.

*Bureau* means the Bureau of Indian Affairs in the Department of the Interior.

*Department* means the Department of the Interior.

*OIEP* means the Office of Indian Education Programs in the Bureau of Indian Affairs.

*School* means a school funded by the Bureau of Indian Affairs.

*Secretary* means the Secretary of the Interior or a designated representative.

*Secretaries* means the Secretary of the Interior and the Secretary of Education.

## Subpart A—Defining Adequate Yearly Progress

### § 30.102 Does the Act require the Secretary of the Interior to develop a definition of AYP for Bureau-funded schools?

Yes, the Act requires the Secretary to develop a definition of AYP through negotiated rulemaking. In developing the Secretary's definition of AYP, the No Child Left Behind Negotiated Rulemaking Committee (Committee) considered a variety of options. In choosing the definition in § 30.104, the Committee in no way intended to diminish the Secretary's trust responsibility for Indian education or any statutory rights in law. Nothing in this part:

(a) Affects in any way the sovereign rights of tribes; or

(b) Terminates or changes the trust responsibility of the United States to Indian tribes or individual Indians.

### § 30.103 Did the Committee consider a separate Bureau definition of AYP?

Yes, the Committee considered having the Bureau of Indian Affairs develop a separate Bureau definition of AYP. For a variety of reasons, the Committee reached consensus on the definition in § 30.104. This definition is in no way intended to diminish the United States' trust responsibility for Indian education nor is it intended to give States authority over Bureau-funded schools.

### § 30.104 What is the Secretary's definition of AYP?

The Secretary defines AYP as follows. The definition meets the requirements in 20 U.S.C. 6311(b).

(a) Effective in the 2005–2006 school year, the academic content and student achievement standards, assessments, and the definition of AYP are those of the State where the school is located, unless an alternative definition of AYP is proposed by the tribal governing body or school board and approved by the Secretary.

(1) If the geographic boundaries of the school include more than one State, the tribal governing body or school board may choose the State definition it desires. Such decision shall be communicated to the Secretary in writing.

(2) This section does not mean that the school is under the jurisdiction of the State for any purpose, rather a reference to the State is solely for the purpose of using the State's assessment, academic content and student achievement standards, and definition of AYP.

(3) The use of the State's definition of AYP does not diminish or alter the Federal Government's trust responsibility for Indian education.

(b) School boards or tribal governing bodies may seek a waiver that may include developing their own definition of AYP, or adopting or modifying an existing definition of AYP that has been accepted by the Department of Education. The Secretary is committed to providing technical assistance to a school, or a group of schools, to develop an alternative definition of AYP.

**Alternative Definition of AYP**

### § 30.105 May a tribal governing body or school board use another definition of AYP?

Yes. A tribal governing body or school board may waive all or part of the Secretary's definition of academic content and achievement standards, assessments, and AYP. However, unless an alternative definition is approved under § 30.113, the school must use the Secretary's definition of academic content and achievement standards, assessments, and AYP.

### § 30.106 How does a tribal governing body or school board propose an alternative definition of AYP?

If a tribal governing body or school board decides that the definition of AYP in § 30.104 is inappropriate, it may decide to waive all or part of the definition. Within 60 days of the decision to waive, the tribal governing body or school board must submit to the Secretary a proposal for an alternative definition of AYP. The proposal must meet the requirements of 20 U.S.C. 6311(b) and 34 CFR 200.13–200.20, taking into account the unique circumstances and needs of the school or schools and the students served.

**§ 30.107 What must a tribal governing body or school board include in its alternative definition of AYP?**

(a) An alternative definition of AYP must meet the requirements of 20 U.S.C. 6311(b)(2) of the Act and 34 CFR 200.13–200.20, taking into account the unique circumstances and needs of the school or schools and the students served.

(b) In accordance with 20 U.S.C. 6311(b) of the Act and 34 CFR 200.13–200.20, an alternative definition of AYP must:

(1) Apply the same high standards of academic achievement to all students;

(2) Be statistically valid and reliable;

(3) Result in continuous and substantial academic improvement for all students;

(4) Measure the progress of all students based on a high-quality assessment system that includes, at a minimum, academic assessments in mathematics and reading or language arts;

(5) Measure progress separately for reading or language arts and for mathematics;

(6) Unless disaggregation of data cannot yield statistically reliable information or reveals personally identifiable information, apply the same annual measurable objectives to each of the following:

(i) The achievement of all students; and

(ii) The achievement of economically disadvantaged students, students from major racial or ethnic groups, students with disabilities, and students with limited English proficiency;

(7) Establish a starting point;

(8) Create a timeline to ensure that all students are proficient by the 2013–2014 school year;

(9) Establish annual measurable objectives;

(10) Establish intermediate goals;

(11) Include at least one other academic indicator which, for any school with a 12th grade, must be graduation rate; and

(12) Ensure that at least 95 percent of the students enrolled in each group under § 30.107(b)(6) are assessed.

(c) If a Bureau-funded school's alternative definition of AYP does not use a State's academic content and student achievement standards and academic assessments, the school must include with its alternative definition the academic standards and assessment it proposes to use. These standards and assessments must meet the requirements in 20 U.S.C. 6311(b) and 34 CFR 200.1–200.9.

**§ 30.108 May an alternative definition of AYP use parts of the Secretary's definition?**

Yes, a tribal governing body or school board may take part of the Secretary's definition and propose to waive the remainder. The proposed alternative definition of AYP must, however, include both the parts of the Secretary's AYP definition the tribal governing body or school board is adopting and those parts the tribal governing body or school board is proposing to change.

## Technical Assistance

**§ 30.109 Will the Secretary provide assistance in developing an alternative AYP definition?**

Yes, the Secretary through the Bureau, shall provide technical assistance either directly or through contract to the tribal governing body or the school board in developing an alternative AYP definition. A tribal governing body or school board needing assistance must submit a request to the Director of OIEP under § 30.110. In providing assistance, the Secretary may consult with the Secretary of Education and may use funds supplied by the Secretary of Education in accordance with 20 U.S.C. 7301.

**§ 30.110 What is the process for requesting technical assistance to develop an alternative definition of AYP?**

(a) The tribal governing body or school board requesting technical assistance to develop an alternative definition of AYP must submit a written request to the Director of OIEP, specifying the form of assistance it requires.

(b) The Director of OIEP must acknowledge receipt of the request for technical assistance within 10 days of receiving the request.

(c) No later than 30 days after receiving the original request, the Director of OIEP will identify a point of contact. This contact will immediately begin working with the tribal governing body or school board to jointly develop the specifics of the technical assistance, including identifying the form, substance, and timeline for the assistance.

**§ 30.111 When should the tribal governing body or school board request technical assistance?**

In order to maximize the time the tribal governing body or school board has to develop an alternative definition of AYP and to provide full opportunity for technical assistance, the tribal governing body or school board should request technical assistance before formally notifying the Secretary of its intention to waive the Secretary's definition of AYP.

## Approval of Alternative Definition

**§ 30.113 How does the Secretary review and approve an alternative definition of AYP?**

(a) The tribal governing body or school board submits a proposed alternative definition of AYP to the Director, OIEP within 60 days of its decision to waive the Secretary's definition.

(b) Within 60 days of receiving a proposed alternative definition of AYP, OIEP will notify the tribal governing body or the school board of:

(1) Whether the proposed alternative definition is complete; and

(2) If the definition is complete, an estimated timetable for the final decision.

(c) If the proposed alternative definition is incomplete, OIEP will provide the tribal governing body or school board with technical assistance to complete the proposed alternative definition of AYP, including identifying what additional items are necessary.

(d) The Secretaries will review the proposed alternative definition of AYP to determine whether it is consistent with the requirements of 20 U.S.C. 6311(b). This review must take into account the unique circumstances and needs of the schools and students.

(e) The Secretaries shall approve the alternative definition of AYP if it is consistent with the requirements of 20 U.S.C. 6311(b), taking into consideration the unique circumstances and needs of the school or schools and the students served.

(f) If the Secretaries approve the alternative definition of AYP:

(1) The Secretary shall promptly notify the tribal governing body or school board; and

(2) The alternate definition of AYP will become effective at the start of the following school year.

(g) The Secretaries will disapprove the alternative definition of AYP if it is not consistent with the requirements of 20 U.S.C. 6311(b). If the alternative definition is disapproved, the tribal governing body or school board will be notified of the following:

(1) That the definition is disapproved; and

(2) The reasons why the proposed alternative definition does not meet the requirements of 20 U.S.C. 6311(b).

(h) If the Secretaries deny a proposed definition under paragraph (g) of this section, they shall provide technical assistance to overcome the basis for the denial.

## Subpart B—Assessing Adequate Yearly Progress

### § 30.114 Which students must be assessed?

All students in grades three through eight and at least once in grades ten through twelve who are enrolled in a Bureau-funded school must be assessed.

### § 30.115 Which students' performance data must be included for purposes of AYP?

The performance data of all students assessed pursuant to § 30.114 must be included for purposes of AYP if the student is enrolled in a Bureau-funded school for a full academic year as defined by the Secretary or by an approved alternative definition of AYP.

### § 30.116 If a school fails to achieve its annual measurable objectives, what other methods may it use to determine whether it made AYP?

A school makes AYP if each group of students identified in § 30.107(b)(6) meets or exceeds the annual measurable objectives and participation rate identified in §§ 30.107(b)(9) and 30.107(b)(12) respectively, and the school meets the other academic indicators identified in § 30.107(b)(11). If a school fails to achieve its annual measurable objectives for any group identified in § 30.107(b)(6), there are two other methods it may use to determine whether it made AYP:

(a) *Method A—''Safe Harbor.''* Under ''safe harbor,'' the following requirements must be met for each group referenced under § 30.107(b)(6) that does not achieve the school's annual measurable objectives:

(1) In each group that does not achieve the school's annual measurable objectives, the percentage of students who were below the ''proficient'' level of academic achievement decreased by at least 10 percent from the preceding school year; and

(2) The students in that group made progress on one or more of the other academic indicators; and

(3) Not less than 95 percent of the students in that group participated in the assessment.

(b) *Method B—Uniform Averaging Procedure.* A school may use uniform averaging. Under this procedure, the school may average data from the school year with data from one or two school years immediately preceding that school year and determine if the resulting average makes AYP.

## Subpart C—Failure To Make Adequate Yearly Progress

### § 30.117 What happens if a Bureau-funded school fails to make AYP?

| Number of yrs of failing to make AYP in same academic subject | Status | Action required by entity operating school for the following school year |
|---|---|---|
| 1st year of failing AYP | No status change | Analyze AYP data and consider consultation with outside experts. |
| 2nd year of failing AYP | School improvement, year one | Develop a plan or revise an existing plan for school improvement in consultation with parents, school staff and outside experts. |
| 3rd year of failing AYP | School Improvement, year two | Continue revising or modifying the plan for school improvement in consultation with parents, school staff and outside experts. |
| 4th year of failing AYP | Corrective Action | Implement at least one of the six corrective actions steps found in 20 U.S.C. 6316(b)(7)(C)(iv). |
| 5th year of failing AYP | Planning to Restructure | Prepare a restructuring plan and make arrangements to implement the plan. |
| 6th year of failing AYP | Restructuring | Implement the restructuring plan no later than the beginning of the school year following the year in which it developed the plan. |
| 7th year (and beyond) of failing AYP. | Restructuring | Continue implementation of the restructuring plan until AYP is met for two consecutive years. |

### § 30.118 May a Bureau-funded school present evidence of errors in identification before it is identified for school improvement, corrective action, or restructuring?

Yes. The Bureau must give such a school the opportunity to review the data on which the bureau would identify a school for improvement, and present evidence as set out in 20 U.S.C. 6316(b)(2).

### § 30.119 Who is responsible for implementing required remedial actions at a Bureau-funded school identified for school improvement, corrective action or restructuring?

(a) For a Bureau-operated school, implementation of remedial actions is the responsibility of the Bureau.

(b) For a tribally operated contract school or grant school, implementation of remedial actions is the responsibility of the school board of the school.

### § 30.120 Are Bureau-funded schools exempt from offering school choice and supplemental educational services when identified for school improvement, corrective action, and restructuring?

Yes, Bureau-funded schools are exempt from offering public school choice and supplemental educational services when identified for school improvement, corrective action, and restructuring.

### § 30.121 What funds are available to assist schools identified for school improvement, corrective action, or restructuring?

From fiscal year 2004 to fiscal year 2007, the Bureau will reserve 4 percent of its title I allocation to assist Bureau-funded schools identified for school improvement, corrective action, and restructuring.

(a) The Bureau will allocate at least 95 percent of funds under this section to Bureau-funded schools identified for school improvement, corrective action, and restructuring to carry out those schools' responsibilities under 20 U.S.C. 6316(b). With the approval of the school board the Bureau may directly provide for the remedial activities or arrange for their provision through other entities such as school support teams or educational service agencies.

(b) In allocating funds under this section, the Bureau will give priority to schools that:

(1) Are the lowest-achieving schools;

(2) Demonstrate the greatest need for funds; and

(3) Demonstrate the strongest commitment to ensuring that the funds enable the lowest-achieving schools to meet progress goals in the school improvement plans.

(c) Funds reserved under this section must not decrease total funding under title I, part A of the Act, for any school below the level for the preceding year. To the extent that reserving funds under this section would reduce the title I, part A dollar amount of any school

below the amount of title I, part A dollars the school received the previous year, the Secretary is authorized to reduce the title I, part A allocations of those schools receiving an increase in the title I, part A funds over the previous year to create the 4 percent reserve. This section does not authorize a school to receive title I, part A dollars it is not otherwise eligible to receive.

(d) The Bureau will publish in the **Federal Register** a list of schools receiving funds under this section.

#### § 30.122 Must the Bureau assist a school it identified for school improvement, corrective action, or restructuring?

Yes, if a Bureau-funded school is identified for school improvement, corrective action, or restructuring, the Bureau must provide technical or other assistance described in 20 U.S.C. 6316(b)(4) and 20 U.S.C. 6316(g)(3) .

#### § 30.123 What is the Bureau's role in assisting Bureau-funded schools to make AYP?

The Bureau must provide support to all Bureau-funded schools to assist them in achieving AYP. This includes technical assistance and other forms of support.

#### § 30.124 Will the Bureau apply for funds that are available to help schools that fail to meet AYP?

Yes, to the extent that Congress appropriates other funds to assist schools not meeting AYP, the Bureau will apply to the Department of Education for these funds.

#### § 30.125 What happens if a State refuses to allow a school access to the State assessment?

(a) The Department will work directly with State officials to assist schools in obtaining access to the State's assessment. This can include direct communication with the Governor of the State. A Bureau-funded school may, if necessary, pay a State for access to its assessment tools and scoring services.

(b) If a State does not provide access to the State's assessment, the Bureau-funded school must submit a waiver for an alternative definition of AYP.

### Subpart D—Responsibilities and Accountability

#### § 30.126 What is required for the Bureau to meet its reporting responsibilities?

The Bureau has the following reporting responsibilities to the Department of Education, appropriate Committees of Congress, and the public.

(a) In order to provide information about annual progress, the Bureau must obtain from all Bureau-funded schools the results of assessments administered for all tested students, special education students, students with limited English proficiency, and disseminate such results in an annual report.

(b) The Bureau must identify each school that did not meet AYP in accordance with the school's AYP definition.

(c) Within its annual report to Congress, the Secretary shall include all of the reporting requirements of 20 U.S.C. 6316(g)(5).

#### § 30.150 Information collection.

Notwithstanding any other provision of law, no person is required to respond to, nor shall any person be subject to a penalty for failure to comply with, a collection of information subject to the requirements of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*)(PRA), unless that collection of information displays a currently valid Office of Management and Budget (OMB) Control Number. This part involves collections of information subject to the PRA in §§ 30.104(a)(1), 30.104(b), 30.106, 30.107, 30.110, and 30.118. These collections have been approved by OMB under control number 1076–0163.

■ 2. New part 37 is added to read as follows:

## PART 37—GEOGRAPHIC BOUNDARIES

Sec.

37.100 What is the purpose of this part?
37.101 What definitions apply to the terms in this part?
37.102 How is this part organized?
37.103 Information collection.

**Subpart A—All Schools**

37.110 Who determines geographic attendance areas?
37.111 What role does a tribe have in issues relating to school boundaries?
37.112 Must each school have a geographic attendance boundary?

**Subpart B—Day Schools, On-Reservation Boarding Schools, and Peripheral Dorms**

37.120 How does this part affect current geographic attendance boundaries?
37.121 Who establishes geographic attendance boundaries under this part?
37.122 Once geographic attendance boundaries are established, how can they be changed?
37.123 How does a Tribe develop proposed geographic attendance boundaries or boundary changes?
37.124 How are boundaries established for a new school or dorm?
37.125 Can an eligible student living off a reservation attend a school or dorm?

**Subpart C—Off-Reservation Boarding Schools**

37.130 Who establishes boundaries for Off-Reservation Boarding Schools?
37.131 Who may attend an ORBS?

**Authority:** Public Law 107–110, 115 Stat. 1425.

#### § 37.100 What is the purpose of this part?

(a) This part:

(1) Establishes procedures for confirming, establishing, or revising attendance areas for each Bureau-funded school;

(2) Encourages consultation with and coordination between and among all agencies (school boards, tribes, and others) involved with a student's education; and

(3) Defines how tribes may develop policies regarding setting or revising geographic attendance boundaries, attendance, and transportation funding for their area of jurisdiction.

(b) The goals of the procedures in this part are to:

(1) Provide stability for schools;

(2) Assist schools to project and to track current and future student enrollment figures for planning their budget, transportation, and facilities construction needs;

(3) Adjust for geographic changes in enrollment, changes in school capacities, and improvement of day school opportunities; and

(4) Avoid overcrowding or stress on limited resources.

#### § 37.101 What definitions apply to the terms in this part?

*Act* means the No Child Left Behind Act, Public Law 107–110, enacted January 8, 2002. The No Child Left Behind Act reauthorizes and amends the Elementary and Secondary Education Act (ESEA) and the amended Education Amendments of 1978.

*Bureau* means the Bureau of Indian Affairs in the Department of the Interior.

*Geographic attendance area* means a physical land area that is served by a Bureau-funded school.

*Geographic attendance boundary* means a line of demarcation that clearly delineates and describes the limits of the physical land area that is served by a Bureau-funded school.

*Secretary* means the Secretary of the Interior or a designated representative.

#### § 37.102 How is this part organized?

This part is divided into three subparts. Subpart A applies to all Bureau-funded schools. Subpart B applies only to day schools, on-reservation boarding schools, and peripheral dorms—in other words, to all Bureau-funded schools except off-reservation boarding schools. Subpart C applies only to off-reservation boarding schools (ORBS).

**§ 37.103 Information collection.**

Notwithstanding any other provision of law, no person is required to respond to, nor shall any person be subject to a penalty for failure to comply with, a collection of information subject to the requirements of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*) (PRA), unless that collection of information displays a currently valid Office of Management and Budget (OMB) Control Number. This part involves collections of information subject to the PRA in §§ 37.122(b), and 37.123(c). These collections have been approved by OMB under control number 1076–0163.

## Subpart A—All Schools

**§ 37.110 Who determines geographic attendance areas?**

The Tribal governing body or the Secretary determines geographic attendance areas.

**§ 37.111 What role does a tribe have in issues relating to school boundaries?**

A tribal governing body may:

(a) Establish and revise geographical attendance boundaries for all but ORB schools;

(b) Authorize ISEP-eligible students, residing within the tribe's jurisdiction, to receive transportation funding to attend schools outside the geographic attendance area in which the student lives; and

(c) Authorize tribal member students who are ISEP-eligible and are not residing within the tribe's jurisdiction to receive transportation funding to attend schools outside the student's geographic attendance area.

**§ 37.112 Must each school have a geographic attendance boundary?**

Yes. The Secretary must ensure that each school has a geographic attendance area boundary.

## Subpart B—Day Schools, On-Reservation Boarding Schools, and Peripheral Dorms

**§ 37.120 How does this part affect current geographic attendance boundaries?**

The currently established geographic attendance boundaries of day schools, on-reservation boarding schools, and peripheral dorms remain in place unless the tribal governing body revises them.

**§ 37.121 Who establishes geographic attendance boundaries under this part?**

(a) If there is only one day school, on-reservation boarding school, or peripheral dorm within a reservation's boundaries, the Secretary will establish the reservation boundary as the geographic attendance boundary;

(b) When there is more than one day school, on-reservation boarding school, or peripheral dorm within a reservation boundary, the Tribe may choose to establish boundaries for each;

(c) If a Tribe does not establish boundaries under paragraph (b) of this section, the Secretary will do so.

**§ 37.122 Once geographic attendance boundaries are established, how can they be changed?**

(a) The Secretary can change the geographic attendance boundaries of a day school, on-reservation boarding school, or peripheral dorm only after:

(1) Notifying the Tribe at least 6 months in advance; and

(2) Giving the Tribe an opportunity to suggest different geographical attendance boundaries.

(b) A tribe may ask the Secretary to change geographical attendance boundaries by writing a letter to the Director of the Office of Indian Education Programs, explaining the tribe's suggested changes. The Secretary must consult with the affected tribes before deciding whether to accept or reject a suggested geographic attendance boundary change.

(1) If the Secretary accepts the Tribe's suggested change, the Secretary must publish the change in the **Federal Register**.

(2) If the Secretary rejects the Tribe's suggestion, the Secretary will explain in writing to the Tribe why the suggestion either:

(i) Does not meet the needs of Indian students to be served; or

(ii) Does not provide adequate stability to all affected programs.

**§ 37.123 How does a Tribe develop proposed geographic attendance boundaries or boundary changes?**

(a) The Tribal governing body establishes a process for developing proposed boundaries or boundary changes. This process may include consultation and coordination with all entities involved in student education.

(b) The Tribal governing body may delegate the development of proposed boundaries to the relevant school boards. The boundaries set by the school boards must be approved by the Tribal governing body.

(c) The Tribal governing body must send the proposed boundaries and a copy of its approval to the Secretary.

**§ 37.124 How are boundaries established for a new school or dorm?**

Geographic attendance boundaries for a new day school, on-reservation boarding school, or peripheral dorm must be established by either:

(a) The tribe; or

(b) If the tribe chooses not to establish boundaries, the Secretary.

**§ 37.125 Can an eligible student living off a reservation attend a school or dorm?**

Yes. An eligible student living off a reservation can attend a day school, on-reservation boarding school, or peripheral dorm.

## Subpart C—Off-Reservation Boarding Schools

**§ 37.130 Who establishes boundaries for Off-Reservation Boarding Schools?**

The Secretary or the Secretary's designee, in consultation with the affected Tribes, establishes the boundaries for off-reservation boarding schools (ORBS).

**§ 37.131 Who may attend an ORBS?**

Any student is eligible to attend an ORBS.

# PART 39—THE INDIAN SCHOOL EQUALIZATION PROGRAM

■ 3. The authority citation for part 39 is revised to read as follows:

**Authority:** 25 U.S.C. 13, 2008; Public Law 107–110, 115 Stat. 1425.

■ 4. In part 39, subparts A through H are revised to read as follows:

**Subpart A—General**

Sec.
39.1 What is the purpose of this part?≤
39.2 What definitions apply to terms in this part?
39.3 Information collection.

**Subpart B—Indian School Equalization Formula**

39.100 What is the Indian School Equalization Formula?
39.101 Does ISEF assess the actual cost of school operations?

Base and Supplemental Funding

39.102 What is academic base funding?
39.103 What are the factors used to determine base funding?
39.104 How must a school's base funding provide for students with disabilities?
39.105 Are additional funds available for special education?
39.106 Who is eligible for special education funding?
39.107 Are schools allotted supplemental funds for special student and/or school costs?

**Gifted and Talented Programs**

39.110 Can ISEF funds be distributed for the use of gifted and talented students?
39.111 What does the term gifted and talented mean?
39.112 What is the limit on the number of students who are gifted and talented?
39.113 What are the special accountability requirements for the gifted and talented program?

