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Vol. 70 No. 92 May 13, 2005

Pages 25457–25752

Federal Register

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FOR: Any person who uses the Federal Register and Code of Federal Regulations.

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WHAT: Free public briefings (approximately 3 hours) to present:

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4. An introduction to the finding aids of the FR/CFR system.

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

WHEN: Tuesday, May 17, 2005
9:00 a.m.–Noon

WHERE: Office of the Federal Register
Conference Room, Suite 700
800 North Capitol Street, NW.
Washington, DC 20002

RESERVATIONS: (202) 741–6008

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Presidential Documents

Title 3—

The President

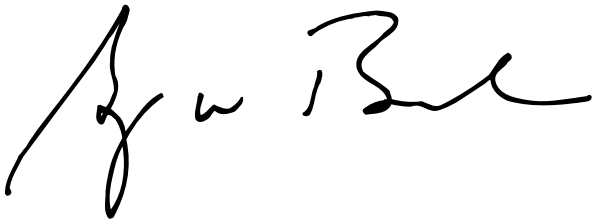
Presidential Determination No. 2005–23 of April 29, 2005

Determination Pursuant to Section 2(c)(1) of the Migration and Refugee Assistance Act of 1962, as Amended

Memorandum for the Secretary of State

Pursuant to section 2(c)(1) of the Migration and Refugee Assistance Act of 1962, as amended, 22 U.S.C. 2601(c)(1), I hereby determine that it is important to the national interest that up to $34.7 million be made available from the U.S. Emergency Refugee and Migration Assistance Fund to support unexpected urgent humanitarian needs in the West Bank and Gaza, and refugee repatriation to Burundi and the Democratic Republic of the Congo. These funds may be used, as appropriate, to provide contributions to international, governmental, and nongovernmental organizations, and, as necessary, for administrative expenses of the Bureau of Population, Refugees, and Migration.

You are authorized and directed to inform the appropriate committees of the Congress of this determination and the obligation of funds under this authority, and to arrange for the publication of this memorandum in the **Federal Register.**



THE WHITE HOUSE,
Washington, April 29, 2005.

[FR Doc. 05–9735
Filed 5–12–05; 8:45 am]
Billing code 4710–10–P

Federal Register
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Presidential Documents

Proclamation 7899 of May 10, 2005

National Hurricane Preparedness Week, 2005

By the President of the United States of America

A Proclamation

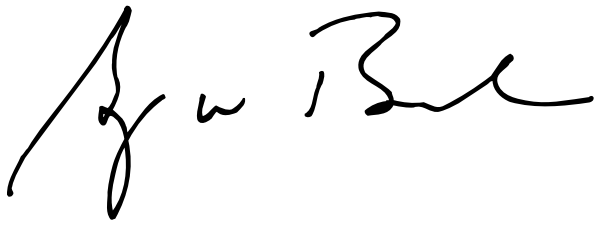
Each year from June through November, Americans living on the Eastern seaboard and along the Gulf of Mexico face an increased threat of hurricanes. These powerful storms can create severe flooding, cause power outages, and damage homes and businesses with their high winds, tornadoes, storm surges, and heavy rainfall. The effects of these storms can be devastating to families and cause lasting economic distress. During National Hurricane Preparedness Week, we call attention to the importance of planning ahead and securing our homes and property in advance of storms.

Last year, six hurricanes and three tropical storms hit the United States, causing the loss of dozens of lives and billions of dollars in damage. Across the United States, Americans responded to these natural disasters with extraordinary strength, compassion, and generosity. Many volunteers donated their time and talents to help with the cleanup, recovery, and rebuilding of communities devastated by the hurricanes and tropical storms.

To prepare for the 2005 hurricane season, I urge all our citizens to become aware of the dangers of hurricanes and tropical storms and to learn how to minimize their destructive effects. Our Nation's weather researchers and forecasters continue to improve the accuracy of hurricane warnings, enabling residents and visitors to prepare for storms. By working together, Federal, State, and local agencies, first responders, the news media, and private citizens can help save lives and diminish the damage caused by these natural disasters.

NOW, THEREFORE, I, GEORGE W. BUSH, President of the United States of America, by virtue of the authority vested in me by the Constitution and laws of the United States, do hereby proclaim May 15 through May 21, 2005, as National Hurricane Preparedness Week. I call upon government agencies, private organizations, schools, and the news media to share information about hurricane preparedness and response to help save lives and prevent property damage. I also call upon Americans living in hurricane-prone areas of our Nation to use this opportunity to learn more about protecting themselves against the effects of hurricanes and tropical storms.

IN WITNESS WHEREOF, I have hereunto set my hand this tenth day of May, in the year of our Lord two thousand five, and of the Independence of the United States of America the two hundred and twenty-ninth.



[FR Doc. 05–9736
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Billing code 3195–01–P

Rules and Regulations

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DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Part 1

[Docket No. 2002N–0277] (formerly 02N–0277)

Final Regulation Implementing the Public Health Security and Bioterrorism Preparedness and Response Act of 2002—Establishment and Maintenance of Records for Foods; Notice of Public Meetings

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice of public meetings.