39.114 What characteristics may qualify a student as gifted and talented for purposes of supplemental funding?
39.115 How are eligible gifted and talented students identified and nominated?
39.116 How does a school determine who receives gifted and talented services?
39.117 How does a school provide gifted and talented services for a student?
39.118 How does a student receive gifted and talented services in subsequent years?
39.119 When must a student leave a gifted and talented program?
39.120 How are gifted and talented services provided?
39.121 What is the WSU for gifted and talented students?

**Language Development Programs**

39.130 Can ISEF funds be used for Language Development Programs?
39.131 What is a Language Development Program?
39.132 Can a school integrate Language Development Programs into its regular instructional program?
39.133 Who decides how Language Development funds can be used?
39.134 How does a school identify a Limited English Proficient student?
39.135 What services must be provided to an LEP student?
39.136 What is the WSU for Language Development programs?
39.137 May schools operate a language development program without a specific appropriation from Congress?

**Small School Adjustment**

39.140 How does a school qualify for a Small School Adjustment?
39.141 What is the amount of the Small School Adjustment?
39.143 What is a small high school?
39.144 What is the small high school adjustment?
39.145 Can a school receive both a small school adjustment and a small high school adjustment?
39.146 Is there an adjustment for small residential programs?

**Geographic Isolation Adjustment**

39.160 Does ISEF provide supplemental funding for extraordinary costs related to a school's geographic isolation?

**Subpart C—Administrative Procedures, Student Counts, and Verifications**

39.200 What is the purpose of the Indian School Equalization Formula?
39.201 Does ISEF reflect the actual cost of school operations?
39.202 What are the definitions of terms used in this subpart?
39.203 When does OIEP calculate a school's allotment?
39.204 How does OIEP calculate ADM?
39.205 How does OIEP calculate a school's total WSUs for the school year?
39.206 How does OIEP calculate the value of one WSU?
39.207 How does OIEP determine a school's funding for the school year?
39.208 How are ISEP funds distributed?
39.209 When may a school count a student for membership purposes?
39.210 When must a school drop a student from its membership?
39.211 What other categories of students can a school count for membership purposes?
39.212 Can a student be counted as enrolled in more than one school?
39.213 Will the Bureau fund children being home schooled?
39.214 What is the minimum number of instructional hours required in order to be considered a full-time educational program?
39.215 Can a school receive funding for any part-time students?

**Residential Programs**

39.216 How does ISEF fund residential programs?
39.217 How are students counted for the purpose of funding residential services?
39.218 Are there different formulas for different levels of residential services?
39.219 What happens if a residential program does not maintain residency levels required by this subpart?
39.220 What reports must residential programs submit to comply with this rule?
39.221 What is a full school month?

**Phase-in Period**

39.230 How will the provisions of this subpart be phased in?

**Subpart D—Accountability**

39.401 What is the purpose of this subpart?
39.402 What definitions apply to terms used in this subpart?
39.403 What certification is required?
39.404 What is the certification and verification process?
39.405 How will verifications be conducted?
39.406 What documentation must the school maintain for additional services it provides?
39.407 How long must a school maintain records?
39.408 What are the responsibilities of administrative officials?
39.409 How does the OIEP Director ensure accountability?
39.410 What qualifications must an audit firm meet to be considered for auditing ISEP administration?
39.411 How will the auditor report its findings?
39.412 What sanctions apply for failure to comply with this subpart?
39.413 Can a school appeal the verification of the count?

**Subpart E—Contingency Fund**

39.500 What emergency and contingency funds are available?
39.501 What is an emergency or unforeseen contingency?
39.502 How does a school apply for contingency funds?
39.503 How can a school use contingency funds?
39.504 May schools carry over contingency funds to a subsequent fiscal year?
39.505 What are the reporting requirements for the use of the contingency fund?

**Subpart F—School Board Training Expenses**

39.600 Are Bureau-operated school board expenses funded by ISEP limited?
39.601 Is school board training for Bureau-operated schools considered a school board expense subject to the limitation?
39.603 Is school board training required for all Bureau-funded schools?
39.604 Is there a separate weight for school board training at Bureau-operated schools?

**Subpart G—Student Transportation**

39.700 What is the purpose of this subpart?
39.701 What definitions apply to terms used in this subpart?

**Eligibility for Funds**

39.702 Can a school receive funds to transport residential students using commercial transportation?
39.703 What ground transportation costs are covered for students traveling by commercial transportation?
39.704 Are schools eligible to receive chaperone expenses to transport residential students?
39.705 Are schools eligible for transportation funds to transport special education students?
39.706 Are peripheral dormitories eligible for day transportation funds?
39.707 Which student transportation expenses are currently not eligible for Student Transportation Funding?
39.708 Are miles generated by non-ISEP eligible students eligible for transportation funding?

**Calculating Transportation Miles**

39.710 How does a school calculate annual bus transportation miles for day students?
39.711 How does a school calculate annual bus transportation miles for residential students?

**Reporting Requirements**

39.720 Why are there different reporting requirements for transportation data?
39.721 What transportation information must off-reservation boarding schools report?
39.722 What transportation information must day schools, on-reservation boarding schools and peripheral dormitory schools report?

**Miscellaneous Provisions**

39.730 Which standards must student transportation vehicles meet?
39.731 Can transportation time be used as instruction time for day school students?
39.732 How does OIEP allocate transportation funds to schools?

**Subpart H—Determining the Amount Necessary To Sustain an Academic or Residential Program**

39.801 What is the formula to determine the amount necessary to sustain a school's academic or residential program?
39.802 What is the student unit value in the formula?

39.803 What is a weighted student unit in the formula?
39.804 How is the SUIV calculated?
39.805 What was the student unit for instruction value (SUIV) for the school year 1999–2000?
39.806 How is the SURV calculated?
39.807 How will the Student Unit Value be adjusted annually?
39.808 What definitions apply to this subpart?
39.809 Information collection.

## Subpart A—General

### § 39.1 What is the purpose of this part?

This part provides for the uniform direct funding of Bureau-operated and tribally operated day schools, boarding schools, and dormitories. This part applies to all schools, dormitories, and administrative units that are funded through the Indian School Equalization Program of the Bureau of Indian Affairs.

### § 39.2 What definitions apply to terms in this part?

*Act* means the No Child Left Behind Act, Public Law 107–110, enacted January 8, 2002. The No Child Left Behind Act reauthorizes and amends the Elementary and Secondary Education Act (ESEA) and the amended Education Amendments of 1978.

*Agency* means an organizational unit of the Bureau which provides direct services to the governing body or bodies and members of one or more specified Indian Tribes. The term includes Bureau Area Offices only with respect to off-reservation boarding schools administered directly by such Offices.

*Agency school board* means a body, the members of which are appointed by the school boards of the schools located within such agency, and the number of such members shall be determined by the Director in consultation with the affected tribes, except that, in agencies serving a single school, the school board of such school shall fulfill these duties.

*Assistant Secretary* means the Assistant Secretary of Indian Affairs, Department of the Interior, or his or her designee.

*At no cost* means provided without charge, but does not preclude incidental fees normally charged to non-disabled students or their parents as a part of the regular education program.

*Average Daily Membership (ADM)* means the aggregated ISEP-eligible membership of a school for a school year, divided by the number of school days in the school's submitted calendar.

*Basic program* means the instructional program provided to all students at any age level exclusive of any supplemental programs that are not provided to all students in day or boarding schools.

*Basic transportation miles* means the daily average of all bus miles logged for round trip home-to-school transportation of day students.

*Bureau* means the Bureau of Indian Affairs in the Department of the Interior.

*Bureau-funded school* means

(1) Bureau school;

(2) A contract or grant school; or

(3) A school for which assistance is provided under the Tribally Controlled Schools Act of 1988.

*Bureau school* means a Bureau-operated elementary or secondary day or boarding school or a Bureau-operated dormitory for students attending a school other than a Bureau school.

*Count Week* means the last full week in September during which schools count their student enrollment for ISEP purposes.

*Director* means the Director of the Office of Indian Education Programs in the Bureau of Indian Affairs or a designee.

*Education Line Officer* means the Bureau official in charge of Bureau education programs and functions in an Agency who reports to the Director.

*Eligible Indian student* means a student who:

(1) Is a member of, or is at least one-fourth degree Indian blood descendant of a member of, a tribe that is eligible for the special programs and services provided by the United States through the Bureau of Indian Affairs to Indians because of their status as Indians;

(2) Resides on or near a reservation or meets the criteria for attendance at a Bureau off-reservation home-living school; and

(3) Is enrolled in a Bureau-funded school.

*Home schooled* means a student who is not enrolled in a school and is receiving educational services at home at the parent's or guardian's initiative.

*Homebound* means a student who is educated outside the classroom.

*Individual supplemental services* means non-base academic services provided to eligible students. Individual supplemental services that are funded by additional WSUs are gifted and talented or language development services.

*ISEP* means the Indian School Equalization Program.

*Limited English Proficient (LEP)* means a child from a language background other than English who needs language assistance in his/her own language or in English in the schools. This child has sufficient difficulty speaking, writing, or understanding English to deny him/her the opportunity to learn successfully in English-only classrooms and meets one or more of the following conditions:

(1) The child was born outside of the United States or the child's Native language is not English;

(2) The child comes from an environment where a language other than English is dominant; or

(3) The child is an American Indian or Alaska Native and comes from an environment where a language other than English has had a significant impact on the child's level of English language proficiency.

*Local School Board* means a body chosen in accordance with the laws of the tribe to be served or, in the absence of such laws, elected by the parents of the Indian children attending the school. For a school serving a substantial number of students from different tribes:

(1) The members of the local school board shall be appointed by the tribal governing bodies affected; and

(2) The Secretary shall determine number of members in consultation with the affected tribes.

*OIEP* means the Office of Indian Education Programs in the Bureau of Indian Affairs.

*Physical education* means the development of physical and motor fitness, fundamental motor skills and patterns, and skills in aquatics, dance, and individual and group games and sports (including intramural and lifetime sports). The term includes special physical education, adapted physical education, movement education, and motor development.

*Resident* means a student who is residing at a boarding school or dormitory during the weeks when student membership counts are conducted and is either:

(1) A member of the instructional program in the same boarding school in which the student is counted as a resident; or

(2) Enrolled in and a current member of a public school or another Bureau-funded school.

*Residential program* means a program that provides room and board in a boarding school or dormitory to residents who are either:

(1) Enrolled in and are current members of a public school or Bureau-funded school; or

(2) Members of the instructional program in the same boarding school in which they are counted as residents and:

(i) Are officially enrolled in the residential program of a Bureau-operated or -funded school; and

(ii) Are actually receiving supplemental services provided to all students who are provided room and

board in a boarding school or a dormitory.

*Secretary* means the Secretary of the Interior or a designated representative.

*School* means a school funded by the Bureau of Indian Affairs. The term ''school'' does not include public, charter, or private schools.

*School bus* means a passenger vehicle that is:

(1) Used to transport day students to and/or from home and the school; and

(2) Operated by an operator in the employ of, or under contract to, a Bureau-funded school, who is qualified to operate such a vehicle under Tribal, State or Federal regulations governing the transportation of students.

*School day* means a day as defined by the submitted school calendar, as long as annual instructional hours are as they are reflected in § 39.213, excluding passing time, lunch, recess, and breaks.

*Special education* means:

(1) Specially designed instruction, at no cost to the parents, to meet the unique needs of a child with a disability, including:

(i) Instruction conducted in the classroom, in the home, in hospitals and institutions, and in other settings; and

(ii) Instruction in physical education.

(2) The term includes each of the following, if it meets the requirements of paragraph (1) of this definition:

(i) Speech-language pathology services, or any other related service, if the service is considered special education rather than a related service under State standards;

(1) Travel training; and

(2) Vocational education.

*Specially designed instruction* means adapting, as appropriate, to the needs of an eligible child under this part, the content, methodology, or delivery or instruction:

(1) To address the unique needs of the child that result from the child's disability; and

(2) To ensure access of the child to the general curriculum, so that he or she can meet the educational standards within the jurisdiction of the public agency that apply to all children

*Three-year average* means:

(1) For academic programs, the average daily membership of the 3 years before the current year of operation; and

(2) For the residential programs, the count period membership of the 3 years before the current year of operation.

*Travel training* means providing instruction, as appropriate, to children with significant cognitive disabilities, and any other children with disabilities who require this instruction, to enable them to:

(1) Develop an awareness of the environment in which they live; and

(2) Learn the skills necessary to move efficiently and safely from place to place within that environment (*e.g.,* in school, in the home, at work, and in the community).

*Tribally operated school* means an elementary school, secondary school, or dormitory that receives financial assistance for its operation under a contract, grant, or agreement with the Bureau under section 102, 103(a), or 208 of 25 U.S.C. 450 *et seq.,* or under the Tribally Controlled Schools Act of 1988.

*Vocational education* means organized educational programs that are directly related to the preparation of individuals for paid or unpaid employment, or for additional preparation for a career requiring other than a baccalaureate or advanced degree.

*Unimproved roads* means unengineered earth roads that do not have adequate gravel or other aggregate surface materials applied and do not have drainage ditches or shoulders.

*Weighted Student Unit* means:

(1) The measure of student membership adjusted by the weights or ratios used as factors in the Indian School Equalization Formula; and

(2) The factor used to adjust the weighted student count at any school as the result of other adjustments made under this part.

### § 39.3 Information collection.

Notwithstanding any other provision of law, no person is required to respond to, nor shall any person be subject to a penalty for failure to comply with a collection of information, subject to the requirements of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*) (PRA), unless that collection of information displays a currently valid Office of Management and Budget (OMB) Control Number. This part contains in §§ 39.410 and 39.502 collections of information subject to the PRA. These collections have been approved by OMB under control number 1076–0163.

## Subpart B—Indian School Equalization Formula

### § 39.100 What is the Indian School Equalization Formula?

The Indian School Equalization Formula (ISEF) was established to allocate Indian School Equalization Program (ISEP) funds. OIEP applies ISEF to determine funding allocation for Bureau-funded schools as described in §§ 39.204 through 39.206.

### § 39.101 Does ISEF assess the actual cost of school operations?

No. ISEF does not attempt to assess the actual cost of school operations either at the local level or in the aggregate at the national level. ISEF provides a method of distribution of funds appropriated by Congress for all schools.

## Base and Supplemental Funding

### § 39.102 What is academic base funding?

Academic base funding is the ADM times the weighted student unit.

### § 39.103 What are the factors used to determine base funding?

To determine base funding, schools must use the factors shown in the following table. The school must apply the appropriate factor to each student for funding purposes.

| Grade level | Base academic funding factor | Base residential funding factor |
|---|---|---|
| Kindergarten | 1.15 | NA |
| Grades 1–3 | 1.38 | 1.75 |
| Grades 4–6 | 1.15 | 1.6 |
| Grades 7–8 | 1.38 | 1.6 |
| Grades 9–12 | 1.5 | 1.6 |

### § 39.104 How must a school's base funding provide for students with disabilities?

(a) Each school must provide for students with disabilities by:

(1) Reserving 15 percent of academic base funding to support special education programs; and

(2) Providing resources through residential base funding to meet the needs of students with disabilities under the National Criteria for Home-Living Situations.

(b) A school may spend all or part of the 15 percent academic base funding reserved under paragraph (a)(1) of this section on school-wide programs to benefit all students (including those without disabilities) only if the school can document that it has met all needs of students with disabilities with such funds, and after having done so, there are unspent funds remaining from such funds.

### § 39.105 Are additional funds available for special education?

(a) Schools may supplement the 15 percent base academic funding reserved under § 39.104 for special education with funds available under part B of the Individuals with Disabilities Education Act (IDEA). To obtain part B funds, the

school must submit an application to OIEP. IDEA funds are available only if the school demonstrates that funds reserved under § 39.104(a) are inadequate to pay for services needed by all eligible ISEP students with disabilities.

(b) The Bureau will facilitate the delivery of IDEA part B funding by:

(1) Providing technical assistance to schools in completing the application for the funds; and

(2) Providing training to Bureau staff to improve the delivery of part B funds.

**§ 39.106 Who is eligible for special education funding?**

To receive ISEP special education funding, a student must be under 22 years old and must not have received a high school diploma or its equivalent on the first day of eligible attendance. The following minimum age requirements also apply:

(a) To be counted as a kindergarten student, a child must be at least 5 years old by December 31; and

(b) To be counted as a first grade student; a child must be at least 6 years old by December 31.

**§ 39.107 Are schools allotted supplemental funds for special student and/or school costs?**

Yes, schools are allotted supplemental funds for special student and/or school costs. ISEF provides additional funds to schools through add-on weights (called special cost factors). ISEF adds special cost factors as shown in the following table.

| Cost Factor | For more information see |
|---|---|
| Gifted and talented students. | §§ 39.110 through 39.121 |
| Students with language development needs. | §§ 39.130 through 39.137 |
| Small school size ..... | §§ 39.140 through 39.156 |
| Geographic isolation of the school. | § 39.160 |

## Gifted and Talented Programs

**§ 39.110 Can ISEF funds be distributed for the use of gifted and talented students?**

Yes, ISEF funds can be distributed for the provision of services for gifted and talented students.

**§ 39.111 What does the term gifted and talented mean?**

The term gifted and talented means students, children, or youth who:

(a) Give evidence of high achievement capability in areas such as intellectual, creative, artistic, or leadership capacity, or in specific academic fields; and

(b) Need services or activities not ordinarily provided by the school in order to fully develop those capabilities.

**§ 39.112 What is the limit on the number of students who are gifted and talented?**

There is no limit on the number of students that a school can classify as gifted and talented.

**§ 39.113 What are the special accountability requirements for the gifted and talented program?**

If a school identifies more than 13 percent of its student population as gifted and talented the Bureau will immediately audit the school's gifted and talented program to ensure that all identified students:

(a) Meet the gifted and talented requirement in the regulations; and

(b) Are receiving gifted and talented services.

**§ 39.114 What characteristics may qualify a student as gifted and talented for purposes of supplemental funding?**

To be funded as gifted and talented under this part, a student must be identified as gifted and talented in at least one of the following areas.

(a) *Intellectual Ability* means scoring in the top 5 percent on a statistically valid and reliable measurement tool of intellectual ability.

(b) *Creativity/Divergent Thinking* means scoring in the top 5 percent of performance on a statistically valid and reliable measurement tool of creativity/divergent thinking.

(c) *Academic Aptitude/Achievement* means scoring in the top 15 percent of academic performance in a total subject area score on a statistically valid and reliable measurement tool of academic achievement/aptitude, or a standardized assessment, such as an NRT or CRT.

(d) *Leadership* means the student is recognized as possessing the ability to lead, guide, or influence the actions of others as measured by objective standards that a reasonable person of the community would believe demonstrates that the student possess leadership skills. These standards include evidence from surveys, supportive documentation portfolios, elected or appointed positions in school, community, clubs and organization, awards documenting leadership capabilities. No school can identify more than 15 percent of its student population as gifted and talented through the leadership category.

(e) *Visual and Performing Arts* means outstanding ability to excel in any imaginative art form; including, but not limited to, drawing, printing, sculpture, jewelry making, music, dance, speech, debate, or drama as documented from surveys, supportive documentation portfolios, awards from judged or juried competitions. No school can identify more than 15 percent of its student population as gifted and talented through the visual and performing arts category.

**§ 39.115 How are eligible gifted and talented students identified and nominated?**

(a) Screening can be completed annually to identify potentially eligible students. A student may be nominated for gifted and talented designation using the criteria in § 39.114 by any of the following:

(1) A teacher or other school staff;

(2) Another student;

(3) A community member;

(4) A parent or legal guardian; or

(5) The student himself or herself.

(b) Students can be nominated based on information regarding the student's abilities from any of the following sources:

(1) Collections of work;

(2) Audio/visual tapes;

(3) School grades;

(4) Judgment of work by qualified individuals knowledgeable about the student's performances (*e.g.*, artists, musicians, poets, historians, etc.);

(5) Interviews or observations; or

(6) Information from other sources.

(c) The school must have written parental consent to collect documentation of gifts and talents under paragraph (b) of this section.

**§ 39.116 How does a school determine who receives gifted and talented services?**

(a) To determine who receives gifted and talented funding, the school must use qualified professionals to perform a multi-disciplinary assessment. The assessment may include the examination of work samples or performance appropriate to the area under consideration. The school must have the parent or guardian's written permission to conduct individual assessments or evaluations. Assessments under this section must meet the following standards:

(1) The assessment must use assessment instruments specified in § 39.114 for each of the five criteria for which the student is nominated;

(2) If the assessment uses a multi-criteria evaluation, that evaluation must be an unbiased evaluation based on student needs and abilities;

(3) Indicators for visual and performing arts and leadership may be determined based on national, regional, or local criteria; and

(4) The assessment may use student portfolios.

(b) A multi-disciplinary team will review the assessment results to determine eligibility for gifted and talented services. The purpose of the team is to determine eligibility and placement to receive gifted and talented services.

(1) Team members may include nominator, classroom teacher, qualified professional who conducted the assessment, local experts as needed, and other appropriate personnel such as the principal and/or a counselor.

(2) A minimum of three team members is required to determine eligibility.

(3) The team will design a specific education plan to provide gifted and talented services related in the areas identified.

**§ 39.117 How does a school provide gifted and talented services for a student?**

Gifted and talented services are provided through or under the supervision of highly qualified professional teachers. To provide gifted and talented services for a student, a school must take the steps in this section.

(a) The multi-disciplinary team formed under § 39.116(b) will sign a statement of agreement for placement of services based on documentation reviewed.

(b) The student's parent or guardian must give written permission for the student to participate.

(c) The school must develop a specific education plan that contains:

(1) The date of placement;

(2) The date services will begin;

(3) The criterion from § 39.114 for which the student is receiving services and the student's performance level;

(4) Measurable goals and objectives; and

(5) A list of staff responsible for each service that the school is providing.

**§ 39.118 How does a student receive gifted and talented services in subsequent years?**

For each student receiving gifted and talented services, the school must conduct a yearly evaluation of progress, file timely progress reports, and update the specific education plan.

(a) If a school identifies a student as gifted and talented based on § 39.114 (a), (b), or (c), then the student does not need to reapply for the gifted and talented program. However, the student must be reevaluated at least every 3 years through the 10th grade to verify eligibility for funding.

(b) If a school identifies a student as gifted and talented based on § 39.114 (d) or (e), the student must be reevaluated annually for the gifted and talented program.

**§ 39.119 When must a student leave a gifted and talented program?**

A student must leave the gifted and talented program when either:

(a) The student has received all of the available services that can meet the student's needs;

(b) The student no longer meets the criteria that have qualified him or her for the program; or

(c) The parent or guardian removes the student from the program.

**§ 39.120 How are gifted and talented services provided?**

In providing services under this section, the school must:

(a) Provide a variety of programming services to meet the needs of the students;

(b) Provide the type and duration of services identified in the Individual Education Plan established for each student; and

(c) Maintain individual student files to provide documentation of process and services; and

(d) Maintain confidentiality of student records under the Family Educational Rights and Privacy Act (FERPA).

**§ 39.121 What is the WSU for gifted and talented students?**

The WSU for a gifted and talented student is the base academic weight (see § 39.103) subtracted from 2.0. The following table shows the gifted and talented weights obtained using this procedure.

| Grade level | Gifted and talented WSU |
|---|---|
| Kindergarten | 0.85 |
| Grades 1 to 3 | 0.62 |
| Grades 4 to 6 | 0.85 |
| Grades 7 to 8 | 0.62 |
| Grades 9 to 12 | 0.50 |

## Language Development Programs

**§ 39.130 Can ISEF funds be used for Language Development Programs?**

Yes, schools can use ISEF funds to implement Language Development programs that demonstrate the positive effects of Native language programs on students' academic success and English proficiency. Funds can be distributed to a total aggregate instructional weight of 0.13 for each eligible student.

**§ 39.131 What is a Language Development Program?**

A Language Development program is one that serves students who either:

(a) Are not proficient in spoken or written English;

(b) Are not proficient in any language;

(c) Are learning their Native language for the purpose of maintenance or language restoration and enhancement;

(d) Are being instructed in their Native language; or

(e) Are learning non-language subjects in their Native language.

**§ 39.132 Can a school integrate Language Development programs into its regular instructional program?**

A school may offer Language Development programs to students as part of its regular academic program. Language Development does not have to be offered as a stand-alone program.

**§ 39.133 Who decides how Language Development funds can be used?**

Tribal governing bodies or local school boards decide how their funds for Language Development programs will be used in the instructional program to meet the needs of their students.

**§ 39.134 How does a school identify a Limited English Proficient student?**

A student is identified as limited English proficient (LEP) by using a nationally recognized scientifically research-based test.

**§ 39.135 What services must be provided to an LEP student?**

A school must provide services that assist each LEP student to:

(a) Become proficient in English and, to the extent possible, proficient in their Native language; and

(b) Meet the same challenging academic content and student academic achievement standards that all students are expected to meet under 20 U.S.C. 6311(b)(1).

**§ 39.136 What is the WSU for Language Development programs?**

Language Development programs are funded at 0.13 WSUs per student.

**§ 39.137 May schools operate a language development program without a specific appropriation from Congress?**

Yes, a school may operate a language development program without a specific appropriation from Congress, but any funds used for such a program must come from existing ISEP funds. When Congress specifically appropriates funds for Indian or Native languages, the factor to support the language development program will be no more than 0.25 WSU.

## Small School Adjustment

**§ 39.140 How does a school qualify for a Small School Adjustment?**

A school will receive a small school adjustment if either:

(a) Its average daily membership (ADM) is less than 100 students; or

(b) It serves lower grades and has a diploma-awarding high school component with an average instructional daily membership of less than 100 students.

**§ 39.141 What is the amount of the Small School Adjustment?**

(a) A school with a 3-year ADM of 50 or fewer students will receive an adjustment equivalent to an additional 12.5 base WSU; or

(b) A school with a 3-year ADM of 51 to 99 students will use the following formula to determine the number of WSU for its adjustment. With X being the ADM, the formula is as follows:

WSU adjustment = ((100 – X)/200)*X

**§ 39.143 What is a small high school?**

For purposes of this part, a small high school:

(a) Is accredited under 25 U.S.C. 2001(b);

(b) Is staffed with highly qualified teachers;

(c) Operates any combination of grades 9 through 12;

(d) Offers high school diplomas; and

(e) Has an ADM of fewer than 100 students.

**§ 39.144 What is the small high school adjustment?**

(a) The small high school adjustment is a WSU adjustment given to a small high school that meets both of the following criteria:

(1) It has a 3-year average daily membership (ADM) of less than 100 students; and

(2) It operates as part of a school that during the 2003–04 school year also included lower grades.

(b) The following table shows the WSU adjustment given to small high schools. In the table, ''X'' stands for the ADM.

| ADM of high school component | Amount of small high school adjustment | School receives a component small school adjustment under § 39.141 |
|---|---|---|
| 50 or fewer students | 6.25 base WSU | Yes. |
| 51 to 99 students | determined using the following formula: WSU = ((100–X)/200)*X/2 | Yes. |
| 50 or fewer students | 12.5 base WSU | No. |
| 51 to 99 students | determined using the following formula: WSU = ((100–X)/200)*X | No. |

**§ 39.145 Can a school receive both a small school adjustment and a small high school adjustment?**

A school that meets the criteria in § 39.140 can receive both a small school adjustment and a small high school adjustment. The following table shows the total amount of adjustments for eligible schools by average daily membership (ADM) category.

| ADM—entire school | ADM—high school component | Small school adjustment | Small high school adjustment | Total adjustment |
|---|---|---|---|---|
| 1–50 | NA | 12.5 | NA | 12.5 |
| 1–50 | 1–50 | 12.5 | 6.25 | 18.75 |
| 51–99 | 1–50 | [2] 12.5–0.5 | 6.25 | 18.75–6.75 |
| 51–99 | 51–99 | [1] 12.5–0.5 | [2] 6.25–0.25 | 18.75–0.7 |
| 99 | 1–50 | 0.5 | 12.5 | 12.5 |
| 99 | 51–99 | 0.5 | [2] 12.5–0.5 | 12.5–0.5 |

[1] The amount of the adjustment is within this range. The exact figure depends upon the results obtained using the formula in § 39.141.
[2] The amount of the adjustment is within this range. The exact figure depends upon the results obtained using the formula in § 39.144.

**§ 39.146 Is there an adjustment for small residential programs?**

In order to compensate for the additional costs of operating a small residential program, OIEP will add to the total WSUs of each qualifying school as shown in the following table:

| Type of residential program | Number of WSUs added |
|---|---|
| Residential student count of 50 or fewer ISEP-eligible students | 12.5. |
| Residential student count of between 51 and 99 ISEP-eligible students | Determined by the formula ((100-X)/200))X, where X equals the residential student count. |

## Geographic Isolation Adjustment

**§ 39.160 Does ISEF provide supplemental funding for extraordinary costs related to a school's geographic isolation?**

Yes. Havasupai Elementary School, for as long as it remains in its present location, will be awarded an additional cost factor of 12.5 WSU.

## Subpart C—Administrative Procedures, Student Counts, and Verifications

**§ 39.200 What is the purpose of the Indian School Equalization Formula?**

OIEP uses the Indian School Equalization Formula (ISEF) to

distribute Indian School Equalization Program (ISEP) appropriations equitably to Bureau-funded schools.

**§ 39.201 Does ISEF reflect the actual cost of school operations?**

ISEF does not attempt to assess the actual cost of school operations either at the local school level or in the aggregate nationally. ISEF is a relative distribution of available funds at the local school level by comparison with all other Bureau-funded schools.

**§ 39.202 What are the definitions of terms used in this subpart?**

*Homebound* means a student who is educated outside the classroom.

*Home schooled* means a student who is not enrolled in a school and is receiving educational services at home at the parent's or guardian's initiative.

*School day* means a day as defined by the submitted school calendar, as long as annual instructional hours are as they are reflected in § 39.213, excluding passing time, lunch, recess, and breaks.

*Three-year average means:*

(1) For academic programs, the average daily membership of the 3 years before the current year of operation; and

(2) For the residential programs, the count period membership of the 3 years before the current year of operation.

**§ 39.203 When does OIEP calculate a school's allotment?**

OIEP calculates a school's allotment no later than July 1. Schools must submit final ADM enrollment figures no later than June 15.

**§ 39.204 How does OIEP calculate ADM?**

OIEP calculates ADM by:

(a) Adding the total enrollment figures from periodic reports received from each Bureau-funded school; and

(b) Dividing the total enrollment for each school by the number of days in the school's reporting period.

**§ 39.205 How does OIEP calculate a school's total WSUs for the school year?**

(a) OIEP will add the weights obtained from the calculations in paragraphs (a)(1), (a)(2), and (a)(3) of this section to obtain the total weighted student units (WSUs) for each school.

(1) Each year's ADM is multiplied by the applicable weighted student unit for each grade level;

(2) Calculate any supplemental WSUs generated by the students; and

(3) Calculate any supplemental WSUs generated by the schools.

(b) The total WSU for the school year is the sum of paragraphs (a)(1), (a)(2), and (a)(3) of this section.

**§ 39.206 How does OIEP calculate the value of one WSU?**

(a) To calculate the appropriated dollar value of one WSU, OIEP divides the systemwide average number of WSUs for the previous 3 years into the current year's appropriation.

(b) To calculate the average WSU for a 3-year period:

(1) *Step 1.* Add together each year's total WSU (calculated under paragraph (b) of this section); and

(2) *Step 2.* Divide the sum obtained in step 1 by 3.

**§ 39.207 How does OIEP determine a school's funding for the school year?**

To determine a school's funding for the school year, OIEP uses the following seven-step process:

(a) *Step 1.* Multiply the appropriate base academic and/or residential weight from § 39.103 by the number of students in each grade level category.

(b) *Step 2.* Multiply the number of students eligible for supplemental program funding under § 39.107 by the weights for the program.

(c) *Step 3.* Calculate the school-based supplemental weights under § 639.107.

(d) *Step 4.* Add together the sums obtained in steps 1 through 3 to obtain each school's total WSU.

(e) *Step 5.* Add together the total WSUs for all Bureau-funded schools.

(f) *Step 6.* Calculate the value of a WSU by dividing the current school year's funds by the average total WSUs as calculated under step 5 for the previous 3 years.

(g) *Step 7.* Multiply each school's WSU total by the base value of one WSU to determine funding for that school.

**§ 39.208 How are ISEP funds distributed?**

(a) On July 1, schools will receive 80 percent of their funds as determined in § 39.207.

(b) On December 1, the balance will be distributed to all schools after verification of the school count and any adjustments made through the appeals process for the third year.

**§ 39.209 When may a school count a student for membership purposes?**

If a student is enrolled, is in attendance during any of the first 10 days of school, and receives at least 5 days' instruction, the student is deemed to be enrolled all 10 days and shall be counted for ADM purposes. The first 10 days of school, for purposes of this section, are determined by the calendar that the school submits to OIEP.

(a) For ISEP purposes, a school can add a student to the membership when he or she has been enrolled and has received a full day of instruction from the school.

(b) Except as provided in § 39.210, to be counted for ADM, a student dropped under § 39.209 must:

(1) Be re-enrolled; and

(2) Receive a full day of instruction from the school.

**§ 39.210 When must a school drop a student from its membership?**

If a student is absent for 10 consecutive school days, the school must drop that student from the membership for ISEP purposes of that school on the 11th day.

**§ 39.211 What other categories of students can a school count for membership purposes?**

A school can count other categories of students for membership purposes as shown in the following table.

| Type of student | Circumstances under which student can be included in the school's membership |
|---|---|
| (a) Homebound. | (1) The student is temporarily confined to the home for some or all of the school day for medical, family emergency, or other reasons required by law or regulation;<br>(2) The student is being provided by the school with at least 5 documented contact hours each week of academic services by certified educational personnel; and<br>(3) Appropriate documentations is on file at the school. |
| (b) Located in an institutional setting outside of the school. | The school is either:<br>(1) Paying for the student to receive educational services from the facility; or<br>(2) Providing educational services by certified school staff for at least 5 documented contact hours each week. |
| (c) Taking college courses during the school day. | The student is both:<br>(1) Concurrently enrolled in, and receiving credits for both the school's courses and college courses; and<br>(2) In physical attendance at the school at least 3 documented contact hours per day. |
| (d) Taking distance learning courses. | The student is both:<br>(1) Receiving high school credit for grades; and<br>(2) In physical attendance at the school at least 3 documented contact hours per day. |
| (e) Taking internet courses. | The student is both:<br>(1) Receiving high school credit for grades; and<br>(2) Taking the courses at the school site under a teacher's supervision. |

**§ 39.212 Can a student be counted as enrolled in more than one school?**

Yes, if a student attends more than one school during an academic year, each school may count the student as enrolled once the student meets the criteria in 39.209.

**§ 39.213 Will the Bureau fund children being home schooled?**

No, the Bureau will not fund any child that is being home schooled.

**§ 39.214 What is the minimum number of instructional hours required in order to be considered a full-time educational program?**

A full time program provides the following number of instructional/student hours to the corresponding grade level:

| Grade | Hours |
|---|---|
| K | 720 |
| 1–3 | 810 |
| 4–8 | 900 |
| 9–12 | 970 |

**§ 39.215 Can a school receive funding for any part-time students?**

(a) A school can receive funding for the following part-time students:

(1) Kindergarten students enrolled in a 2-hour program; and

(2) Grade 7–12 students enrolled in at least half but less than a full instructional day.

(b) The school must count students classified as part-time at 50 percent of their basic instructional WSU value.

## Residential Programs

**§ 39.216 How does ISEF fund residential programs?**

Residential programs are funded on a WSU basis using a formula that takes into account the number of nights of service per week. Funding for residential programs is based on the average of the 3 previous years' residential WSUs.

**§ 39.217 How are students counted for the purpose of funding residential services?**

For a student to be considered in residence for purposes of this subpart, the school must be able to document that the student was:

(a) In residence at least one night during the first full week of October;

(b) In residence at least one night during the week preceding the first full week in October;

(c) In residence at least one night during the week following the first full week in October; and

(d) Present for both the after school count and the midnight count at least one night during each week specified in this section.

**§ 39.218 Are there different formulas for different levels of residential services?**

(a) Residential services are funded as shown in the following table:

| If a residential program operates . . . | Each student is funded at the level of . . . |
|---|---|
| (1) 4 nights per week or less. | Total WSU × 4/7. |
| (2) 5, 6 or 7 nights per week. | Total WSU × 7/7. |

(b) In order to qualify for residential services funding under paragraph (a)(2) of this section, a school must document that at least 10 percent of residents are present on 3 of the 4 weekends during the count period.

(c) At least 50 percent of the residency levels established during the count period must be maintained every month for the remainder of the school year.

(d) A school may obtain waivers from the requirements of this section if there are health or safety justifications.

**§ 39.219 What happens if a residential program does not maintain residency levels required by this subpart?**

Each school must maintain its declared nights of service per week as certified in its submitted school calendar. For each month that a school does not maintain 25 percent of the residency shown in its submitted calendar, the school will lose one-tenth of its current year allocation.

**§ 39.220 What reports must residential programs submit to comply with this subpart?**

Residential programs must report their monthly counts to the Director on the last school day of the month. To be counted, a student must have been in residence at least 10 nights during each full school month.

**§ 39.221 What is a full school month?**

A full school month is each 30-day period following the first day that residential services are provided to students based on the school residential calendar.

## Phase-in Period

**§ 39.230 How will the provisions of this subpart be phased in?**

The calculation of the three-year rolling average of ADM for each school and for the entire Bureau-funded school system will be phased-in as shown in the following table.

| Time period | How OIEP must calculate ADM |
|---|---|
| (a) First school year after May 31, 2005 | Use the prior 3 years' count period to create membership for funding purposes |
| (b) Second school year after May 31, 2005 | (1) The academic program will use the previous year's ADM school year and the 2 prior years' count periods; and<br>(2) The residential program will use the previous year's count period and the 2 prior years' count weeks |
| (c) Each succeeding school year after May 31, 2005 | Add one year of ADM or count period and drop one year of prior count weeks until both systems are operating on a 3-year rolling average using the previous 3 years' count after period or ADM, respectively. |

## Subpart D—Accountability

**§ 39.401 What is the purpose of this subpart?**

The purpose of this subpart is to ensure accountability of administrative officials by creating procedures that are systematic and can be verified by a random independent outside auditing procedures. These procedures will ensure the equitable distribution of funds among schools.

**§ 39.402 What definitions apply to terms used in this subpart?**

*Administrative officials* means any persons responsible for managing and operating a school, including the school supervisor, the chief school administrator, tribal officials, Education Line Officers, and the Director, OIEP.

*Director* means the Director of the Office of Indian Education Programs of the Bureau of Indian Affairs.

*Education Line Officer* means the Bureau official in charge of Bureau education programs and functions in an Agency who reports to the Director.

**§ 39.403 What certification is required?**

(a) Each school must maintain an individual file on each student receiving basic educational and supplemental services. The file must contain written documentation of the following:

(1) Each student's eligibility and attendance records;

(2) A complete listing of all supplemental services provided, including all necessary documentation required by statute and regulations (*e.g.*, a current and complete Individual Education Plan for each student receiving supplemental services); and

(3) Documentation of expenditures and program delivery for student transportation to and from school provided by commercial carriers.

(b) The School must maintain the following files in a central location:

(1) The school's ADM and supplemental program counts and residential count;

(2) Transportation related documentation, such as school bus mileage, bus routes;

(3) A list of students transported to and from school;

(4) An electronic student count program or database;

(5) Class record books;

(6) Supplemental program class record books;

(7) For residential programs, residential student attendance documentation;

(8) Evidence of teacher certification; and

(9) The school's accreditation certificate.

(c) The Director must maintain a record of required certifications for ELOs, specialists, and school superintendents in a central location.

**§ 39.404 What is the certification and verification process?**

(a) Each school must:

(1) Certify that the files required by § 39.403 are complete and accurate; and

(2) Compile a student roster that includes a complete list of all students by grade, days of attendance, and supplemental services.

(b) The chief school administrator and the president of the school board are responsible for certifying the school's ADM and residential count is true and accurate to the best of their knowledge or belief and is supported by appropriate documentation.

(c) OIEP's education line officer (ELO) will annually review the following to verify that the information is true and accurate and is supported by program documentation:

(1) The eligibility of every student;

(2) The school's ADM and supplemental program counts and residential count;

(3) Evidence of accreditation;

(4) Documentation for all provided basic and supplemental services, including all necessary documentation required by statute and regulations (*e.g.*, a current and complete Individual Education Plan for each student receiving supplemental services); and

(5) Documentation required by subpart G of this part for student transportation to and from school provided by commercial carriers.

**§ 39.405 How will verifications be conducted?**

The eligibility of every student shall be verified. The ELO will take a random sampling of five days with a minimum of one day per grading period to verify the information in § 39.404(c). The ELO will verify the count for the count period and verify residency during the remainder of the year.

**§ 39.406 What documentation must the school maintain for additional services it provides?**

Every school must maintain a file on each student receiving additional services. (Additional services include homebound services, institutional services, distance courses, Internet courses or college services.) The school must certify, and its records must show, that:

(a) Each homebound or institutionalized student is receiving 5 contact hours each week by certified educational personnel;

(b) Each student taking college, distance or internet courses is in physical attendance at the school for at least 3 certified contact hours per day.

**§ 39.407 How long must a school maintain records?**

The responsible administrative official for each school must maintain records relating to ISEP, supplemental services, and transportation-related expenditures. The official must maintain these records in appropriate retrievable storage for at least the four years prior to the current school year, unless Federal records retention schedules require a longer period.

**§ 39.408 What are the responsibilities of administrative officials?**

Administrative officials have the following responsibilities:

(a) Applying the appropriate standards in this part for classifying and counting ISEP eligible Indian students at the school for formula funding purposes;

(b) Accounting for and reporting student transportation expenditures;

(c) Providing training and supervision to ensure that appropriate standards are adhered to in counting students and accounting for student transportation expenditures;

(d) Submitting all reports and data on a timely basis; and

(e) Taking appropriate disciplinary action for failure to comply with requirements of this part.

**§ 39.409 How does the OIEP Director ensure accountability?**

(a) The Director of OIEP must ensure accountability in student counts and student transportation by doing all of the following:

(1) Conducting annual independent and random field audits of the processes and reports of at least one school per OIEP line office to ascertain the accuracy of Bureau line officers' reviews;

(2) Hearing and making decisions on appeals from school officials;

(3) Reviewing reports to ensure that standards and policies are applied consistently, education line officers treat schools fairly and equitably, and the Bureau takes appropriate administrative action for failure to follow this part; and

(4) Reporting the results of the findings and determinations under this section to the appropriate tribal governing body.

(b) The purpose of the audit required by paragraph (a)(1) of this section is to ensure that the procedures outlined in these regulations are implemented. To conduct the audit required by paragraph (a)(1) of this section, OIEP will select an independent audit firm that will:

(1) Select a statistically valid audit sample of recent student counts and student transportation reports; and

(2) Analyze these reports to determine adherence to the requirements of this part and accuracy in reporting.

**§ 39.410 What qualifications must an audit firm meet to be considered for auditing ISEP administration?**

To be considered for auditing ISEP administration under this subpart, an independent audit firm must:

(a) Be a licensed Certified Public Accountant Firm that meets all requirements for conducting audits under the Federal Single Audit Act;

(b) Not be under investigation or sanction for violation of professional audit standards or ethics;

(c) Certify that it has conducted a conflict of interests check and that no conflict exists; and

(d) Be selected through a competitive bidding process.

### § 39.411 How will the auditor report its findings?

(a) The auditor selected under § 39.410 must:

(1) Provide an initial draft report of its findings to the governing board or responsible Federal official for the school(s) involved; and

(2) Solicit, consider, and incorporate a response to the findings, where submitted, in the final audit report.

(b) The auditor must submit a final report to the Assistant Secretary—Indian Affairs and all tribes served by each school involved. The report must include all documented exceptions to the requirements of this part, including those exceptions that:

(1) The auditor regards as negligible;

(2) The auditor regards as significant, or as evidence of incompetence on the part of responsible officials, and that must be resolved in a manner similar to significant audit exceptions in a fiscal audit; or

(3) Involve fraud and abuse.

(c) The auditor must immediately report exceptions involving fraud and abuse directly to the Department of the Interior Inspector General's office.

### § 39.412 What sanctions apply for failure to comply with this subpart?

(a) The employer of a responsible administrative official must take appropriate personnel action if the official:

(1) Submits false or fraudulent ISEP-related counts;

(2) Submits willfully inaccurate counts of student participation in weighted program areas; or

(3) Certifies or verifies submissions described in paragraphs (a)(1) or (a)(2) of this section.

(b) Unless prohibited by law, the employer must report:

(1) Notice of final Federal personnel action to the tribal governing body and tribal school board; and

(2) Notice of final tribal or school board personnel action to the Director of OIEP.

### § 39.413 Can a school appeal the verification of the count?

Yes, a school may appeal to the Director any administrative action disallowing any academic, transportation, supplemental program or residential count. In this appeal, the school may provide evidence to indicate the student's eligibility, membership or residency or adequacy of a program for all or a portion of school year. The school must follow the applicable appeals process in 25 CFR part 2 or 25 CFR part 900, subpart L.

## Subpart E—Contingency Fund

### § 39.500 What emergency and contingency funds are available?

The Secretary:

(a) Must reserve 1 percent of funds from the allotment formula to meet emergencies and unforeseen contingencies affecting educational programs;

(b) Can carry over to the next fiscal year a maximum of 1 percent the current year funds; and

(c) May distribute all funds in excess of 1 percent equally to all schools or distribute excess as a part of ISEP.

### § 39.501 What is an emergency or unforeseen contingency?

An emergency or unforeseen contingency is an event that meets all of the following criteria:

(a) It could not be planned for;

(b) It is not the result of mismanagement, malfeasance, or willful neglect;

(c) It is not covered by an insurance policy in force at the time of the event;

(d) The Assistant Secretary determines that Bureau cannot reimburse the emergency from the facilities emergency repair fund; and

(e) It could not have been prevented by prudent action by officials responsible for the educational program.

### § 39.502 How does a school apply for contingency funds?

To apply for contingency funds, a school must send a request to the ELO. The ELO must send the request to the Director for consideration within 48 hours of receipt. The Director will consider the severity of the event and will attempt to respond to the request as soon as possible, but in any event within 30 days.

### § 39.503 How can a school use contingency funds?

Contingency funds can be used only for education services and programs, including repair of educational facilities.

### § 39.504 May schools carry over contingency funds to a subsequent fiscal year?

Bureau-operated schools may carry over funds to the next fiscal year.

### § 39.505 What are the reporting requirements for the use of the contingency fund?

(a) At the end of each fiscal year, Bureau/OIEP shall send an annual report to Congress detailing how the Contingency Funds were used during the previous fiscal year.

(b) By October 1 of each year, the Bureau must send a letter to each school and each tribe operating a school listing the allotments from the Contingency Fund.

## Subpart F—School Board Training Expenses

### § 39.600 Are Bureau-operated school board expenses funded by ISEP limited?

Yes. Bureau-operated schools are limited to $8,000 or one percent (1%) of ISEP allotted funds (not to exceed $15,000).

### § 39.601 Is school board training for Bureau-operated schools considered a school board expense subject to the limitation?

No, school board training for Bureau-operated schools is not considered a school board expense subject to the limitation in § 39.600.

### § 39.603 Is school board training required for all Bureau-funded schools?

Yes. Any new member of a local school board or an agency school board must complete 40 hours of training within one year of appointment, provided that such training is recommended, but is not required, for a tribal governing body that serves in the capacity of a school board.

### § 39.604 Is there a separate weight for school board training at Bureau-operated schools?

Yes. There is an ISEP weight not to exceed 1.2 WSUs to cover school board training and expenses at Bureau-operated schools.

## Subpart G—Student Transportation

### § 39.700 What is the purpose of this subpart?

(a) This subpart covers how transportation mileage and funds for schools are calculated under the ISEP transportation program. The program funds transportation of students from home to school and return.

(b) To use this part effectively, a school should:

(1) Determine its eligibility for funds using the provisions of §§ 39.702 through 39.708;

(2) Calculate its transportation miles using the provisions of §§ 39.710 and 39.711; and

(3) Submit the required reports as required by §§ 39.721 and 39.722.

### § 39.701 What definitions apply to terms used in this subpart?

*ISEP* means the Indian School Equalization Program.

*Transportation mileage count week* means the last full week in September.

*Unimproved roads* means unengineered earth roads that do not

have adequate gravel or other aggregate surface materials applied and do not have drainage ditches or shoulders.

## Eligibility for Funds

### § 39.702 Can a school receive funds to transport residential students using commercial transportation?

A school transporting students by commercial bus, train, airplane, or other commercial modes of transportation will be funded at the cost of the commercial ticket for:

(a) The trip from home to school in the Fall;

(b) The round-trip return home at Christmas; and

(c) The return trip home at the end of the school year.

### § 39.703 What ground transportation costs are covered for students traveling by commercial transportation?

This section applies only if a school transports residential students by commercial bus, train or airplane from home to school. The school may receive funds for the ground miles that the school has to drive to deliver the students or their luggage from the bus, train, or plane terminal to the school.

### § 39.704 Are schools eligible to receive chaperone expenses to transport residential students?

Yes. Schools may receive funds for actual chaperone expenses, excluding salaries, during the transportation of students to and from home at the beginning and end of the school year and at Christmas.

### § 39.705 Are schools eligible for transportation funds to transport special education students?

Yes. A school that transports a special education student from home to a treatment center and back to home on a daily basis as required by the student's Individual Education Plan may count those miles for day student funding.

### § 39.706 Are peripheral dormitories eligible for day transportation funds?

Yes. If the peripheral dormitory is required to transport dormitory students to the public school, the dormitory may count those miles driven transporting students to the public school for day transportation funding.

### § 39.707 Which student transportation expenses are currently not eligible for Student Transportation Funding?

(a) The following transportation expenses are currently not eligible for transportation funding, however the data will be collected under the provisions in this subpart:

(1) Fuel and maintenance runs;

(2) Transportation home for medical or other emergencies;

(3) Transportation from school to treatment or special services programs;

(4) Transportation to after-school programs; and

(5) Transportation for day and boarding school students to attend instructional programs less than full-time at locations other than the school reporting the mileage.

(b) Examples of after-school programs covered by paragraph (a)(4) of this section include:

(1) Athletics;

(2) Band;

(3) Detention;

(4) Tutoring, study hall and special classes; and

(5) Extra-curricular activities such as arts and crafts.

### § 39.708 Are miles generated by non-ISEP eligible students eligible for transportation funding?

No. Only miles generated by ISEP-eligible students enrolled in and attending a school are eligible for student transportation funding.

## Calculating Transportation Miles

### § 39.710 How does a school calculate annual bus transportation miles for day students?

To calculate the total annual bus transportation miles for day students, a school must use the appropriate formula from this section. In the formulas, Tu = Miles driven on Tuesday of the transportation mileage count week, W = Miles driven on Wednesday of the transportation mileage count week, and Th = Miles driven on Thursday of the transportation mileage count week.

(a) For ISEP-eligible day students whose route is entirely over improved roads, calculate miles using the following formula:

$$\frac{Tu + W + Th}{3} * 180$$

(b) For ISEP-eligible day students whose route is partly over unimproved roads, calculate miles using the following three steps.

(1) *Step 1.* Apply the following formula to miles driven over improved roads only:

$$\frac{Tu + W + Th}{3} * 180$$

(2) *Step 2.* Apply the following formula to miles driven over unimproved roads only:

$$\frac{Tu + W + Th}{3} * 1.2 * 180$$

(3) *Step 3.* Add together the sums from steps 1 and 2 to obtain the total annual transportation miles.

### § 39.711 How does a school calculate annual bus transportation miles for residential students?

To calculate the total annual transportation miles for residential students, a school must use the procedures in paragraph (b) of this section.

(a) The school can receive funds for the following trips:

(1) Transportation to the school at the start of the school year;

(2) Round trip home at Christmas; and

(3) Return trip to home at the end of the school year.

(b) To calculate the actual miles driven to transport students from home to school at the start of the school year, add together the miles driven for all buses used to transport students from their homes to the school. If a school transports students over unimproved roads, the school must separate the number of miles driven for each bus into improved miles and unimproved miles. The number of miles driven is the sum of:

(1) The number of miles driven on improved roads; and

(2) The number of miles driven on unimproved roads multiplied by 1.2.

(c) The annual miles driven for each school is the sum of the mileage from paragraphs (b)(1) and (b)(2) of this section multiplied by 4.

## Reporting Requirements

### § 39.720 Why are there different reporting requirements for transportation data?

In order to construct an actual cost data base, residential and day schools must report data required by §§ 39.721 and 39.722.

### § 39.721 What transportation information must off-reservation boarding schools report?

(a) Each off-reservation boarding school that provides transportation must report annually the information required by this section. The report must:

(1) Be submitted to OIEP by August 1 and cover the preceding school year;

(2) Include a Charter/Commercial and Air Transportation Form signed and certified as complete and accurate by the School Principal and the appropriate ELO; and

(3) Include the information required by paragraph (b) of this section.

(b) Each annual transportation report must include the following information:

(1) Fixed vehicle costs, including: the number and type of buses, passenger

size, and local GSA rental rate and duration of GSA contract;

(2) Variable vehicle costs;

(3) Mileage traveled to transport students to and from school on school days, to sites of special services, and to extra-curricular activities;

(4) Medical trips;

(5) Maintenance and Service costs; and

(6) Driver costs;

(7) All expenses referred to in § 39.707.

**§ 39.722 What transportation information must day schools, on-reservation boarding schools and peripheral dormitory schools report?**

(a) By August 1 of each year, all schools and peripheral dorms that provide transportation must submit a report that covers the preceding year. This report must include:

(1) Fixed vehicle costs and other costs, including: the number and type of buses, passenger size, and local GSA rental rate and duration of GSA contract;

(2) Variable vehicle costs;

(3) Mileage traveled to transport students to and from school on school days, to sites of special services, and to extra-curricular activities;

(4) Mileage driven for student medical trips;

(5) Costs of vehicle maintenance and service cost, including cost of miles driven to obtain maintenance and service;

(6) Driver costs; and

(7) All expenses referred to in § 39.707.

(b) In addition, all day schools and on-reservation boarding schools must include in their report a Day Student Transportation Form signed and certified as complete and accurate by the School Principal and the appropriate ELO.

## Miscellaneous Provisions

**§ 39.730 Which standards must student transportation vehicles meet?**

All vehicles used by schools to transport students must meet or exceed all appropriate Federal motor vehicle safety standards and State or Tribal motor vehicle safety standards. The Bureau will not fund transportation mileage and costs incurred transporting students in vehicles that do not meet these standards.

**§ 39.731 Can transportation time be used as instruction time for day school students?**

No. Transportation time cannot be used as instruction time for day school students in meeting the minimum required hours for academic funding.

**§ 39.732 How does OIEP allocate transportation funds to schools?**

OIEP allocates transportation funds based on the types of transportation programs that the school provides. To allocate transportation funds OIEP:

(a) Multiplies the one-way commercial costs for all schools by four to identify the total commercial costs for all schools;

(b) Subtracts the commercial cost total from the appropriated transportation funds and allocates the balance of the transportation funds to each school with a per-mile rate;

(c) Divides the balance of funds by the sum of the annual day miles and the annual residential miles to identify a per-mile rate;

(d) For day transportation, multiplies the per-mile rate times the annual day miles for each school; and

(e) For residential transportation, multiplies the per mile rate times the annual transportation miles for each school.

## Subpart H—Determining the Amount Necessary To Sustain an Academic or Residential Program

**§ 39.801 What is the formula to determine the amount necessary to sustain a school's academic or residential program?**

(a) The Secretary's formula to determine the minimum annual amount necessary to sustain a Bureau-funded school's academic or residential program is as follows:

Student Unit Value × Weighted Student Unit = Annual Minimum Amount per student.

(b) Sections 39.802 through 39.807 explain the derivation of the formula in paragraph (a) of this section.

(c) If the annual minimum amount calculated under this section and §§ 39.802 through 39.807 is not fully funded, OIEP will pro rate funds distributed to schools using the Indian School Equalization Formula.

**§ 39.802 What is the student unit value in the formula?**

The student unit value is the dollar value applied to each student in an academic or residential program. There are two types of student unit values: the student unit instructional value (SUIV) and the student unit residential value (SURV).

(a) The student unit instructional value (SUIV) applies to a student enrolled in an instructional program. It is an annually established ratio of 1.0 that represents a student in grades 4 through 6 of a typical non-residential program.

(b) The student unit residential value (SURV) applies to a residential student. It is an annually established ratio of 1.0 that represents a student in grades 4 through 6 of a typical residential program.

**§ 39.803 What is a weighted student unit in the formula?**

A weighted student unit is an adjusted ratio using factors in the Indian School Equalization Formula to establish educational priorities and to provide for the unique needs of specific students, such as:

(a) Students in grades kindergarten through 3 or grades 7 through 12;

(b) Special education students;

(c) Gifted and talented students;

(d) Distance education students;

(e) Vocational and industrial education students;

(f) Native Language Instruction students;

(g) Small schools;

(h) Personnel costs;

(i) Alternative schooling; and

(j) Early Childhood Education programs.

**§ 39.804 How is the SUIV calculated?**

The SUIV is calculated by the following 5-step process:

(a) *Step 1.* Use the adjusted national average current expenditures (ANACE) of public and private schools determined by data from the U.S. Department of Education-National Center of Education Statistics (NCES) for the last school year for which data is available.

(b) *Step 2.* Subtract the average specific Federal share per student (title I part A and IDEA part B) of the total revenue for Bureau-funded elementary and secondary schools for the last school year for which data is available as reported by NCES (15%).

(c) *Step 3.* Subtract the administrative cost grant/agency area technical services revenue per student as a percentage of the total revenue (current expenditures) of Bureau-funded schools from the last year data is available.

(d) *Step 4.* Subtract the day transportation revenue per student as a percentage of the total revenue (current revenue) Bureau-funded schools for the last school year for which data is available.

(e) *Step 5.* Add Johnson O'Malley funding. (See the table, in § 39.805)

**§ 39.805 What was the student unit for instruction value (SUIV) for the school year 1999–2000?**

The process described in § 39.804 is illustrated in the table below, using figures for the 1999–2000 school year:

| | | |
|---|---|---|
| Step 1 | $8,030 | ANACE. |
| Step 2 | −1205 | Average specific Federal share of total revenue for Bureau-funded schools. |
| Step 3 | −993 | Cost grant/technical services revenue as a percentage total revenue. |
| Step 4 | −658 | Transportation revenue as a percentage of the total revenue. |
| Step 5 | 85 | Johnson O'Malley funding. |
| Total | $5,259 | SUIV. |

**§ 39.806 How is the SURV calculated?**

(a) The SURV is the adjusted national average current expenditures for residential schools (ANACER) of public and private residential schools. This average is determined using data from the Association of Boarding Schools.

(b) Applying the procedure in paragraph (a) of this section, the SURV for school year 1999–2000 was $11,000.

**§ 39.807 How will the Student Unit Value be adjusted annually?**

(a) The student unit instructional value (SUIV) and the student unit residential value (SURV) will be adjusted annually to derive the current year Student Unit Value (SUV) by dividing the calculated SUIV and the SURV into two parts and adjusting each one as shown in this section.

(1) The first part consists of 85 percent of the calculated SUIV and the SURV. OIEP will adjust this portion using the personnel cost of living increase of the Department of Defense schools for each year.

(2) The second part consists of 15 percent the calculated SUIV and the SURV. OIEP will adjust this portion using the Consumer Price Index-Urban of the Department of Labor.

(b) If the student unit value amount is not fully funded, the schools will receive their pro rata share using the Indian School Equalization Formula.

**§ 39.808 What definitions apply to this subpart?**

*Adjusted National Average Current Expenditure [ANACE]* means the actual current expenditures for pupils in fall enrollment in public elementary and secondary schools for the last school year for which data is available. These expenditures are adjusted annually to reflect current year expenditures of federally financed schools' cost of day and residential programs.

*Current expenditures* means expenses related to classroom instruction, classroom supplies, administration, support services-students and other support services and operations. Current expenditures do not include facility operations and maintenance, buildings and improvements, furniture, equipment, vehicles, student activities and debt retirement.

**§ 39.809 Information collection.**

Notwithstanding any other provision of law, no person is required to respond to, nor shall any person be subject to a penalty for failure to comply with, a collection of information subject to the requirements of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*) (PRA), unless that collection of information displays a currently valid Office of Management and Budget (OMB) Control Number. This part involves collections of information subject to the PRA in §§ 39.410 and 39.502. These collections have been approved by OMB under control numbers 1076–0122, 1076–0134, and 1076–0163.

■ 5. Part 42 is revised to read as follows:

## PART 42—STUDENT RIGHTS

Sec.

42.1 What general principles apply to this part?
42.2 What rights do individual students have?
42.3 How should a school address alleged violations of school policies?
42.4 What are alternative dispute resolution processes?
42.5 When can a school use ADR processes to address an alleged violation?
42.6 When does due process require a formal disciplinary hearing?
42.7 What does due process in a formal disciplinary proceeding include?
42.8 What are a student's due process rights in a formal disciplinary proceeding?
42.9 What are victims' rights in formal disciplinary proceedings?
42.10 How must the school communicate individual student rights to students, parents or guardians, and staff?
42.11 Information collection.

**Authority:** 5 U.S.C. 301, Pub. L. 107–110, 115 Stat. 1425.

**§ 42.1 What general principles apply to this part?**

(a) This part applies to every Bureau-funded school. The regulations in this part govern student rights and due process procedures in disciplinary proceedings in all Bureau-funded schools. To comply with this part, each school must:

(1) Respect the constitutional, statutory, civil and human rights of individual students; and

(2) Respect the role of Tribal judicial systems where appropriate.

(b) All student rights, due process procedures, and educational practices should, where appropriate or possible, afford students consideration of and rights equal to the student's traditional Native customs and practices.

**§ 42.2 What rights do individual students have?**

Individual students at Bureau-funded schools have, and must be accorded, at least the following rights:

(a) The right to an education that may take into consideration Native American or Alaska Native values;

(b) The right to an education that incorporates applicable Federal and Tribal constitutional and statutory protections for individuals; and

(c) The right to due process in instances of disciplinary actions.

**§ 42.3 How should a school address alleged violations of school policies?**

(a) In addressing alleged violations of school policies, each school must consider, to the extent appropriate, the reintegration of the student into the school community.

(b) The school may address a student violation using alternative dispute resolution (ADR) processes or the formal disciplinary process.

(1) When appropriate, the school should first attempt to use the ADR processes described in § 42.4 that may allow resolution of the alleged violation without recourse to punitive action.

(2) Where ADR processes do not resolve matters or cannot be used, the school must address the alleged violation through a formal disciplinary proceeding under § 42.7 consistent with the due process rights described in § 42.7.

**§ 42.4 What are alternative dispute resolution processes?**

Alternative dispute resolution (ADR) processes are formal or informal processes that may allow resolution of the violation without recourse to punitive action.

(a) ADR processes may:

(1) Include peer adjudication, mediation, and conciliation; and

(2) Involve appropriate customs and practices of the Indian Tribes or Alaska Native Villages to the extent that these practices are readily identifiable.

(b) For further information on ADR processes and how to use them, contact the Office of Collaborative Action and Dispute Resolution by:

(1) Sending an e-mail to: *cadr@ios.doi.gov*; or

(2) Writing to: Office of Collaborative Action and Dispute Resolution, Department of the Interior, 1849 C Street NW., MS 5258, Washington, DC 20240.

**§ 42.5 When can a school use ADR processes to address an alleged violation?**

(a) The school may address an alleged violation through the ADR processes described in § 42.4, unless one of the conditions in paragraph (b) of this section applies.

(b) The school must not use ADR processes in any of the following circumstances:

(1) Where the Act requires immediate expulsion (''zero tolerance'' laws);

(2) For a special education disciplinary proceeding where use of ADR would not be compatible with the Individuals with Disabilities Education Act (Pub. L. 105–17); or

(3) When all parties do not agree to using alternative dispute resolution processes.

(c) If ADR processes do not resolve matters or cannot be used, the school must address alleged violations through the formal disciplinary proceeding described in § 42.8.

**§ 42.6 When does due process require a formal disciplinary hearing?**

Unless local school policies and procedures provide for less, a formal disciplinary hearing is required before a suspension in excess of 10 days or expulsion.

**§ 42.7 What does due process in a formal disciplinary proceeding include?**

Due process must include written notice of the charges and a fair and impartial hearing as required by this section.

(a) The school must give the student written notice of charges within a reasonable time before the hearing required by paragraph (b) of this section. Notice of the charges includes:

(1) A copy of the school policy allegedly violated;

(2) The facts related to the alleged violation;

(3) Information about any statements that the school has received relating to the charge and instructions on how to obtain copies of those statements; and

(4) Information regarding those parts of the student's record that the school will consider in rendering a disciplinary decision.

(b) The school must hold a fair and impartial hearing before imposing disciplinary action, except under the following circumstances:

(1) If the Act requires immediate removal (such as, if the student brought a firearm to school) or if there is some other statutory basis for removal;

(2) In an emergency situation that seriously and immediately endangers the health or safety of the student or others; or

(3) If the student (or the student's parent or guardian if the student is less than 18 years old) chooses to waive entitlement to a hearing.

(c) In an emergency situation under paragraph (b)(2) of this section, the school:

(1) May temporarily remove the student;

(2) Must immediately document for the record the facts giving rise to the emergency; and

(3) Must afford the student a hearing that follows due process, as set forth in this part, within ten days.

**§ 42.8 What are a student's due process rights in a formal disciplinary proceeding?**

A student has the following due process rights in a formal disciplinary proceeding:

(a) The right to have present at the hearing the student's parents or guardians (or their designee);

(b) The right to be represented by counsel (legal counsel will not be paid for by the Bureau-funded school or the Secretary);

(c) The right to produce, and have produced, witnesses on the student's behalf and to confront and examine all witnesses;

(d) The right to the record of the disciplinary action, including written findings of fact and conclusions;

(e) The right to administrative review and appeal under school policy;

(f) The right not to be compelled to testify against himself or herself; and

(g) The right to have an allegation of misconduct and related information expunged from the student's school record if the student is found not guilty of the charges.

**§ 42.9 What are victims' rights in formal disciplinary proceedings?**

In formal disciplinary proceedings, each school must consider victims' rights when appropriate.

(a) The victim's rights may include a right to:

(1) Participate in disciplinary proceedings either in writing or in person;

(2) Provide a statement concerning the impact of the incident on the victim; and

(3) Have the outcome explained to the victim and to his or her parents or guardian by a school official, consistent with confidentiality.

(b) For the purposes of this part, the victim is the actual victim, not his or her parents or guardians.

**§ 42.10 How must the school communicate individual student rights to students, parents or guardians, and staff?**

Each school must:

(a) Develop a student handbook that includes local school policies, definitions of suspension, expulsion, zero tolerance, and other appropriate terms, and a copy of the regulations in this part;

(b) Provide all school staff a current and updated copy of student rights and responsibilities before the first day of each school year;

(c) Provide all students and their parents or guardians a current and updated copy of student rights and responsibilities every school year upon enrollment; and

(d) Require students, school staff, and to the extent possible, parents and guardians, to confirm in writing that they have received a copy and understand the student rights and responsibilities.

**§ 42.11 Information collection.**

Notwithstanding any other provision of law, no person is required to respond to, nor shall any person be subject to a penalty for failure to comply with a collection of information, subject to the requirements of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*) (PRA), unless that collection of information displays a currently valid Office of Management and Budget (OMB) Control Number. This part in §§ 42.6, 42.7, and 42.9 contains collections of information subject to the PRA. These collections have been approved by OMB under control number 1076–0163.

■ 6. New part 44 is added to read as follows:

## PART 44—GRANTS UNDER THE TRIBALLY CONTROLLED SCHOOLS ACT

Sec.

44.101 What directives apply to a grantee under this part?
44.102 Does this part affect existing tribal rights?
44.103 Who is eligible for a grant?
44.104 How can a grant be terminated?
44.105 How does a tribal governing body retrocede a program to the Secretary?
44.106 How can the Secretary revoke an eligibility determination?
44.107 Under what circumstances may the Secretary reassume a program?
44.108 How must the Secretary make grant payments?
44.109 What happens if the grant recipient is overpaid?

44.110 What Indian Self-Determination Act provisions apply to grants under the Tribally Controlled Schools Act?
44.111 Does the Federal Tort Claims Act apply to grantees?
44.112 Information Collection

**Authority:** Public Law 107–110, Title 10, Part D, the Native American Education Improvement Act, 115 Stat. 2007; Part B, Section 1138, Regional Meetings and Negotiated Rulemaking, 115 Stat. 2057.

### § 44.101 What directives apply to a grantee under this part?

In making a grant under this part the Secretary will use only:

(a) The Tribally Controlled Schools Act;

(b) The regulations in this part; and

(c) Guidelines, manuals, and policy directives agreed to by the grantee.

### § 44.102 Does this part affect existing tribal rights?

This part does not:

(a) Affect in any way the sovereign immunity from suit enjoyed by Indian tribes;

(b) Terminate or change the trust responsibility of the United States to any Indian tribe or individual Indian;

(c) Require an Indian tribe to apply for a grant; or

(d) Impede awards by any other Federal agency to any Indian tribe or tribal organization to administer any Indian program under any other law.

### § 44.103 Who is eligible for a grant?

The Secretary can make grants to Indian tribes and tribal organizations that operate:

(a) A school under the provisions of 25 U.S.C. 450 *et seq.*;

(b) A tribally controlled school (including a charter school, community-generated school or other type of school) approved by tribal governing body; or

(c) A Bureau-funded school approved by tribal governing body.

### § 44.104 How can a grant be terminated?

A grant can be terminated only by one of the following methods:

(a) Retrocession;

(b) Revocation of eligibility by the Secretary; or

(c) Reassumption by the Secretary.

### § 44.105 How does a tribal governing body retrocede a program to the Secretary?

(a) To retrocede a program, the tribal governing body must:

(1) Notify the Bureau in writing, by formal action of the tribal governing body; and

(2) Consult with the Bureau to establish a mutually agreeable effective date. If no date is agreed upon, the retrocession is effective 120 days after the tribal governing body notifies the Bureau.

(b) The Bureau must accept any request for retrocession that meets the criteria in paragraph (a) of this section.

(c) After the tribal governing body retrocedes a program:

(1) The tribal governing body decides whether the school becomes Bureau-operated or contracted under 25 U.S.C. 450 *et seq.*; and

(2) If the tribal governing body decides that the school is to be Bureau-operated, the Bureau must provide education-related services in at least the same quantity and quality as those that were previously provided.

### § 44.106 How can the Secretary revoke an eligibility determination?

(a) In order to revoke eligibility, the Secretary must:

(1) Provide the tribe or tribal organization with a written notice;

(2) Furnish the tribe or tribal organization with technical assistance to take remedial action; and

(3) Provide an appeal process.

(b) The Secretary cannot revoke an eligibility determination if the tribe or tribal organization is in compliance with 25 U.S.C. 2505(c).

(c) The Secretary can take corrective action if the school fails to be accredited by January 8, 2005.

(d) In order to revoke eligibility for a grant, the Secretary must send the tribe or tribal organization a written notice that:

(1) States the specific deficiencies that are the basis of the revocation or reassumption; and

(2) Explains what actions the tribe or tribal organization must take to remedy the deficiencies.

(e) The tribe or tribal organization may appeal a notice of revocation or reassumption by requesting a hearing under 25 CFR part 900, subpart L or P.

(f) After revoking eligibility, the Secretary will either contract the program under 25 U.S.C. 450 *et seq.* or operate the program directly.

### § 44.107 Under what circumstances may the Secretary reassume a program?

The Secretary may only reassume a program in compliance with 25 U.S.C. 450m and 25 CFR part 900, subpart P. The tribe or school board shall have a right to appeal the reassumption pursuant to 25 CFR part 900, subpart L.

### § 44.108 How must the Secretary make grant payments?

(a) The Secretary makes two annual grant payments.

(1) The first payment, consisting of 80 per cent of the amount that the grantee was entitled to receive during the previous academic year, must be made no later than July 1 of each year; and

(2) The second payment, consisting of the remainder to which the grantee is entitled for the academic year, must be made no later than December 1 of each year.

(b) For funds that become available for obligation on October 1, the Secretary must make payments no later than December 1.

(c) If the Secretary does not make grant payments by the deadlines stated in this section, the Secretary must pay interest under the Prompt Payment Act. If the Secretary does not pay this interest, the grantee may pursue the remedies provided under the Prompt Payment Act.

### § 44.109 What happens if the grant recipient is overpaid?

(a) If the Secretary has mistakenly overpaid the grant recipient, then the Secretary will notify the grant recipient of the overpayment. The grant recipient must return the overpayment within 30 days after the final determination that overpayment occurred.

(b) When the grant recipient returns the money to the Secretary, the Secretary will distribute the money equally to all schools in the system.

### § 44.110 What Indian Self-Determination Act provisions apply to grants under the Tribally Controlled Schools Act?

(a) The following provisions of 25 CFR part 900 apply to grants under the Tribally Controlled Schools Act.

(1) Subpart F; Standards for Tribal or Tribal Organization Management Systems, § 900.45.

(2) Subpart H; Lease of Tribally-owned Buildings by the Secretary.

(3) Subpart I; Property Donation Procedures.

(4) Subpart N; Post-award Contract Disputes.

(5) Subpart P; Retrocession and Reassumption Procedures.

(b) To resolve any disputes arising from the Secretary's administration of the requirements of this part, the procedures in subpart N of part 900 apply if the dispute involves any of the following:

(1) Any exception or problem cited in an audit;

(2) Any dispute regarding the grant authorized;

(3) Any dispute involving an administrative cost grant;

(4) Any dispute regarding new construction or facility improvement or repair; or

(5) Any dispute regarding the Secretary's denial or failure to act on a request for facilities funds.

**§ 44.111 Does the Federal Tort Claims Act apply to grantees?**

Yes, the Federal Tort Claims Act applies to grantees.

**§ 44.112 Information collection.**

Notwithstanding any other provision of law, no person is required to respond to, nor shall any person be subject to a penalty for failure to comply with a collection of information, subject to the requirements of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*) (PRA), unless that collection of information displays a currently valid Office of Management and Budget (OMB) Control Number. This part in § 44.105 contains collections of information subject to the PRA. These collections have been approved by OMB under control number 1076–0163.

■ 7. New Part 47 is added to subchapter E to read as follows:

## PART 47—UNIFORM DIRECT FUNDING AND SUPPORT FOR BUREAU-OPERATED SCHOOLS

Sec.
47.1 What is the purpose of this part?
47.2 What definitions apply to terms in this part?
47.3 How does a Bureau-operated school find out how much funding it will receive?
47.4 When does OIEP provide funding?
47.5 What is the school supervisor responsible for?
47.6 Who has access to local education financial records?
47.7 What are the expenditure limitations for Bureau-operated schools?
47.8 Who develops the local educational financial plans?
47.9 What are the minimum requirements for the local educational financial plan?
47.10 How is the local educational financial plan developed?
47.11 Can these funds be used as matching funds for other Federal programs?
47.12 Information collection.

**Authority:** Pub. L. 107–110, 115 Stat. 1425.

**§ 47.1 What is the purpose of this part?**

This part contains the requirements for developing local educational financial plans that Bureau-operated schools need in order to receive direct funding from the Bureau of Indian Affairs under section 1127 of the Act.

**§ 47.2 What definitions apply to terms in this part?**

*Act* means the No Child Left Behind Act, Public Law 107–110, enacted January 8, 2002. The No Child Left Behind Act reauthorizes and amends the Elementary and Secondary Education Act (ESEA) and the amended Education Amendments of 1978.

*Budget* means that element in the local educational financial plan which shows all costs of the plan by discrete programs and sub-cost categories.

*Bureau* means the Bureau of Indian Affairs in the Department of the Interior.

*Consultation* means soliciting and recording the opinions of Bureau-operated school boards regarding each element of the local educational financial plan and incorporating these opinions to the greatest degree feasible in the development of the local educational financial plan at each stage.

*Director* means the Director, Office of Indian Education Programs.

*Local educational financial plan* means the plan that:

(1) Programs dollars for educational services for a particular Bureau-operated school; and

(2) Has been ratified in an action of record by the local school board or determined by the superintendent under the appeals process in 25 CFR part 2.

*OIEP* means the Office of Indian Education Programs in the Bureau of Indian Affairs of the Department of the Interior.

*Secretary* means the Secretary of the Interior or a designated representative.

**§ 47.3 How does a Bureau-operated school find out how much funding it will receive?**

The Office of Indian Education Programs (OIEP) will notify each Bureau-operated school in writing of the annual funding amount it will receive as follows:

(a) No later than July 1 OIEP will let the Bureau-operated school know the amount that is 80 percent of its funding; and

(b) No later than September 30 OIEP will let the Bureau-operated school know the amount of the remaining 20 percent.

**§ 47.4 When does OIEP provide funding?**

By July 1 of each year OIEP will make available for obligation 80 percent of the funds for the fiscal year that begins on the following October 1.

**§ 47.5 What is the school supervisor responsible for?**

Each Bureau-operated school's school supervisor has the responsibilities in this section. The school supervisor must do all of the following:

(a) Ensure that the Bureau-operated school spends funds in accordance with the local educational financial plan, as ratified or amended by the school board;

(b) Sign all documents required to obligate or pay funds or to record receipt of goods and services;

(c) Report at least quarterly to the local school board on the amounts spent, obligated, and currently remaining in funds budgeted for each program in the local educational financial plan;

(d) Recommend changes in budget amounts to carry out the local educational financial plan, and incorporate these changes in the budget as ratified by the local school board, subject to provisions for appeal and overturn; and

(e) Maintain expenditure records in accordance with financial planning system procedures.

**§ 47.6 Who has access to local education financial records?**

The Comptroller General, the Assistant Secretary, the Director, or any of their duly authorized representatives have access for audit and explanation purposes to any of the local school's accounts, documents, papers, and records which are related to the Bureau-operated schools' operation.

**§ 47.7 What are the expenditure limitations for Bureau-operated schools?**

Each Bureau-operated school must spend all allotted funds in accordance with applicable Federal regulations and local education financial plans. If a Bureau-operated school and OIEP region or Agency support services staff disagree over expenditures, the Bureau-operated school must appeal to the Director for a decision.

**§ 47.8 Who develops the local educational financial plans?**

The local Bureau-operated school supervisor develops the local educational financial plan in active consultation with the local school board, based on the tentative allotment received.

**§ 47.9 What are the minimum requirements for the local educational financial plan?**

(a) The local educational financial plan must include:

(1) Separate funds for each group receiving a discrete program of services is to be provided, including each program funded through the Indian School Equalization Program;

(2) A budget showing the costs projected for each program; and

(3) A certification provision meeting the requirements of paragraph (b) of this section.

(b) The certification required by paragraph (a)(3) of this section must provide for:

(1) Certification by the chairman of the school board that the plan has been ratified in an action of record by the board; and

(2) Certification by the Education Line Officer that he or she has approved the plan as shown in an action overturning

the school board's rejection or amendment of the plan.

### § 47.10 How is the local educational financial plan developed?

(a) The following deadlines apply to development of the local educational financial plan:

(1) Within 15 days after receiving the tentative allotment, the school supervisor must consult with the local school board on the local educational financial plan.

(2) Within 30 days of receiving the tentative allotment, the school board must review the local educational financial plan and, by a quorum vote, ratify, reject, or amend, the plan.

(3) Within one week of the school board action under paragraph (a)(2) of this section, the supervisor must either:

(i) Send the plan to the education line officer (ELO), along with the official documentation of the school board action; or

(ii) Appeal the school board's decision to the ELO.

(4) The ELO will review the local educational financial plan for compliance with laws and regulations and may refer the plan to the Solicitor's Office for legal review. If the ELO notes any problem with the plan, he or she must:

(i) Notify the local board and local supervisor of the problem within two weeks of receiving the plan;

(ii) Make arrangements to assist the local school supervisor and board to correct the problem; and

(iii) Refer the problem to the Director of the Office of Indian Education if it cannot be solved locally.

(b) When consulting with the school board under paragraph (a)(1) of this section, the school supervisor must:

(1) Discuss the present program of the Bureau-operated school and any proposed changes he or she wishes to recommend;

(2) Give the school board members every opportunity to express their own ideas and views on the supervisor recommendations; and

(3) After the discussions required by paragraphs (b)(1) and (b)(2) of this section, present a draft plan to the school board with recommendations concerning each of the elements.

(c) If the school board does not act within the deadline in paragraph (a)(2) of this section, the supervisor must send the plan to the ELO for ratification. The school board may later amend the plan by a quorum vote; the supervisor must transmit this amendment in accordance with paragraph (a)(3) of this section.

### § 47.11 Can these funds be used as matching funds for other Federal programs?

A Bureau-operated school may use funds that it receives under this part as matching funds for other Federal programs.

### § 47.12 Information collection.

Notwithstanding any other provision of law, no person is required to respond to, nor shall any person be subject to a penalty for failure to comply with, a collection of information subject to the requirements of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*) (PRA), unless that collection of information displays a currently valid Office of Management and Budget (OMB) Control Number. This part contains collections of information subject to the PRA in §§ 47.5, 47.7, 47.9, and 47.10. These collections have been approved by OMB under control number 1076–1063.

[FR Doc. 05–8256 Filed 4–27–05; 8:45 am]

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# Part III

# Securities and Exchange Commission

**17 CFR Part 201**

**Proposed Amendments to the Rules of Practice and Related Provisions; Proposed Rule**

**SECURITIES AND EXCHANGE COMMISSION**

**17 CFR Part 201**

**[Release No. 34–51595; File No. S7–05–05]**

## Proposed Amendments to the Rules of Practice and Related Provisions

**AGENCY:** Securities and Exchange Commission.

**ACTION:** Proposed rule.

**SUMMARY:** The Securities and Exchange Commission (''Commission'') is proposing for public comment amendments to its Rules of Practice and related provisions. The Commission is proposing the amendments as a result of its experience with these rules and to correct typographical errors and change certain citations. The proposed amendments are intended to enhance the transparency and facilitate parties' understanding of the rules and to make practice under the rules easier and more efficient.

**DATES:** Comments should be received on or before May 31, 2005.

**ADDRESSES:** Comments may be submitted by any of the following methods:

*Electronic Comments*

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/proposed.shtml*); or
- Send an e-mail to *rule-comments@sec.gov*. Please include File Number S7–05–05 on the subject line; or
- Use the Federal eRulemaking Portal (*http://www.regulations.gov*). Follow the instructions for submitting comments.

*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 S7–05–05. This file number should be included on the subject line if e-mail is used. To help us 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/proposed.shtml*). Comments are also available for public inspection and copying in the Commission's Public Reference Room, 450 Fifth Street, NW., Washington, DC 20549. All comments received will be posted without change; we do not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly.

**FOR FURTHER INFORMATION CONTACT:** Diane V. White, Office of the General Counsel, (202) 942–0950, Securities and Exchange Commission, 450 5th Street, NW., Washington, DC 20549–0208.

**SUPPLEMENTARY INFORMATION:** The Commission proposes to amend its Rules of Practice and related provisions as a result of the Commission's experience with its existing rules and in order to correct references and change certain citations.[1] The majority of these proposals are technical and not substantive.

### I. Discussion

A. Rule 141(a)(2)(ii) now generally authorizes service on other corporations or entities by delivering a copy of the order instituting proceedings (''OIP'') to an officer, managing or general agent, or authorized agent by personal service or by mail.[2] The Commission has observed that, in proceedings instituted under Section 12(j) of the Securities Exchange Act of 1934, 15 U.S.C. 78*l*(j), to revoke or suspend the registration of a class of securities for failure to make timely periodic filings, it sometimes has been difficult to serve the issuer of the class of securities. An issuer that is delinquent in its filings often does not keep current with the Commission the name of a valid representative. In certain instances, the Commission's staff has sought to accomplish service on such an issuer by serving multiple copies of the OIP on various persons, such as the issuer's officers or directors.[3] The Commission proposes to amend Rule 141(a)(2)(ii) to authorize service on an issuer at the most recent address set forth in its most recent filing with the Commission, together with obtaining confirmation of attempted delivery.

The Commission also proposes to add Rule 141(a)(2)(vi) to authorize service on persons registered with self-regulatory organizations at the most recent address shown in the Central Registration Depository, together with obtaining confirmation of attempted delivery. We request comment as to whether this method will provide adequate notice of a proceeding. We recognize that the Central Registration Depository requires only that addresses be kept current for two years after a person ceases to be associated with a member of a self-regulatory organization, and we request comment as to whether the rule should refer explicitly to such a two-year period.

B. Currently, Rule 430(a) provides that any person aggrieved by an action made by authority delegated in Sections 200.30–1 through 200.30–8 or Sections 200.30–11 through 200.30–18 may seek review of the action pursuant to Rule 430(b). Rule 430(b) provides that Commission review is to be sought by filing a written notice of intention to petition for review within five days ''after actual notice to the party of the action or service of notice pursuant to § 201.141(b), whichever is earlier.'' While the current rule permits appeals by any aggrieved person, an aggrieved person who is not a party may not receive actual notice or learn of service of notice promptly after the action. Nonetheless, it is important that a deadline for the filing of a notice of intention to petition for review be established, so that people may know when an action is beyond challenge. The proposed amendment would therefore provide that both parties and aggrieved persons may seek Commission review of the action by filing a notice of intention to petition for review within five days after actual notice of the action to the party or person, or 15 days after publication of the notice of action in the **Federal Register**, or five days after service of notice of the action pursuant to § 201.141(b), whichever is the earliest. The Commission requests comment on whether this form of publication would provide adequate notice, or whether another form of publication should be used to supplement the **Federal Register**. The Commission further seeks comment on whether posting of a notice of action pursuant to delegated authority on the Commission's Web site would aid in giving notice to persons who might be aggrieved by such action. The Commission also seeks comment as to whether 15 days after publication

[1] The Commission may determine to delegate certain of its authority under these proposed rules if it subsequently adopts them.

[2] Rule 141(a)(2)(ii) states that notice to a corporation or other entity of a proceeding ''shall be made'' by ''delivering a copy of the order instituting proceedings to an officer, managing or general agent, or any other agent authorized by appointment or by law to receive such notice, by any method specified in paragraph (a)(2)(i) of this rule.''

Rule 141(a)(2)(i) authorizes delivery by ''handing a copy of the order to the individual; or leaving a copy at the individual's office with a clerk or other person in charge thereof; or leaving a copy at the individual's dwelling house or usual place of abode with some person of suitable age and discretion then residing therein; or sending a copy of the order addressed to the individual by U.S. Postal Service certified, registered or Express Mail and obtaining confirmation of receipt; or giving confirmed telegraphic notice.''

[3] *See, e.g., Alcohol Sensors Int'l, Ltd.*, Exchange Act Rel. No. 50150 (Aug. 5, 2004), 83 SEC Docket 1748, 1749 n.1 (stating that more than 430 copies of the OIP were served in order to accomplish service on seventeen respondents in a Section 12(j) proceeding).

allows parties and aggrieved persons sufficient time to file a notice.[4]

C. Currently, Rule 55, which governs the conduct of Equal Access to Justice Act (''EAJA'') proceedings before an administrative law judge, authorizes the law judge considering an application for an award of fees and expenses under the Equal Access to Justice Act, 5 U.S.C. § 504, to order all proceedings that are otherwise available under Rule 8(d) of the Rules of Practice. Former Rule 8(d) authorized the conduct of prehearing conferences and briefings. When the Commission comprehensively revised and renumbered its Rules of Practice in 1995, former Rule 8(d) was incorporated into Rules 221 and 222(a).[5] However, the reference to Rule 8(d) contained in EAJA Rule 55 was not changed at that time. The proposed amendment would replace the reference to Rule 8(d) with a reference to Rules 221 and 222(a).

D. Current Rule 102(e)(3)(iii) provides that Commission review of a hearing officer's initial decision on a petition to lift a temporary suspension of a person from appearing and practicing before the Commission will be governed by the time limits set forth in § 201.531. The proposed amendment would correct the reference, by referring to § 201.540, which governs the appeal and Commission review of certain initial decisions.

E. Currently, Rule 111(h) provides no time limit within which a law judge is required to rule upon a motion to correct a manifest error of fact in an initial decision. The proposed amendment would make clear that such a ruling must be made within 20 days of the filing of any brief in opposition. Any brief in opposition must be filed within five days after service of the motion.

F. Current Rule 152(d) provides that an original and three copies of all papers shall be filed. The proposed amendment would make clear that if filing is made by facsimile pursuant to Rule 151, the filer must transmit only one non-facsimile original with a manual signature and does not need to transmit additional non-facsimile copies.

G. Currently, Rule 154(c) and Rule 250(c) provide page limitations for, respectively, motions in general and motions for summary disposition. Rule 450(c), however, now sets word-count limitations, instead of page limitations, for briefs filed with the Commission. The proposed amendment to Rule 154(c) would substitute a limitation for motions of 7,000 words, exclusive of any table of contents, table of authority, or addendum of applicable cases, legislative provisions, or exhibits. Rule 470(b), which currently requires motions for reconsideration to comply with the page length limitation in Rule 154(c), would be amended to refer to proposed Rule 154(c)'s word limitation.

The proposed amendment to Rule 250(c) would set a limitation of 9,800 words for a motion for summary disposition, supporting memorandum of points and authorities, but not including any declarations, affidavits or attachments. Motions for summary dispositions are often made in cases where a respondent has been criminally convicted or an injunction has been entered and the conviction or injunction provides the basis for an administrative order against the respondent. In such cases, documents establishing the conviction or injunction must be included as exhibits to the motion; these documents alone can total more than the entire word limitation allotted to the motion. The proposed amendment would exclude such attachments from the word-count restriction.

H. Current Rule 201(b) provides that by order of the Commission, any proceeding may be severed with respect to some or all parties. The proposed amendment would allow severance with respect to ''one or more'' parties, making clear that severance is available as to a single party, under appropriate circumstances.

I. Current Rule 210(a)(2) contains a reference to § 201.612. Section 612 was renumbered as § 201.1103, effective April 19, 2004. The proposed amendment would change the reference accordingly.[6]

J. Current Rule 411(c) refers to ''any brief in opposition to a petition for review permitted pursuant to § 201.410(d).'' The Rules of Practice no longer provide for briefs in opposition to a petition for review, and Section 410(d) was removed and reserved effective April 19, 2004. The proposed amendment would delete the reference.

K. Currently, Rule 601(a) provides that funds due pursuant to an order by a hearing officer shall be paid on the first day after the order becomes final pursuant to Rule 360. Under Rule 360(d)(2) as revised, effective April 19, 2004, an initial decision no longer becomes final automatically. That rule now provides that the Commission will issue an order stating that a decision has become final. Rule 360(d)(2) further provides for the order of finality to state the date on which sanctions, if any, take effect. Proposed Rule 601would clarify that funds due pursuant to an order by a hearing officer are to be paid in accordance with the order of finality.

L. Current Rule 900(b) requires the Chief Administrative Law Judge to apprise the Commission specifically if a proceeding assigned to an administrative law judge has not been concluded ''within 30 days of the guidelines established in paragraph (a) of this section.'' Paragraph (a) no longer contains guidelines relevant to the timely conclusion of proceedings before law judges; these guidelines are now found in § 201.360(a)(2). Rule 360(a)(3) requires the Chief Administrative Law Judge to submit a motion for an extension to the Commission if it is determined that an initial decision cannot be issued within the period specified in the guidelines. The submission of such motions renders the specific apprisal by the Chief Administrative Law Judge under Rule 900(b) unnecessary. The proposed amendment would eliminate that requirement.

M. In proceedings where an order issued by the Commission requires a respondent to pay disgorgement and assesses a civil penalty against that respondent, current Rule 1100 allows the Commission to create a Fair Fund for the benefit of investors who were harmed by the violation found. The proposed amendment would make clear that in such cases, hearing officers also have the authority to create Fair Funds.

N. Tables I, II, and III have been superseded by subsequent amendments to the federal securities laws and these rules, and are of little utility to the public. The proposed amendment would delete these tables.

## II. Request for Public Comments

We request and encourage any interested person to submit comments regarding: (1) The proposed changes that are the subject of this release, (2) additional or different changes, or (3) other matters that may have an effect on the proposals contained in this release.

## III. Administrative Procedure Act, Regulatory Flexibility Act, and Paperwork Reduction Act

The Commission finds, in accordance with Section 533(b)(3)(A) of the

[4] *See* 44 U.S.C. 1508 (stating that time between publication of notice in **Federal Register** and date fixed in notice for hearing or termination of opportunity to be heard should generally be not less than fifteen days unless otherwise specifically prescribed by Act of Congress).

[5] *See* Exchange Act Rel. No. 35833 (June 23, 1995), 59 SEC Docket 1546, 1631 tbl. III.

[6] Language was inadvertently deleted from Rule 210(b) in an earlier revision of the Rules of Practice. This language is now being reinstated.

Administrative Procedure Act,[7] that this revision relates solely to agency organization, procedure, or practice. It is therefore not subject to the provisions of the Administrative Procedure Act requiring notice, opportunity for public comment, and publication. The Regulatory Flexibility Act [8] therefore does not apply. Similarly, because these rules relate to ''agency organization, procedure or practice that does not substantially affect the rights or obligations of non-agency parties,'' the Commission is not soliciting comment for purposes of the Small Business Regulatory Enforcement Fairness Act.[9] Nonetheless, the Commission has determined that it would be useful to publish these proposed rules for notice and comment before adoption.[10] These rules do not contain any collection of information requirements as defined by the Paperwork Reduction Act of 1995, as amended.[11]

## IV. Costs and Benefits of the Proposed Amendments

Taken as a whole, the Commission's Rules of Practice create governmental review and remedial processes. That is, they are procedural and administrative in nature. The benefits to the parties are the familiar benefits of due process: notice, opportunity to be heard, efficiency, and fairness. The costs of these processes fall largely on the Commission.

The proposals set forth in this release variously clarify existing practice, relate to internal agency management, increase the efficiency of proceedings, or promote due process. The Commission requests data to quantify the costs and the value of the benefits identified. The Commission also seeks estimates and views regarding these costs and benefits for particular types of market participants, as well as any other costs or benefits that may result from the adoption of the proposed rules.

## V. Effect on Efficiency, Competition and Capital Formation

Section 2(b) of the Securities Act of 1933,[12] Section 3(f) of the Exchange Act,[13] Section 2(c) of the Investment Company Act of 1940,[14] and Section 202(c) of the Investment Advisers Act of 1940 [15] require us, when engaging in rulemaking that requires us to consider or determine whether an act is necessary or appropriate in the public interest, to consider whether the action will promote efficiency, competition, and capital formation. Section 23(a)(2) of the Exchange Act [16] prohibits us from adopting any rule that would impose a burden on competition not necessary or appropriate in furtherance of the purposes of the Exchange Act. The proposed rules and amendments are intended to enhance the transparency and facilitate parties' understanding of the Rules. The proposed amendments are also intended to clarify existing practice and increase the efficiency of Commission enforcement and self-regulatory organization disciplinary review proceedings. The proposed rules and amendments would apply to all persons involved in administrative proceedings before the Commission and therefore the Commission does not expect the proposed rules and amendments to have an anti-competitive effect. To the extent the proposed rules and amendments would foster making whole victims of securities laws violations and would increase the transparency and efficiency of the Commission's administrative proceedings, there might be an increase in investor confidence in market fairness and efficiency. However, the magnitude of the effect of the proposed amendments in this regard is difficult to quantify. We request comment on the possible effects of our rule proposals on efficiency, competition, and capital formation. Commenters are requested to provide empirical data and other factual support for their views if possible.

## VI. Statutory Basis and Text of Proposed Amendments

These amendments to the Rules of Practice and related provisions are being adopted pursuant to statutory authority granted to the Commission, including section 3 of the Sarbanes-Oxley Act of 2002, 15 U.S.C. 7202; section 19 of the Securities Act, 15 U.S.C. 77s; sections 4A, 19, and 23 of the Exchange Act, 15 U.S.C. 78d–1, 78s, and 78w; section 20 of the Public Utility Holding Company Act of 1935, 15 U.S.C. 79t; section 319 of the Trust Indenture Act of 1939, 15 U.S.C. 77sss; sections 38 and 40 of the Investment Company Act, 15 U.S.C. 80a–37 and 80a–39; and section 211 of the Investment Advisers Act, 15 U.S.C. 80b–11.

### List of Subjects in 17 CFR Part 201

Administrative practice and procedure.

### Text of the Amendment

For the reasons set out in the preamble, Title 17, Chapter II of the Code of Federal Regulations is proposed to be amended as follows:

## PART 201—RULES OF PRACTICE

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

**Authority:** 15 U.S.C. 77s, 78w, 78x, 79t, 77sss, 80a–37 and 80b–11; 5 U.S.C. 504(c)(1).

2. Section 201.55 is amended by revising the third sentence in paragraph (a) to read as follows:

**§ 201.55 Further proceedings.**

(a) * * * The administrative law judge may order all proceedings that are otherwise available under Rules 221 and 222(a) of the Commission's Rules of Practice, §§ 201.211 and 201.222(a). * * *

* * * * *

3. The authority citation for Part 201, subpart D, continues to read as follows:

**Authority:** 15 U.S.C. 77f, 77g, 77h, 77h–1, 77j, 77s, 77u, 78c(b), 78d–1, 78d–2, 78*l*, 78m, 78n, 78o(d), 78o–3, 78s, 78u–2, 78u–3, 78v, 78w, 79c, 79s, 79t, 79z–5a, 77sss, 77ttt, 80a–8, 80a–9, 80a–37, 80a–38, 80a–39, 80a–40, 80a–41, 80a–44, 80b–3, 80b–9, 80b–11, 80b–12, 7202, 7215, and 7217.

**§ 201.102 [Amended]**

4. Section 201.102 is amended by revising the cite ''§ 201.531'' to read ''§ 201.540'' in the last sentence of paragraph (e)(3)(iii).

5. Section 201.111 is amended by revising paragraph (h) to read as follows:

**§ 201.111 Hearing officer: Authority.**

* * * * *

(h) Subject to any limitations set forth elsewhere in these Rules of Practice, considering and ruling upon all procedural and other motions, including a motion to correct a manifest error of fact in the initial decision. Any motion to correct must be filed within ten days of the initial decision. A brief in opposition may be filed within five days of a motion to correct. The hearing officer shall have 20 days from the date of filing of any brief in opposition filed to rule on a motion to correct;

* * * * *

6. Section 201.141 is amended by:

a. Revising paragraph (a)(2)(ii); and

b. Adding paragraph (a)(2)(vi).

The revision and addition read as follows.

**§ 201.141 Orders and decisions: Service of orders instituting proceeding and other orders and decisions.**

(a) * * *

[7] 5 U.S.C. 553(b)(3)(A).

[8] 5 U.S.C. 601 *et seq.*

[9] 5 U.S.C. 804(3)(C).

[10] *See* 5 U.S.C. 603.

[11] 44 U.S.C. 3501 *et seq.*

[12] 15 U.S.C. 77b(b).

[13] 15 U.S.C. 78c(f).

[14] 15 U.S.C. 80a–2(c).

[15] 15 U.S.C. 80b–2(c).

[16] 15 U.S.C. 78w(a)(2).

(2) * * *

(ii) *To corporations or entities.* Notice of a proceeding shall be made to a person other than a natural person by delivering a copy of the order instituting proceedings to an officer, managing or general agent, or any other agent authorized by appointment or law to receive such notice, by any method specified in paragraph (a)(2)(i) of this section, or, in the case of an issuer of a class of securities registered with the Commission, by sending a copy of the order addressed to the most recent address shown on the entity's most recent filing with the Commission by U.S. Postal Service certified, registered or Express Mail and obtaining a confirmation of attempted delivery.

* * * * *

(vi) *To persons registered with self-regulatory organizations.* Notice of a proceeding shall be made to a person registered with a self-regulatory organization by any method specified in paragraph (a)(2)(i) of this section, or by sending a copy of the order addressed to the most recent address for the person shown in the Central Registration Depository by U.S. Postal Service certified, registered or Express Mail and obtaining a confirmation of attempted delivery.

* * * * *

7. Section 201.152 is amended by revising paragraph (d) to read as follows:

**§ 201.152 Filing of papers: Form.**

* * * * *

(d) *Number of copies.* An original and three copies of all papers shall be filed, unless filing is made by facsimile in accordance with § 201.151. If filing is made by facsimile, the filer shall also transmit to the Office of the Secretary one non-facsimile original with a manual signature, contemporaneously with the facsimile transmission.

* * * * *

8. Section 201.154 is amended by revising paragraph (c) to read as follows:

**§ 201.154 Motions.**

* * * * *

(c) *Length limitation.* A motion (together with the brief in support of the motion, the brief in opposition to the motion, or any reply brief) shall not exceed 7,000 words, exclusive of any table of contents or table of authorities. The word limit shall not apply to any addendum that consists solely of copies of applicable cases, pertinent legislative provisions or rules, or relevant exhibits. Requests for leave to file motions and briefs in excess of 7,000 words are disfavored. A motion that does not, together with any accompanying brief, exceed 15 pages in length, exclusive of pages containing the table of contents, table of authorities, and any addendum that consists solely of copies of applicable cases, pertinent legislative provisions, or rules and exhibits, but inclusive of pleadings incorporated by reference, is presumptively considered to contain no more than 7,000 words. Any motion that exceeds these page limits must include a certificate by the attorney, or an unrepresented party, stating that the brief complies with the length limitation set forth in this paragraph and stating the number of words in the motion. The person preparing the certificate may rely on the word count of a word-processing program to prepare the motion.

9. Section 201.201 is amended by revising the first sentence of paragraph (b) to read as follows:

**§ 201.201 Consolidation and severance of proceedings.**

* * * * *

(b) * * * By order of the Commission, any proceeding may be severed with respect to one or more parties. * * *

10. Section 201.210 is amended by:

a. Revising the cite ''§ 201.612'' to read ''§ 201.1103'' in paragraph (a)(2);

b. Removing the colon at the end of the introductory text of paragraph (b)(1) and adding a period in its place; and

c. Adding a sentence at the end of the introductory text of paragraph (b)(1).

The revision and addition read as follows.

**§ 201.210 Parties, limited participants and amici curiae.**

* * * * *

(b) * * * (1) * * * No person, however, shall be admitted as a party to a proceeding by intervention unless it is determined that leave to participate pursuant to paragraph (c) of this section would be inadequate for the protection of the person's interests.

* * * * *

11. Section 201.250 is amended by revising paragraph (c) to read as follows:

**§ 201.250 Motion for summary disposition.**

* * * * *

(c) The motion for summary disposition, supporting memorandum of points and authorities (exclusive of any declarations, affidavits or attachments) shall not exceed 9,800 words. Requests for leave to file motions and accompanying documents in excess of 9,800 words are disfavored. A motion that does not, together with any accompanying memorandum of points and authorities, exceed 35 pages in length, inclusive of pleadings incorporated by reference (but excluding any declarations, affidavits or attachments) is presumptively considered to contain no more than 9,800 words. Any motion that exceeds these page limits must include a certificate by the attorney, or an unrepresented party, stating that the brief complies with the length limitation set forth in this paragraph and stating the number of words in the motion. The person preparing the certificate may rely on the word count of a word-processing program to prepare the motion.

12. Section 201.411 is amended by revising the first sentence in paragraph (c) to read as follows:

**§ 201.411 Commission consideration of initial decisions by hearing officers.**

* * * * *

(c) * * * The Commission may, on its own initiative, order review of any initial decision, or any portion of any initial decision, within 21 days after the end of the period established for filing a petition for review pursuant to § 210.410(b). * * *

* * * * *

13. Section 201.430 is amended by revising paragraph (b)(1) to read as follows:

**§ 201.430 Appeal of actions made pursuant to delegated authority.**

* * * * *

(b) * * * (1) *Notice of intention to petition for review.* A party to an action made pursuant to delegated authority, or a person aggrieved by such action, may seek Commission review of the action by filing a notice of intention to petition for review within five days after actual notice of the action to the party or person, or 15 days after publication of the notice of action in the **Federal Register**, or five days after service of notice of the action on the party or person pursuant to § 201.141(b), whichever is the earliest.

* * * * *

14. Section 201.470 is amended by revising the third sentence of paragraph (b) to read as follows:

**§ 201.470 Reconsideration.**

* * * * *

(b) * * * A motion for reconsideration shall conform to the requirements, including the limitation on the numbers of words, provided in § 201.154. * * *

15. Section 201.601 is amended by revising paragraph (a) to read as follows:

**§ 201.601 Prompt payment of disgorgement, interest and penalties.**

(a) *Timing of payments.* Unless otherwise provided, funds due pursuant

to an order by the Commission requiring the payment of disgorgement, interest or penalties shall be paid no later than 21 days after service of the order, and funds due pursuant to an order by a hearing officer shall be paid in accordance with the order of finality issued pursuant to § 201.360(d)(2).

* * * * *

16. Section 201.900 is amended by revising the last sentence in paragraph (b) to read as follows:

**§ 201.900 Informal procedures and supplementary information concerning adjudicatory proceedings.**

* * * * *

(b) * * * In connection with these reports, if a proceeding pending before the Commission has not been concluded within 30 days of the guidelines established in paragraph (a) of this section, the General Counsel shall specifically apprise the Commission of that fact, and shall describe the procedural posture of the case, project an estimated date for conclusion of the proceeding, and provide such other information as is necessary to enable the Commission to determine whether additional steps are necessary to reach a fair and timely resolution of the matter.

* * * * *

17. Part 201, subpart D, is amended by removing Tables I, II, and III at the end of the subpart.

## Subpart F—Fair Fund and Disgorgement Plans

18. The authority citation for subpart F continues to read as follows.

**Authority:** 15 U.S.C. 77h–1, 77s, 77u, 78c(b), 78d–1, 78d–2, 78u–2, 78u–3, 78v, 78w, 80a–9, 80a–37, 80a–39, 80a–40, 80b–3, 80b–11, 80b–12, and 7246.

19. Section 201.1100 is revised to read as follows:

**§ 201.1100 Creation of fair fund.**

In any agency process initiated by an order instituting proceedings in which the Commission or the hearing officer issues an order requiring the payment of disgorgement by a respondent and also assessing a civil money penalty against that respondent, the Commission or the hearing officer may order that the amount of disgorgement and of the civil penalty, together with any funds received pursuant to 15 U.S.C. 7246(b), be used to create a fund for the benefit of investors who were harmed by the violation.

Dated: April 21, 2005.

By the Commission.

**Margaret H. McFarland,**

*Deputy Secretary.*

[FR Doc. 05–8484 Filed 4–27–05; 8:45 am]

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Federal Register

Thursday,
April 28, 2005

# Part IV

# Department of Education

## Office of Vocational and Adult Education; Overview Information; Smaller Learning Communities Program; Notices

## DEPARTMENT OF EDUCATION

### Office of Vocational and Adult Education

### Overview Information; Smaller Learning Communities Program Notice Inviting Applications for New Awards for Fiscal Year (FY) 2004 and Subsequent Years' Funds

*Catalog of Federal Domestic Assistance (CFDA) Number:* 84.215L.

**DATES:** *Applications Available:* April 28, 2005.

*Deadline for Transmittal of Applications:* June 7, 2005.

*Deadline for Intergovernmental Review:* August 11, 2005.

*Eligible Applicants:* Local educational agencies (LEAs), including schools funded by the Bureau of Indian Affairs and educational service agencies, applying on behalf of large public high schools, are eligible to apply for a grant.

An LEA that was awarded an implementation grant on behalf of a school under the original SLC program competition held in 2000 (Cohort 1) or the second competition, which was held in 2002 (Cohort 2) may apply on behalf of the school for a second SLC grant under the terms set forth in the notice of final priority, requirements, definitions, and selection criteria for fiscal year (FY) 2004 and subsequent years' funds (NFP), published elsewhere in this issue of the **Federal Register**. LEAs that received funding on behalf of schools for an SLC implementation grant(s) under the competitions held in 2003 (Cohort 3) and 2004 (Cohort 4) may not apply on behalf of those same schools for a grant in this competition.

Additional eligibility requirements are listed in the *Eligibility* section of the *Application Requirements* in the NFP, published elsewhere in this issue of the **Federal Register**.

*Estimated Available Funds:* $125,269,000.

*Estimated Range of Awards:* $650,000 to $11,750,000. See also the chart under Section II. Award Information. Additional information regarding awards and budget determination is in the *Budget Information for Determination of Award* section in the *Application Requirements* in the NFP, published elsewhere in this issue of the **Federal Register**.

*Estimated Size of Award:* LEAs may receive, on behalf of a single school, up to $1,175,000, depending upon the size of the school, during the 60-month project period. LEAs applying on behalf of a group of eligible schools could receive up to $11,750,000 per grant. To ensure that sufficient funds are available to support SLC activities, LEAs may not include more than 10 schools in a single application for a grant. The actual size of awards will be based on a number of factors. These factors include the scope, quality, and comprehensiveness of the proposed project and the range of awards indicated in the application.

*Maximum Award:* Applications that request more funds than the maximum amounts specified for any school or for the total grant will not be read as part of the regular application process. However, if after the Secretary selects applications to be funded, it appears that additional funds remain available, the Secretary may choose to read those additional applications that requested funds exceeding the maximum amounts specified. If the Secretary chooses to fund any of those additional applications, applicants will be required to work with the Department to revise their proposed budgets to fit within the appropriate funding range.

*Estimated Number of Awards:* 150.

**Note:** The Department is not bound by any estimates in this notice.

*Project Period:* Up to 60 months.

### Full Text of Announcement

### I. Funding Opportunity Description

*Purpose of Program:* The purpose of the Smaller Learning Communities (SLC) program is to promote academic achievement through the creation or expansion of small, safe, and successful learning environments in large public high schools to help ensure that all students graduate with the knowledge and skills necessary to make successful transitions to college and careers.

*Priority:* This competition includes one absolute priority. The priority is from the NFP, published elsewhere in this issue of the **Federal Register**.

*Absolute Priority:* For this competition, the priority is an absolute priority. Under 34 CFR 75.105(c)(3) we consider only applications that meet this priority.

The priority is:

*Absolute Priority: Helping All Students to Succeed in Rigorous Academic Courses.*

This priority supports projects to create or expand SLCs that will implement a coherent set of strategies and interventions that are designed to ensure that all students who enter high school with reading/language arts and mathematics skills that are significantly below grade level ''catch up'' quickly so that, by no later than the end of the 10th grade, they have acquired the reading/language arts and mathematics skills they need to participate successfully in rigorous academic courses that will equip them with the knowledge and skills necessary to transition successfully to postsecondary education, apprenticeships, or advanced training.

These accelerated learning strategies and interventions must:

(1) Be grounded in the findings of scientifically based and other rigorous research;

(2) Include the use of age-appropriate instructional materials and teaching and learning strategies;

(3) Provide additional instruction and academic support during the regular school day, which may be supplemented by instruction that is provided before or after school, on weekends, and at other times when school is not in session; and

(4) Provide sustained professional development and ongoing support for teachers and other personnel who are responsible for delivering instruction.

*Application Requirements:* Additional requirements for all projects funded through this competition are in the NFP, published elsewhere in this issue of the **Federal Register**.

These additional requirements are: Eligibility; School Report Cards; Types of Grants; Consortium Applications and Educational Service Agencies; Budget Information for Determination of Award; Student Placement; Including All Students; Performance Indicators; Evaluation; High-Risk Status and Other Enforcement Mechanisms; Required Meetings Sponsored by the Department; and Previous Grantees.

*Definitions:* In addition to the definitions in the authorizing statute and 35 CFR 77.1, the definitions in the NFP, published elsewhere in this issue of the **Federal Register**, apply.

**Program Authority:** 20 U.S.C. 7249.

*Applicable Regulations:* (a) The Education Department General Administrative Regulations (EDGAR) in 34 CFR parts 75, 77, 79, 80, 81, 82, 84, 85, 86, 97, 98, and 99, and (b) the priority, requirements, definitions, and selection criteria contained in the NFP, published elsewhere in this issue of the **Federal Register**.

**Note:** The regulations in part 79 apply to all applicants except federally recognized Indian tribes.

### II. Award Information

*Type of Award:* Discretionary grants.

*Estimated Available Funds:* $125,269,000.

*Estimated Range of Awards:* $650,000 to $11,750,000. The following chart provides the ranges of awards per high school size for 60-month SLC grants:

SLC GRANT AWARD RANGES

| Student enrollment | Award ranges per school |
|---|---|
| 1,000–2,000 Students | $650,000–$800,000 |
| 2,001–3,000 Students | $650,000–$925,000 |
| 3,001–4,000 Students | $650,000–$1,050,000 |
| 4,001 and Up | $650,000–$1,175,000 |

Additional information regarding awards and budget determination is in the Budget Information for Determination of Award section in the Application Requirements in the NFP, published elsewhere in this issue of the **Federal Register**.

*Estimated Size of Award:* LEAs may receive, on behalf of a single school, up to $1,175,000, depending upon the size of the school, for the full 60-month project period. LEAs applying on behalf of a group of eligible schools may receive up to $11,750,000 per grant. To ensure that sufficient funds are available to support SLC activities, LEAs may not include more than 10 schools in a single application for a grant. The actual size of awards will be based on a number of factors. These factors include the scope, quality, and comprehensiveness of the proposed project and the range of awards indicated in the application.

*Maximum Award:* Applications that request more funds than the maximum amounts specified for any school or for the total grant will not be read as part of the regular application process. However, if after the Secretary selects applications to be funded, it appears that additional funds remain available, the Secretary may choose to read those additional applications that requested funds exceeding the maximum amounts specified. If the Secretary chooses to fund any of those additional applications, applicants will be required to work with the Department to revise their proposed budgets to fit within the appropriate funding range.

*Estimated Number of Awards:* 150.

**Note:** The Department is not bound by any estimates in this notice.

*Project Period:* Up to 60 months.

## III. Eligibility Information

1. *Eligible Applicants:* Local educational agencies (LEAs), including schools funded by the Bureau of Indian Affairs and educational service agencies, applying on behalf of large public high schools, are eligible to apply for a grant.

An LEA that was awarded an implementation grant on behalf of a school under the original SLC program competition held in 2000 (Cohort 1) or the second competition, which was held in 2002 (Cohort 2) may apply on behalf of the school for a second SLC grant under the terms set forth in this notice. LEAs that received funding on behalf of schools for an SLC implementation grant(s) under the competitions held in 2003 (Cohort 3) and 2004 (Cohort 4) may not apply on behalf of those same schools for a grant in this competition.

Additional eligibility requirements are listed in the *Eligibility* section of the *Application Requirements* in the NFP, published elsewhere in this issue of the **Federal Register**.

2. *Cost Sharing or Matching:* This competition does not involve cost sharing or matching.

## IV. Application and Submission Information

1. *Address to Request Application Package:* Deborah Williams, U.S. Department of Education, OVAE, 400 Maryland Avenue, SW., Potomac Center Plaza, room 11064, Washington, DC 20202–7241. Telephone: (202) 245–7770 or via Internet: *deborah.williams@ed.gov.*

If you use a telecommunications device for the deaf (TDD), you may call the Federal Relay Service (FRS) at 1–800–877–8339.

You may also obtain an application package via Internet from the following address: *http://www.ed.gov/programs/slcp/applicant.html.*

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 program contact person listed in this section.

2. *Content and Form of Application Submission:* To be considered for funding, LEAs must identify in their applications the name(s) of the eligible large high school(s) and the number of students enrolled in each school. A large high school is defined as one having grades 11 and 12, with 1,000 or more students enrolled in grades 9 and above. Enrollment figures must be based upon data from the current school year or data from the most recently completed school year. We will not accept applications from LEAs applying on behalf of schools that are being constructed and do not have an active student enrollment at the time of application. LEAs may apply on behalf of no more than 10 schools. Additional requirements concerning the content of an application are in the NFP for this program, published elsewhere in this issue of the **Federal Register.** These requirements, together with the forms you must submit, also are in the application package for this competition.

3. *Submission Dates and Times:*

*Applications Available:* April 28, 2005.

Applications for grants under this competition must be submitted by mail or hand delivery. For information (including dates and times) about how to submit your application by mail or hand delivery, please refer to section IV. 6. Other Submission Requirements in this notice.

We do not consider an application that does not comply with the deadline requirements.

*Deadline for Intergovernmental Review:* August 11, 2005.

4. *Intergovernmental Review:* This competition is subject to Executive Order 12372 and the regulations in 34 CFR part 79. Information about Intergovernmental Review of Federal Programs under Executive Order 12372 is in the application package for this competition.

5. *Funding Restrictions:* We reference regulations outlining funding restrictions in the *Applicable Regulations* section of this notice.

6. *Other Submission Requirements:* Applications for grants under this competition must be submitted in paper format by mail or hand delivery.

*a. Submission of Applications by Mail*

If you submit your application by mail (through the U.S. Postal Service of a commercial carrier), you must mail the original and three copies of your application, on or before the application deadline date, to the Department at the applicable following address:

By mail through the U.S. Postal Service:

U.S. Department of Education, Application Control Center, Attention: (CFDA Number 84.215L), 400 Maryland Avenue, SW., Washington, DC 20202–4260; or—

By mail through a commercial carrier:

U.S. Department of Education, Application Control Center—Stop 4260, Attention: (CFDA Number 84.215L), 7100 Old Landover Road, Landover, MD 20785–1506.

Regardless of the address you use, 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 Secretary of the U.S. Department 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 postmarked after the application deadline date, we will not consider your application.

**Note:** 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.

*b. Submission of Applications by Hand Delivery*

If you submit your application by hand delivery, you or a courier service) must deliver the original and three copies of your application, by hand, on or before the application deadline date, to the Department at the following address:

U.S. Department of Education, Application Control Center, Attention: (CFDA Number 84.215L), 550 12th Street, SW., Room 7041, Potomac Center Plaza, Washington, DC 20202–4260.

The Application Control Center accepts hand deliveries daily between 8 a.m. and 4:30 p.m., Washington, DC time, except Saturdays, Sundays, and Federal holidays.

*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 ED 424 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 grant application receipt acknowledgment within 15 days from the application deadline date, 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 in the NFP published elsewhere in this issue of the **Federal Register,** and 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.

**Note:** Requirements listed in the NFP published elsewhere in this issue of the **Federal Register** are material requirements. Failure to comply with any requirement or with any elements of the grantee's application would subject the grantee to administrative action, including but not limited to designation as a ''high-risk'' grantee, the imposition of special conditions, or termination of the grant. Circumstances that might cause the Department to take such action include, but are not limited to: the grantee showing a decline in student achievement after two years of implementation of the grant; the grantee's failure to make substantial progress in completing the milestones outlined in the management plan included in the application; and the grantee's expenditure of funds in a manner that is inconsistent with the budget as submitted in the application.

3. *Reporting:* At the end of your project period, you must submit a final performance report, including financial information, as directed by the Secretary. 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. Additional reporting requirements are in the NFP, published elsewhere in this issue of the **Federal Register.**

4. *Performance Measures:* We require applicants to identify in their application specific performance indicators and annual performance objectives for each of these indicators. Specifically, we require applicants to use the following performance indicators to measure the progress of each school:

(1) The percentage of students who score at the proficient and advanced levels on the reading/language arts and mathematics assessments used by the State to determine whether a school has made adequate yearly progress under part A of title I of the Elementary and Secondary Education Act of 1965 (20 U.S.C. 7249), as amended by Public Law 107–110, the No Child Left Behind Act of 2001, as well as these percentages disaggregated by subject matter and the following subgroups:

(A) Major racial and ethnic groups;

(B) Students with disabilities;

(C) Students with limited English proficiency; and

(D) Economically disadvantaged students.

(2) The school's graduation rate, as defined in the State's approved accountability plan for Part A of title I of the ESEA;

(3) The percentage of graduates who enroll in postsecondary education, apprenticeships, or advanced training for the semester following graduation;

(4) The percentage of graduates who are employed by the end of the first quarter after they graduate (*e.g.,* for students who graduate in May or June, this would be September 30);

(5) Other appropriate indicators the LEA may choose to identify in its application, such as rates of average daily attendance and year-to-year retention; achievement and gains in English proficiency of limited English proficient students; the incidence of school violence, drug and alcohol use, and disciplinary actions; or the percentage of students completing advanced placement courses and the rate of passing advanced placement tests (such as Advanced Placement and International Baccalaureate) and courses for college credit.

Applicants are required to include in their applications baseline data for each of these indicators and identify performance objectives for each year of the project period. We further require recipients of grants to report annually on the extent to which each school achieves its performance objectives for each indicator during the preceding school year. We require grantees to include in these reports comparable data, if available, for the preceding three school years so that trends in performance will be more apparent.

## VII. Agency Contact

**FOR FURTHER INFORMATION CONTACT:** Deborah Williams, U.S. Department of Education, OVAE, 400 Maryland Avenue, SW., Potomac Center Plaza, room 11064, Washington, DC 20202–7241. Telephone: (202) 245–7770 or via Internet: *deborah.williams@ed.gov.*

If you use a telecommunications device for the deaf (TDD), you may call the Federal Relay Service (FRS) 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 to the program contact person listed in this section.

## 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: April 22, 2005.

**Susan Sclafani,**

*Assistant Secretary for Vocational and Adult Education.*

[FR Doc. 05–8513 Filed 4–27–05; 8:45 am]

**BILLING CODE 4000–01–P**

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# DEPARTMENT OF EDUCATION

## Smaller Learning Communities Program

**AGENCY:** Office of Vocational and Adult Education, Department of Education.

**ACTION:** Notice of final priority, requirements, definitions, and selection criteria for fiscal year (FY) 2004 and subsequent years' funds.

**SUMMARY:** The Assistant Secretary for Vocational and Adult Education announces a priority, requirements, definitions, and selection criteria under the Smaller Learning Communities (SLC) program. The Assistant Secretary will use this priority, requirements, definitions, and selection criteria for a competition using fiscal year (FY) 2004 funds and may use them in later years.

We intend the priority, requirements, definitions, and selection criteria to further the purpose of the SLC program, which is to promote academic achievement through the creation or expansion of small, safe, and successful learning environments in large public high schools.

**DATES:** The final priority, requirements, definitions, and selection criteria are effective May 31, 2005.

**FOR FURTHER INFORMATION CONTACT:** Deborah Williams, U.S. Department of Education, OVAE, 400 Maryland Avenue, SW., Potomac Center Plaza, room 11064, Washington, DC 20202–7241. Telephone: (202) 245–7770 or via Internet: *deborah.williams@ed.gov.*

If you use a telecommunications device for the deaf (TDD), you may call the Federal Relay Service (FRS) 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 to the contact person listed under **FOR FURTHER INFORMATION CONTACT.**

**SUPPLEMENTARY INFORMATION:**

## Background

The Smaller Learning Communities program is authorized under Title V, Part D, subpart 4 of the Elementary and Secondary Education Act of 1965 (20 U.S.C. 7249), as amended by Public Law 107–110, the No Child Left Behind Act of 2001 (ESEA).

A strategy that may hold promise for improving the academic performance of our Nation's young people is the establishment of smaller learning communities as components of comprehensive high school improvement plans. The problems of large high schools and the related question of optimal school size have been debated for the last 40 years and are of growing interest today.

While the research on school size to date has been largely nonexperimental, some evidence suggests that smaller schools may have advantages over larger schools. Research suggests that the positive outcomes associated with smaller schools stem from the schools' ability to create close, personal environments in which teachers can work collaboratively, with each other and with a small set of students, to challenge students and support learning. A variety of structures and operational strategies are thought to provide important supports for smaller learning environments; some data suggest that these approaches offer substantial advantages to both teachers and students (Ziegler 1993; Caroll 1994).

Structural changes for recasting large schools as a set of smaller learning communities (SLCs) are described in the Conference Report for the Consolidated Appropriations Act, 2000 (Pub. L. 106–113, H.R. Conference Report No. 106–479, at 1240 (1999)). Such methods include establishing small learning clusters, ''houses,'' career academies, magnet programs, and schools-within-a-school. Other activities may include freshman transition activities, advisory and adult advocate systems, academic teaming, multi-year groupings, ''extra help'' or accelerated learning options for students or groups of students entering below grade level, and other innovations designed to create a more personalized high school experience for students. These structural changes and personalization strategies, by themselves, are not likely to improve student academic achievement. They might, however, create valuable opportunities to improve the quality of instruction and curriculum and to provide the individualized attention and academic support that all students need to excel academically. The SLC program encourages local educational agencies (LEAs) to set higher academic expectations for all of their students and to implement reforms that will provide the effective instruction and personalized academic and social support students need to meet those expectations.

The Department's ongoing efforts to ensure improved outcomes for students enrolled in programs funded by the SLC program are reflected in this notice. Many of the changes represent an effort to provide grantees with sufficient time and resources to carry out their plans for raising academic achievement through comprehensive structural and instructional reforms. Toward that end, we are extending the project period from three to five years. In addition, we are increasing the award amounts for individual grants.

In an attempt to facilitate the application process, encourage more LEAs to apply, and raise the quality of proposals received, we have streamlined the number of selection criteria from the previous competition. The priority, requirements, definitions, and selection criteria in this notice continue to focus on making the curriculum more rigorous and improving instruction through SLC structures and strategies.

We published a notice of proposed priority, requirements, definitions, and selection criteria for fiscal year (FY) 2004 and subsequent years' funds in the **Federal Register** on February 25, 2005 (70 FR 9290) (NPP). This notice of final priority, requirements, definitions, and selection criteria contains several changes from the NPP. We fully explain these changes in the following section.

## Analysis of Comments and Changes

In response to our invitation in the NPP, 17 parties submitted comments. An analysis of the comments and of any changes in the priority, requirements,

definitions, and selection criteria since publication of the NPP.

Generally, we do not address technical and other minor changes—and suggested changes the law does not authorize us to make under the applicable statutory authority.

*Comments:* A number of commenters were concerned that grantees with SLC projects ending this year are at a disadvantage, since they are not eligible to apply for an additional grant.

*Discussion:* As we proposed in the NPP, recipients of the first cohort of grants awarded in the SLC program in 2000 are eligible to apply for a grant. Based on public comments, however, we have determined that an LEA may apply on behalf of schools funded in the second cohort of grants awarded in 2001 under the SLC program as well. The requirements for improved academic achievement, continuous data collection and analysis to inform decision-making and program improvement, and third-party external evaluation of implementation are among the significant changes that are included in the program requirements starting with implementation grants awarded in 2003 (cohort 3) and continuing for grants awarded in 2004 (cohort 4). Accordingly, we do not think these grantees are at a disadvantage.

*Change:* We have added language in the *Previous Grantees* section of the notice to provide that recipients of grants in the second SLC cohort are eligible to apply for a grant under the conditions set forth in this notice. After internal review, we also have deleted the requirement that previous grantees include a copy of their final performance report in their applications.

*Comments:* One commenter suggested that we add a ''readiness criterion'' to the selection criteria that would document support from stakeholders outside of the school(s).

*Discussion:* We agree that the commitment of teachers, other school personnel, parents, students, and other community stakeholders is required for effective implementation of new or expansion of existing SLCs. The factors listed under the criterion Foundation for Implementation specifically address this requirement for continued involvement of all stakeholders in the planning stages and throughout the implementation process.

*Changes:* None.

*Comments:* Several commenters sought clarification regarding our proposal to prohibit a grantee from using year 1 of the grant period for planning purposes. One commenter recommended reinstatement of planning grants for $50,000 or $100,000 and a requirement that a grantee begin its implementation plan at the end of one year.

*Discussion:* When the SLC program was established, few resources were available regarding effective SLCs and efficient implementation practices. Accordingly, in the earlier years of this program, planning grants were awarded to provide funding to enable grantees to convene stakeholders for planning, to research SLCs, to visit various sites, and to participate in development opportunities as they decided whether they would apply for an implementation grant or not. Currently there are more readily available resources, planning tools, and SLC findings from research and practice that may inform the planning in schools and districts for the implementation process so that implementation can take place earlier. We do expect some new SLC implementation activities or expansion of some existing SLC to be completed during the first year of the grant; full implementation, however, is not expected in the first year of the project. As required in the selection criterion, Quality of the Management Plan, the application must include clearly defined responsibilities and detailed timelines and milestones for accomplishing project tasks for the project performance period.

*Changes:* We have added language to the *Types of Grants* section under *Application Requirements* to allow grantees to use the first year, if necessary, for some planning activities, and for investigation and piloting of SLC structural changes, strategies, services, more rigorous course offerings, and interventions that may be implemented in the SLCs as part of their whole-school reform initiative.

*Comments:* One commenter recommended that districts be allowed to apply for a grant on behalf of high schools under construction.

*Discussion:* Schools under construction do not have actual student enrollments. Consistent with language in the Conference Report for Consolidated Appropriations Act, 2004 (Pub. L. 108–199), we have decided that to be considered an eligible large high school for purposes of this program, the school must have an actual enrollment of 1,000 or more students at the time of application.

*Changes:* None.

*Comments:* One commenter recommended that we consider citing ''highly specified reform models'' in the selection criterion, Quality of Project Design.

*Discussion:* There are many resources available for use by applicants as they decide what reform models will work best in their specific environment. Resources are available at *http://www.ed.gov/programs/slcp/resources.html* and many other Web sites that may inform decision-making with regard to models and practices to use as the proposed SLC project is designed. Applicants should investigate various research-based strategies, services, and interventions that are likely to improve overall student achievements and program outcomes. Thus, a citation of ''highly specified reform models'' in the selection criteria is unnecessary.

*Changes:* None.

*Comments:* One commenter recommended that the Department establish the performance target for the graduation rate performance indicator and give preference to applicants with the highest graduation rate in a standard number of years.

*Discussion:* The performance indicators and annual performance objectives included in the grant application are established by each applicant and are based upon factors at each school included in the grant application. It is not possible for us to set a target for graduation outcomes that would be realistic for all potential applicants. Further, there are no competitive preference priorities established for this competition.

*Changes:* None.

*Comments:* One commenter requested clarification regarding the award ranges and whether the recommendations were for one year or the full period of the grant.

*Discussion:* We agree with the commenter that potential applicants may be confused about how to calculate the amount of award they are requesting.

*Changes:* We have added language in the *Budget Information for Determining Award* section under Application Requirements that makes it clear that the award recommendations are for the 60-month grant period.

*Comments:* One commenter requested clarification regarding group applications.

*Discussion:* We realize it may be beneficial for school districts to form a consortium for development and implementation of an SLC project. Per the Education Department General Administrative Regulations (EDGAR), applicants may apply as a consortium. The regulations, at 34 CFR 75.127–72.129, set out the details of group applications. All members of a consortium must be eligible entities.

The applicant is considered the grantee and is legally responsible for the grant. The consortium members must enter into an agreement that binds each member to every statement and assurance made by the applicant in the application, and the applicant must submit the agreement with its application.

*Changes:* None.

*Comments:* Two commenters requested clarification regarding the determination of ''high-risk'' status for grantees.

*Discussion:* Designation of a grantee as ''high-risk'' is based on factors that arise during the grant or may be based on past grant performance results. The designation is made only after measures have been taken by the Program Officer to help the grantee remedy any deficiencies. Any such designation would be done in accordance with 34 CFR 80.12 of EDGAR.

*Changes:* None.

**Note:** This notice of final priority, requirements, definitions, and selection criteria does not solicit applications. In any year in which we choose to use this priority, requirements, definitions, and selection criteria, we invite applications through a notice in the **Federal Register.** When inviting applications we designate each priority as absolute, competitive preference, or invitational. The effect of each type of priority follows:

*Absolute priority:* Under an absolute priority we consider only applications that meet the priority (34 CFR 75.105(c)(3)).

*Competitive preference priority:* Under a competitive preference priority we give competitive preference to an application by either (1) awarding additional points, depending on how well or the extent to which the application meets the competitive priority (34 CFR 75.105(c)(2)(i)); or (2) selecting an application that meets the competitive priority over an application of comparable merit that does not meet the priority (34 CFR 75.105(c)(2)(ii)).

*Invitational priority:* Under an invitational priority we are particularly interested in applications that meet the invitational priority. However, we do not give an application that meets the invitational priority a competitive or absolute preference over other applications (34 CFR 75.105(c)(1)).

## Priority

### *Priority: Helping All Students To Succeed in Rigorous Academic Courses*

This priority supports projects to create or expand SLCs that will implement a coherent set of strategies and interventions that are designed to ensure that all students who enter high school with reading/language arts or mathematics skills that are significantly below grade level ''catch up'' quickly so that, by no later than the end of the 10th grade, they have acquired the reading/language arts and mathematics skills they need to participate successfully in rigorous academic courses that will equip them with the knowledge and skills necessary to transition successfully to postsecondary education, apprenticeships, or advanced training.

These accelerated learning strategies and interventions must:

(1) Be grounded in the findings of scientifically based and other rigorous research;

(2) Include the use of age-appropriate instructional materials and teaching and learning strategies;

(3) Provide additional instruction and academic support during the regular school day, which may be supplemented by instruction that is provided before or after school, on weekends, and at other times when school is not in session; and

(4) Provide sustained professional development and ongoing support for teachers and other personnel who are responsible for delivering instruction.

## Application Requirements

The Assistant Secretary announces the following application requirements for this SLC competition. These requirements are in addition to the content that all SLC grant applicants must include in their applications as required by the program statute in title V, part D, subpart 4, section 5441(b) of the ESEA. LEAs, including schools funded by the Bureau of Indian Affairs and educational service agencies, applying on behalf of large public high schools, are eligible to apply for a grant. A discussion of each application requirement follows:

### *Eligibility*

To be considered for funding, LEAs must identify in their applications the name(s) of the eligible large high school(s) and the number of students enrolled in each school. A large high school is defined as one having grades 11 and 12, with 1,000 or more students enrolled in grades 9 and above. Enrollment figures must be based upon data from the current school year or data from the most recently completed school year. We will not accept applications from LEAs applying on behalf of schools that are being constructed and do not have an active student enrollment at the time of application. LEAs may apply on behalf of no more than 10 schools.

### *School Report Cards*

We require that LEAs provide, for each school included in the application, the most recent ''report card'' produced by the State or the LEA to inform the public about the characteristics of the school and its students, including information about student academic achievement and other student outcomes. These ''report cards'' must include, at a minimum, the following information that LEAs are required to report for each school under section 1111(h)(2)(B)(ii) of the ESEA: (1) Whether the school has been identified for school improvement and (2) information that shows how the academic assessments and other indicators of adequate yearly progress compare to those indicators for students in the LEA as a whole and also shows the performance of the school's students on statewide assessments.

### *Types of Grants*

We will award implementation grants to applicants to support the creation or expansion of an SLC or SLCs within each targeted high school. We will not fund any planning grants this year; however, full implementation is not expected in the first year of the grant. In the first year of the implementation grant, grantees will be allowed to continue planning activities including, but not limited to, (a) convening stakeholders who are actively involved in the continuing development of the new SLCs or expansion of SLCs at the targeted schools; (b) investigating and testing new structures and strategies to be implemented throughout the performance period; (c) piloting more rigorous academic courses and requirements to better prepare students for transition to postsecondary education; (d) surveying staff to inform the plans for high quality and sustained professional development throughout the implementation process; (e) conducting surveys of students, staff, and community stakeholders to inform continuous improvement throughout the implementation process; and (f) collecting and analyzing data to inform the initiatives planned for the implementation project.

Grants will be awarded for a period up to 60 months. We require that applicants provide detailed, yearly budget information for the total grant period requested. Understanding the unique complexities of implementing a program that affects a school's organization, physical design, curriculum, instruction, and preparation of teachers, we will award the entire grant amount at the time of the initial award. We also require that applicants provide detailed yearly plans, including benchmarks, for the total grant period requested.

*Consortium Applications and Educational Service Agencies*

In an effort to encourage systemic, district-level reform efforts, we permit an individual LEA to submit only one grant application in a competition, specifying in each application which high schools the LEA intends to fund.

In addition, we require that an LEA applying for a grant under this competition apply only on behalf of a high school or high schools for which it has governing authority, unless the LEA is an educational service agency that includes in its application evidence that the entity that has governing authority over the eligible high school supports the application. An LEA, however, may form a consortium with another LEA and submit a joint application for funds. The consortium must follow the procedures for group applications described in 34 CFR 75.127–75.129 in the Education Department General Administrative Regulations (EDGAR).

An LEA is eligible for only one grant whether the LEA applies independently or as part of a consortium.

*Budget Information for Determination of Award*

LEAs may receive, on behalf of a single school, up to $1,175,000, depending upon the size of the school. This award is for the full 60-month project period. LEAs applying on behalf of a group of eligible schools could receive up to $11,750,000 per grant. To ensure that sufficient funds are available to support SLC activities, LEAs may not include more than 10 schools in a single application for a grant.

The following chart provides the ranges of awards per high school size for 60-month SLC grants:

| SLC Grant Award Ranges | |
|---|---|
| Student Enrollment | Award Ranges Per School |
| 1,000 - 2,000 Students | $650,000 - $800,000 |
| 2,001 - 3,000 Students | $650,000 - $925,000 |
| 3,001 - 4,000 Students | $650,000 - $1,050,000 |
| 4,001 and Up | $650,000 - $1,175,000 |

The actual size of awards will be based on a number of factors. These factors include the scope, quality, and comprehensiveness of the proposed project and the range of awards indicated in the application.

Applications that request more funds than the maximum amounts specified for any school or for the total grant will not be read as part of the regular application process. However, if after the Secretary selects applications to be funded, it appears that additional funds remain available, the Secretary may choose to read those additional applications that requested funds exceeding the maximum amounts specified. If the Secretary chooses to fund any of those additional applications, applicants will be required to work with the Department to revise their proposed budgets to fit within the appropriate funding range.

*Student Placement*

We require applicants for SLC grants to include a description of how students will be selected or placed in an SLC and an assurance that students will not be placed according to ability or any other measure, but will be placed at random or by student/parent choice and not pursuant to testing or other judgments.

*Including All Students*

We require applicants for grants to create or expand an SLC project that will include every student within the school by no later than the end of the fifth school year of implementation. Elsewhere in this notice, we define an SLC as an environment in which a group of teachers and other adults within the school knows the needs, interests, and aspirations of each student well, closely monitors each student's progress, and provides the academic and other support each student needs to succeed.

*Performance Indicators*

We require applicants to identify in their application specific performance indicators and annual performance objectives for each of these indicators. Specifically, we require applicants to use the following performance indicators to measure the progress of each school:

(1) The percentage of students who score at the proficient and advanced

levels on the reading/language arts and mathematics assessments used by the State to determine whether a school has made adequate yearly progress under part A of title I of the ESEA, as well as these percentages disaggregated by subject matter and the following subgroups:

(A) Major racial and ethnic groups;

(B) Students with disabilities;

(C) Students with limited English proficiency; and

(D) Economically disadvantaged students.

(2) The school's graduation rate, as defined in the State's approved accountability plan for part A of title I of the ESEA;

(3) The percentage of graduates who enroll in postsecondary education, apprenticeships, or advanced training for the semester following graduation;

(4) The percentage of graduates who are employed by the end of the first quarter after they graduate (*e.g.,* for students who graduate in May or June, this would be September 30);

(5) Other appropriate indicators the LEA may choose to identify in its application, such as rates of average daily attendance and year-to-year retention; achievement and gains in English proficiency of limited English proficient students; the incidence of school violence, drug and alcohol use, and disciplinary actions; or the percentage of students completing advanced placement courses and the rate of passing advanced placement tests (such as Advanced Placement and International Baccalaureate) and courses for college credit.

Applicants are required to include in their applications baseline data for each of these indicators and identify performance objectives for each year of the project period. We further require recipients of grants to report annually on the extent to which each school achieves its performance objectives for each indicator during the preceding school year. We require grantees to include in these reports comparable data, if available, for the preceding three school years so that trends in performance will be more apparent.

*Evaluation*

We require each applicant to provide assurances that it will support an evaluation of the project that provides information to the project director and school personnel, and that will be useful in gauging the project's progress and in identifying areas for improvement. Each evaluation must include an annual report for each of the first four years of the project period and a final report that would be completed at the end of the fifth year of implementation and that will include information on implementation during the fifth year as well as information on the implementation of the project across the entire project period. We require grantees to submit each of these reports to the Department.

In addition, we require that the evaluation be conducted by an independent third party, selected by the applicant, whose role in the project is limited to conducting the evaluation.

*High-Risk Status and Other Enforcement Mechanisms*

Requirements listed in this notice are material requirements. Failure to comply with any requirement or with any elements of the grantee's application would subject the grantee to administrative action, including but not limited to designation as a ''high-risk'' grantee, the imposition of special conditions, or termination of the grant. Circumstances that might cause the Department to take such action include, but are not limited to: the grantee showing a decline in student achievement after two years of implementation of the grant; the grantee's failure to make substantial progress in completing the milestones outlined in the management plan included in the application; and the grantee's expenditure of funds in a manner that is inconsistent with the budget as submitted in the application.

*Required Meetings Sponsored by the Department*

Applicants must set aside adequate funds within their proposed budget to send their project director to a two-day project directors' meeting in Washington, DC, and to send a team of five key staff members, including their external evaluator, to attend a two-and-a-half-day Regional Institute. The Department will host both meetings.

*Previous Grantees*

An LEA that was awarded an implementation grant on behalf of a school under the original SLC program competition held in 2000 (Cohort 1) may apply on behalf of the school for a second SLC grant under the terms set forth in this notice. An LEA that was awarded an implementation grant on behalf of a school under the competition held in 2002 (Cohort 2) may apply on behalf of the school for a second grant under the terms set forth in this notice. LEAs would not be able to apply for funding on behalf of schools that received an SLC implementation grant under the competitions held in 2003 (Cohort 3) and 2004 (Cohort 4).

**Definitions**

In addition to the definitions set out in the authorizing statute and 34 CFR 77.1, the following definitions also apply to this program:

*BIA School* means a school operated or supported by the Bureau of Indian Affairs.

*Large High School* means an entity that includes grades 11 and 12 and has an enrollment of 1,000 or more students in grades 9 and above.

*Smaller Learning Community (SLC)* means an environment in which a core group of teachers and other adults within the school knows the needs, interests, and aspirations of each student well, closely monitors each student's progress, and provides the academic and other support each student needs to succeed.

**Selection Criteria**

The following selection criteria will be used to evaluate applications for new grants under this program. We may apply these selection criteria to any SLC competition in the future.

**Note:** The maximum score for a grant under this program is 100 points. The points or weights assigned to each criterion and sub-criterion are indicated in parentheses.

*Need for the Project (10 Points)*

In determining the need for the proposed project, we consider the extent to which the applicant will:

(1) Assist schools that have the greatest need for assistance, as indicated by, relative to other high schools within the State, one or more of the factors below:

(A) Student performance on the academic assessments in reading/language arts and mathematics administered by the State under part A, Title I of the ESEA, including gaps in the performance of all students and that of student subgroups, such as economically disadvantaged students, students from major racial and ethnic groups, students with disabilities, or students with limited English proficiency.

(B) The school's dropout rate and gaps in the graduation rate between all students and student subgroups.

(C) Disciplinary actions.

(D) The percentage of graduates who enroll in postsecondary education, apprenticeships, or advanced training in the semester following graduation, and gaps between all students and student subgroups.

*Foundation for Implementation (20 Points)*

In determining the quality of the implementation plan for the proposed

project, we consider the extent to which:

(1)(5 points) Teachers and administrators within each school support the proposed project and have been and will continue to be involved in its planning and development, including, particularly, those teachers who will be directly affected by the proposed project.

(2)(5 points) Parents, students, and other community stakeholders support the proposed project and have been and will continue to be involved in its planning and development.

(3)(5 points) The proposed project is consistent with, and will advance, State and local initiatives to increase student achievement and narrow gaps in achievement between all students and student subgroups.

(4)(5 points) The applicant demonstrates that it has carried out sufficient planning and preparatory activities to enable it to begin to implement the proposed project at the beginning of the school year immediately following receipt of an award.

*Quality of the Project Design (30 Points)*

In determining the quality of the project design for the SLC project, we consider the extent to which—

(1)(5 points) The applicant will implement or expand strategies, new organizational structures, or other changes in practice that are likely to create an environment in which a core group of teachers and other adults within the school knows the needs, interests, and aspirations of each student well, closely monitors each student's progress, and provides the academic and other support each student needs to succeed;

(2)(5 points) The applicant proposes research-based strategies that are likely to improve overall student achievement and other outcomes (including graduation rates and enrollment in postsecondary education), narrow any gaps in achievement between all students and student subgroups, and address the particular needs identified by the school under the paragraph titled Need for the Project, such as—

(A) More rigorous academic curriculum for all students and the provision of academic support to struggling students who need assistance to master more challenging academic content;

(B) More intensive and individualized educational counseling and career and college guidance, provided through mentoring, teacher advisories, adult advocates, or other means;

(C) Strategies designed to increase average daily attendance, increase the percentage of students who transition from the 9th to 10th grade, and improve the graduation rate; and

(D) Expanding opportunities for students to participate in advanced placement courses and other academic and technical courses that offer both high school and postsecondary credit.

(3)(5 points) The applicant will implement accelerated learning strategies and interventions that will assist students who enter the school with reading/language or mathematics skills that are significantly below grade level and that:

(A) Are designed to equip participating students with grade-level reading/language arts and mathematics skills by no later than the end of the 10th grade;

(B) Are grounded in scientifically based research;

(C) Include the use of age-appropriate instructional materials and teaching and learning strategies;

(D) Provide additional instructional and academic support during the regular school day, which may be supplemented by instruction that is provided before or after school, on weekends, and at other times when school is not in session;

(E) Will be delivered with sufficient intensity to improve the reading/language arts or math skills, as appropriate, of participating students; and

(F) Include sustained professional development and ongoing support for teachers and other personnel who are responsible for delivering instruction.

(4)(5 points) The applicant will provide high-quality professional development throughout the project period that advances the understanding of teachers, administrators, and other school staff of effective, research-based instructional strategies for improving the academic achievement of students, including, particularly, students with academic skills that are significantly below grade level, and provide the knowledge and skills those staff need to participate effectively in the development, expansion, or implementation of an SLC.

(5)(5 points) The proposed project fits into a comprehensive district high school improvement strategy to increase the academic achievement of all district high school students, reduce gaps between the achievement of all students and student subgroups, and prepare students to enter postsecondary education or the workforce.

(6)(5 points) The proposed project is part of a cohesive plan that uses funds provided under the ESEA, the Carl D. Perkins Vocational and Technical Education Act, or other Federal programs, as well as local, State, and private funds sufficient to ensure continuation of efforts after Federal support ends.

*Quality of the Management Plan (20 Points)*

In determining the quality of the management plan for the proposed project, we consider the following factors:

(1)(5 points) The adequacy of the proposed management plan to achieve the objectives of the proposed project on time and within budget, including clearly defined responsibilities and detailed timelines and milestones for accomplishing project tasks;

(2)(5 points) The extent to which time commitments of the project director and other key personnel are appropriate and adequate to implement the SLC project effectively.

(3)(5 points) The qualifications, including relevant training and experience, of the project director and other key personnel; and

(4)(5 points) The adequacy of resources, including the extent to which the budget is adequate and costs are directly related to the objectives and SLC activities.

*Quality of the SLC Project Evaluation (20 Points)*

In determining the quality of the proposed project evaluation conducted by an independent, third party evaluator, we consider the following factors—

(1)(5 points) The extent to which the methods of evaluation are thorough, feasible, and appropriate to the goals, objectives, and outcomes of the proposed SLC project;

(2)(5 points) The extent to which the evaluation will collect and report accurate qualitative and quantitative data that will be useful in assessing the success and progress of implementation, including, at a minimum—

(A) Measures of student academic achievement that provide data for the performance indicators identified in the application, including results that are disaggregated for economically disadvantaged students, students from major racial and ethnic groups, students with disabilities, students with limited English proficiency, and other subgroups identified by the applicant; and

(B) Other measures identified by the applicant in the application as performance indicators;

(3)(5 points) The extent to which the methods of evaluation will provide timely and regular feedback to the LEA and the school on the success and progress of implementation and identify areas for needed improvement.

(4)(5 points) The qualifications and relevant training and experience of the independent evaluator.

*Executive Order 12866*

This notice of final priority, requirements, definitions, and selection criteria has been reviewed in accordance with Executive Order 12866. Under the terms of the order, we have assessed the potential costs and benefits of this regulatory action.

The potential costs associated with this notice of final priority, requirements, definitions, and selection criteria are those resulting from statutory requirements and those we have determined as necessary for administering this program effectively and efficiently.

In assessing the potential costs and benefits—both quantitative and qualitative—of this notice of final priority, requirements, definitions, and selection criteria, we have determined that the benefits of the final priority, requirements, definitions, and selection criteria justify the costs.

We have also determined that this regulatory action does not unduly interfere with State, local, and tribal governments in the exercise of their governmental functions.

**Intergovernmental Review**

This program is subject to Executive Order 12372 and the regulations in 34 CFR part 79. One of the objectives of the Executive Order is to foster an intergovernmental partnership and a strengthened federalism. The Executive Order relies on processes developed by State and local governments for coordination and review of proposed Federal financial assistance.

This document provides early notification of our specific plans and actions for this program.

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**Program Authority:** 20 U.S.C. 7249.

(Catalog of Federal Domestic Assistance Number 84.215L, Smaller Learning Communities Program.)

Dated: April 22, 2005.

**Susan Sclafani,**

*Assistant Secretary for Vocational and Adult Education.*

[FR Doc. 05–8514 Filed 4–27–05; 8:45 am]

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Federal Register

Thursday,
April 28, 2005

# Part V

# Department of Commerce

## National Oceanic and Atmospheric Administration

## 50 CFR Part 648

## Fisheries of the Northeastern United States; Monkfish Fishery; Annual Adjustments; Final Rule

**DEPARTMENT OF COMMERCE**

**National Oceanic and Atmospheric Administration**

**50 CFR Part 648**

**[Docket No. 050304060–5106–02; I.D. 030105A]**

**RIN 0648–AS72**

## Fisheries of the Northeastern United States; Monkfish Fishery; Annual Adjustments

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

**ACTION:** Final rule.

**SUMMARY:** NMFS implements measures to establish target total allowable catch (TAC) levels for the monkfish fishery for the 2005 fishing year (FY), and adjust trip limits and days-at-sea (DAS) for limited access monkfish vessels fishing in the Southern Fishery Management Area (SFMA). Based on formulas established in Framework Adjustment 2 (Framework 2) to the Monkfish Fishery Management Plan (FMP), this final rule establishes FY 2005 target TACs of 13,160 mt for the Northern Fishery Management Area (NFMA), and 9,673 mt for the SFMA; and adjusts the trip limits for limited access monkfish vessels fishing in the SFMA to 700 lb (318 kg) tail weight per DAS for limited access Category A, C, and G vessels, and 600 lb (272 kg) tail weight per DAS for limited access Category B, D, and H vessels. This action also announces that the FY 2005 DAS available to all monkfish limited access vessels will be 39.3 DAS as a result of a DAS set-aside program implemented in Amendment 2 to the FMP.

**DATES:** Effective May 1, 2005.

**ADDRESSES:** Copies of the Environmental Assessment (EA), including the Regulatory Impact Review (RIR) and Initial Regulatory Flexibility Analysis (IRFA), prepared for this action are availale upon request from Paul Howard, Executive Director, New England Fishery Management Council (NEFMC), 50 Water Street, Newburyport, MA, 01950. The document is also available online at *http://www.nefmc.org*. NMFS prepared a Final Regulatory Flexibity Analysis (FRFA), which is contained in the classification section of this rule. The small entity compliance guide is available from Patricia A. Kurkul, Regional Administrator, Northeast Regional Office, National Marine Fisheries Service, One Blackburn Drive, Gloucester, MA 01930–2298, and on the Northeast Regional Office's website at *http://www.nero.noaa.gov*.

**FOR FURTHER INFORMATION CONTACT:** Allison Ferreira, Fishery Policy Analyst, (978) 281–9103, fax (978) 281–9135, e-mail *Allison.Ferreira@noaa.gov*.

**SUPPLEMENTARY INFORMATION:**

### Background

Regulations implementing the FMP appear at 50 CFR part 648, subparts A and F. Regulations that set out the annual adjustment process are found at § 648.96. The FMP requires that the Monkfish Monitoring Committee (MFMC) recommend to the Mid-Atlantic Fishery Management Council (MAFMC) and the NEFMC, on an annual basis, target TACs for the NFMA and SFMA, and adjustments in DAS allocations and trip limits for limited access vessels fishing in the SFMA.

The annual target TAC-setting method that was implemented through Framework 2 to the FMP (68 FR 22325; April 28, 2003) is based on a ratio of the observed biomass index (NMFS 3–year average fall trawl survey biomass index) to the annual biomass targets (annual index targets) applied to the monkfish landings for the previous fishing year. The 2004 3–year average biomass index is below the 2004 biomass target (see Table 1). Therefore, according to the process established under Framework 2, the FY 2005 target TAC has been set proportionally below the 2003 FY landings (the most recent fishing year for which complete landing information is available). Once the annual target TACs are established, trip limits and/or DAS are adjusted accordingly, using the methodology established in Framework 2. The annual index targets are based on 10 equal increments between the 1999 biomass index (the start of the rebuilding program) and the biomass target ($B_{target}$), which is to be achieved by 2009 according to the rebuilding plan established in the FMP.

A proposed rule was published in the **Federal Register** on March 18, 2005 (70 FR 13156), with public comment accepted through April 4, 2005. The measures contained in this final rule are unchanged from those published in the proposed rule with the exception of changes in the regulatory text that reflect the addition of two new permit categories (Categories G and H), which are explained in the final rule that implemented Amendment 2 to the FMP (Amendment 2) published elsewhere in this issue of the **Federal Register**. In addition, the preamble of the proposed rule for this action indicated that DAS would be held constant in FY 2005 at 40 monkfish DAS. However, Amendment 2 also implements a set-aside of 500 DAS for monkfish research, reducing the total DAS allocated per vessel to 39.3 DAS for FY 2005. A complete discussion of the methods used to establish the target TACs, trip limits, and DAS restrictions for FY 2005 appeared in the preamble to the proposed rule and is not repeated here.

This action establishes annual target TACs of 13,160 mt for the NFMA, and 9,673 mt for the SFMA for FY 2005. In addition, this action adjusts the trip limits for vessels fishing in the SFMA to 700 lb (318 kg) tail weight per DAS for limited access Category A, C, and G vessels, and 600 lb (272 kg) tail weight per DAS for limited access Category B, D, and H vessels. In order to prevent exceeding the target TAC for the SFMA, this action adjusts the FY 2005 trip limits for monkfish limited access vessels fishing in the SFMA, and initially allocates 40 DAS to all limited access permit holders. As stated above, these DAS are then reduced by less than 1 DAS per vessel to provide for the 500 DAS research set-aside approved under Amendment 2 to the FMP, leaving a final 2005 FY allocation of 39.3 DAS to all categories of monkfish limited access permit holders, with the exception of Category F, which is explained below.

Under Amendment 2 to the FMP, limited access monkfish permit holders with Category A, B, C, or D permits may elect, on an annual basis, to change to a Category F permit. Under the provisions of Amendment 2, Category F permits allow limited access monkfish vessels to fish under a 1,600–lb (726–kg) trip limit in the SFMA Offshore Fishery Program Area in exchange for a reduced DAS allocation. Category F permit DAS are reduced proportionally from the DAS allocated to Category A, B, C, and D permits, according to the ratio of the SFMA trip limit that would otherwise be in effect for that category permit to the 1,600–lb (726–kg) Category F permit trip limit. For example, in FY 2005, and assuming no carryover DAS, Category A and C permit holders who elect to switch to a Category F permit would be authorized to fish 17.2 DAS, and Category B and D permit holders would be authorized to fish 14.7 DAS. Any carryover DAS available to the permit holder would be factored into the proration and would affect the number of DAS ultimately authorized.

The trip limits in the NFMA are unchanged by this action. However, if changes to the management measures in the NFMA were required to ensure that the TAC would not be exceeded, they would be outside the scope of the current rulemaking.

The target TAC setting process, and the trip limit and DAS adjustment procedures established in Framework 2, cannot be changed by this action. A change to these procedures would require further action on behalf of the Councils in the form of a framework adjustment or an amendment to the FMP. The regulations governing framework adjustments to the FMP, specified at § 648.96(c)(3), require at least one initial meeting of the Monkfish Oversight Committee or one of the Councils, and at least two Council meetings, one at each of the MAFMC and the NEFMC. Because this action is being taken in accordance with the annual adjustment procedures for the monkfish fishery specified at § 648.96(b), such meetings are not required, and, therefore, were not conducted.

**Comments and Responses**

No public comments were received on the proposed rule.

**Changes From the Proposed Rule**

In § 648.94, paragraph (b)(2)(i) is revised to include new limited access permit category G, and paragraph (b)(2)(ii) is revised to include new limited access permit category H, as provided for in the final rule implementing Amendment 2 to the FMP.

**Classification**

The Administrator, Northeast Region, NMFS (Regional Administrator), determined that this action to establish target TACs, trip limits, and DAS for the 2005 monkfish fishery is necessary for the conservation and management of the monkfish fishery, and that it is consistent with the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act) and other applicable law.

As explained below, there is good cause under 5 U.S.C. 553(d)(3) to waive the 30–day delay in effectiveness date due to unavoidable time constraints required by the Magnuson-Stevens Act in the approval and implementation of Amendment 2 to the FMP. This action establishes annual measures (TACs, trip limits, DAS) for the monkfish fishery for fishing year 2005 (May 1, 2005, to April 30, 2006). However, implementation of this action could not occur until after implementation of Amendment 2 to the FMP, which contained several more substantial changes to the management system for the monkfish fishery. Following the transmittal of Amendment 2 from the Councils to NMFS, a Notice of Availability on the Amendment was published in the **Federal Register** on January 3, 2005. The Magnuson-Stevens Act requires at least a 60–day public comment period on the Amendment. The approval date for the Amendment was scheduled for April 2, 2005, 30 days following the end of the public comment period. Amendment 2 was partially approved on March 30, 2005. According to the requirements of the Magnuson-Stevens Act, the final rule to implement Amendment 2 is to be published no later than 30 days following the Amendment's approval. The final rule to implement Amendment 2 is published elsewhere in this issue of the **Federal Register**. Because publication of this rule is dependent upon the publication of the final rule to implement Amendment 2, publication of this rule was necessarily delayed while the final rule implementing Amendment 2 followed the requirements of the Magnuson-Stevens Act. Thus, publication of this rule could not have occurred any earlier than this time. In order to implement this final rule before the start of the 2005 fishing year, the Assistant Administrator finds good cause to waive the 30–day delay in effectiveness.

This final rule has been determined to be not significant for purposes of Executive Order 12866.

**Final Regulatory Flexibility Analysis**

This section constitutes the FRFA, which NMFS, pursuant to section 604 of the Regulatory Flexibility Act (RFA), has prepared in support of this action. The FRFA describes the economic impact that this final rule will have on small entities. This FRFA incorporates the IRFA, any comments received on the proposed rule, NMFS's responses to those comments, and the analyses completed to support the action. There are no Federal rules that may duplicate, overlap, or conflict with this final rule. A copy of the IRFA is available from the NEFMC (see **ADDRESSES**).

**Statement of Objective and Need**

A description of the reasons why action by the agency is being taken and the objectives of this action are explained in the preamble of the proposed rule and this final rule and are not repeated here. This action is taken under the authority of the Magnuson-Stevens Act and regulations at 50 CFR part 648.

**Summary of Significant Issues Raised in Public Comments**

No public comments were received on the proposed rule or on the economic analyses summarized in the IRFA.

**Description and Estimate of Number of Small Entities to Which this Rule Will Apply**

This action will impact approximately 393 limited access monkfish permit holders that fish all or part of the fishing year in the SFMA, based on vessel landings for the 2003 FY. Of these 393 permit holders, 158 fished exclusively in the SFMA, and are likely to be most affected by this action. All of the these vessels are considered small entities under the Small Business Administration's size standards for small fishing businesses (less than $3.5 million in gross annual sales) and, therefore, there is no disproportionate impact of the regulations between large and small entities.

**Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements**

This action does not introduce any new reporting, recordkeeping, or other compliance requirements.

**Description of the Steps Taken to Minimize Economic Impacts on Small Entities**

The target TAC setting alternative adopted in Framework 2 to the FMP, and utilized in this action, is less precautionary than the other alternatives considered in Framework 2, but minimizes impacts to small entities to the greatest extent. This target TAC setting method minimizes impacts to small entities because it enables the NEFMC and MAFMC to increase the target TAC in response to an increase in monkfish stock biomass, in the absence of a reliable estimate of fishing mortality (F), but with a cap on that increase. This potential for increased fishing opportunities maximizes the overall benefits to the fishing industry.

Framework 2 considered other alternatives to the formulaic method that was chosen to establish annual TACs for monkfish. Therefore, there is no discretion through this annual adjustment process for considering other alternatives or associated management measures. The annual target TAC setting method established in Framework 2 compares annual biomass targets with a 3–year running average of the NMFS fall trawl survey. If the trawl survey biomass index is less than the annual target, as is the case for FY 2004, the target TAC in the subsequent year (FY 2005) is set to equal the monkfish landings for the previous fishing year (FY 2003), minus the percentage difference between the 3 year average biomass index and the annual index target (see Table 1).

Another option in Framework 2 was considered that would have compared the current F in relation to the fishing mortality threshold (Fthreshold) for establishing 2004 target TACs. This option was determined to be unreasonable because current estimates of F are too imprecise to set target TACs and make a status determination regarding overfishing. Framework 2 also established a formulaic method for adjusting trip limits and DAS for limited access monkfish vessels fishing in the SFMA which is based on a threshold target TAC. Therefore, there are no alternatives to the trip limits that are to be implemented for FY 2005 under this annual adjustment process.

### Small Entity Compliance Guide

Section 212 of the Small Business Regulatory Enforcement Fairness Act of 1996 states that, for each rule or group of related rules for which an agency is required to prepare a FRFA, the agency shall publish one or more guides to assist small entities in complying with the rule, and shall designate such publications as ''small entity compliance guides.'' The agency shall explain the actions a small entity is required to take to comply with a rule or group of rules. As part of this rulemaking process, a small entity compliance guide was prepared. The guide will be sent to all vessels issued a limited access monkfish permit, and to all Federal dealers issued a monkfish permit. In addition, copies of this final rule and guide (i.e., permit holder letter) are available from the Regional Administrator (see **ADDRESSES**) and are also available at the following web site: *http://www.nero.noaa.gov*.

TABLE 1. CALCULATION OF 2005 TARGET TACS.

| Management Area | FY 2003 Landings (mt) | 2004 3–year Average (kg/tow) | 2004 Biomass Target (kg/tow) | Percent Below Biomass Target | 2005 Target TAC (mt) |
|---|---|---|---|---|---|
| NFMA | 14,004 | 1.56 | 1.66 | 6.02 % | 13,160 |
| SFMA | 11,834 | 0.94 | 1.15 | 18.26 % | 9,673 |

### List of Subjects in 50 CFR Part 648

Fisheries, Fishing, Reporting and recordkeeping requirements.

Dated: April 22, 2005.

**Rebecca Lent,**

*Deputy Assistant Administrator for Regulatory Programs, National Marine Fisheries Service.*

For the reasons set out in the preamble, 50 CFR part 648 is amended as follows:

## PART 648—FISHERIES OF THE NORTHEASTERN UNITED STATES

■ 1. The authority citation for part 648 continues to read as follows:

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

### § 648.92 [Amended]

■ 2. In § 648.92, paragraph (b)(1)(ii) is removed and reserved.

■ 3. In § 648.94, paragraphs (b)(2)(i) and (ii) are revised to read as follows:

### § 648.94 Monkfish possession and landing restrictions.

* * * * *

(b) * * *

(2) * * *

(i) *Category A, C, and G vessels.* Category A, C, and G vessels fishing under the monkfish DAS program in the SFMA may land up to 700 lb (318 kg) tail weight or 2,324 lb (1,054 kg) whole weight of monkfish per monkfish DAS (or any prorated combination of tail weight and whole weight based on the conversion factor for tail weight to whole weight of 3.32), unless modified pursuant to § 648.96(b)(2)(ii).

(ii) *Category B, D, and H vessels.* Category B, D, and H vessels fishing under the monkfish DAS program in the SFMA may land up to 600 lb (272 kg) tail weight or 1,992 lb (904 kg) whole weight of monkfish per monkfish DAS (or any prorated combination of tail weight and whole weight based on the conversion factor for tail weight to whole weight of 3.32), unless modified pursuant to § 648.96(b)(2)(ii).

* * * * *

[FR Doc. 05–8523 Filed 4–25–05; 3:51 pm]

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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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**Agricultural Marketing Service**

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Irish potatoes grown in—
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**Rural Utilities Service**

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**Industry and Security Bureau**

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**COMMERCE DEPARTMENT**

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**COURT SERVICES AND OFFENDER SUPERVISION AGENCY FOR THE DISTRICT OF COLUMBIA**

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**EDUCATION DEPARTMENT**

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**Federal Energy Regulatory Commission**

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**INTERIOR DEPARTMENT**

**Surface Mining Reclamation and Enforcement Office**

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**TREASURY DEPARTMENT**

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Economic Growth and Regulatory Paperwork Reduction Act:

Money laundering, safety and soundness, and securities; burden reduction recommendations; comment request; comments due by 5-4-05; published 2-3-05 [FR 05-02079]

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Economic Growth and Regulatory Paperwork Reduction Act:

Money laundering, safety and soundness, and securities; burden reduction recommendations; comment request; comments due by 5-4-05; published 2-3-05 [FR 05-02079]

## LIST OF PUBLIC LAWS

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The text of laws is not published in the **Federal Register** but may be ordered in "slip law" (individual pamphlet) form from the Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20402 (phone, 202–512–1808). The text will also be made available on the Internet from GPO Access at *http://www.gpoaccess.gov/plaws/index.html*. Some laws may not yet be available.

**S. 256/P.L. 109–8**

Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (Apr. 20, 2005; 119 Stat. 23)

**Last List April 19, 2005**

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