SUMMARY: The Food and Drug Administration (FDA) is announcing a series of domestic public meetings to discuss the final regulation implementing section 306 (Maintenance and Inspection of Records) of the Public Health Security and Bioterrorism Preparedness and Response Act of 2002 (Bioterrorism Act). The purpose of these public meetings is to provide to the public information and an opportunity to ask questions regarding the final rule.

DATES: See table 1 of the SUPPLEMENTARY INFORMATION section of this document for meeting dates and times.

ADDRESSES: See table 1 of the SUPPLEMENTARY INFORMATION section of this document for meeting locations.

FOR FURTHER INFORMATION CONTACT: *For general questions about the meeting*: Marion V. Allen, Center for Food Safety and Applied Nutrition (HFS–32), Food and Drug Administration, 5100 Paint Branch Pkwy., College Park, MD 20740, 301–436–1584, FAX: 301–436–2605, e-mail: *marion.allen@fda.hhs.gov*.

Please see III. *Registration for the Public Meetings* for information on how to register for specific site locations.

SUPPLEMENTARY INFORMATION:

I. Background

The events of September 11, 2001, highlighted the need to enhance the security of the U.S. food supply. Congress responded by passing the Bioterrorism Act (Public Law 107–188), which was signed into law on June 12, 2002.

FDA published in the **Federal Register** of December 9, 2004 (69 FR 71562), the final rule implementing section 306 of the Bioterrorism Act and a notice of availability for a draft guidance on records access under the Bioterrorism Act (69 FR 71657). During the public meetings, FDA will explain the final rule and draft guidance, and answer questions for clarification.

II. Final Rule and Draft Guidance

Section 306 of the Bioterrorism Act directs the Secretary of Health and Human Services (the Secretary) to issue final regulations that establish requirements regarding the establishment and maintenance, for not longer than 2 years, of records by persons (excluding farms and restaurants) who manufacture, process, pack, transport, distribute, receive, hold, or import food. The records required by these regulations are those that are needed by the Secretary for inspection to allow the Secretary to identify the immediate previous sources and immediate subsequent recipients of food, including its packaging, in order to address credible threats of serious adverse health consequences or death to humans or animals. The regulation implements the recordkeeping authority in the Bioterrorism Act.

In addition, the Bioterrorism Act provides records inspection authority to FDA such that if FDA has a reasonable belief that an article of food is adulterated and presents a threat of serious adverse health consequences or death to humans or animals, persons (excluding farms and restaurants) who manufacture, process, pack, transport, distribute, receive, hold, or import food must provide access to records. FDA will also discuss the draft guidance for records access authority provided for in the Bioterrorism Act, explaining how we will implement access authority.

III. Registration for the Public Meetings

Please submit your registration information (including name, title, firm name, address, telephone number, e-mail address, and fax number) at least 5 workdays before the public meeting date. For specific site locations, we encourage you to register online at *http://www.cfsan.fda.gov/dms/fsbtac26.html* or to fax your registration directly to Isabelle Howes at 202–479–6801. We will accept registrations onsite. Space is limited and registration will be closed at each site when maximum seating capacity for that site is reached (300 persons per site location).

If you need special accommodations due to a disability, please notify the contact person listed under *Contact* in this document at least 7 workdays in advance of the meeting.

All participants must present a valid photo identification when entering a Federal building and parking facility.

IV. Dates, Times, and Addresses of Public Meetings

TABLE 1.—PUBLIC MEETINGS—SECTION 306: ESTABLISHMENT AND MAINTENANCE OF RECORDS FOR FOODS

Date and Time	Location
Tuesday, June 7, 2005, 9 a.m. to 1 p.m., c.s.t.	Marriott, 775 Brasilla Ave., Kansas City, MO 64153, 816–464–2200
Wednesday, June 8, 2005, 9 a.m. to 1 p.m., P.s.t.	Los Angeles Airport Marriott, 5855 West Century Blvd., Los Angeles, CA 90045, 310–641–5700
Thursday, June 9, 2005, 9 a.m. to 1 p.m., e.s.t.	Harvey W. Wiley Federal Bldg., 5100 Paint Branch Pkwy., College Park, MD 20740
Tuesday, June 14, 2005, 9 a.m. to 1 p.m., c.s.t.	Embassy Suites at Minneapolis Airport, 7901 34th Ave., Bloomington, MN 55425, 952–854–1000
Wednesday, June 15, 2005, 9 a.m. to 1 p.m., e.s.t.	Atlanta, GA, Renaissance Waverly, 2450 Galleria Pkwy., Atlanta, GA 30339, 770–953–4500

V. Transcripts

A transcript will be made of the proceedings of each meeting. You may request a copy of a meeting transcript in writing from FDA's Freedom of Information Office (HFI–35), Food and Drug Administration, 5600 Fishers Lane, rm. 12A–16, Rockville, MD 20857, approximately 30 working days after the public meetings at a cost of 10 cents per page. The transcript of each public meeting will be available for public examination at the Division of Dockets Management (HFA–305), 5630 Fishers Lane, rm. 1061, Rockville, MD 20852 between 9 a.m. and 4 p.m., Monday through Friday.

VI. Electronic Access

Information about the public meetings, contact information, and the provisions of the Bioterrorism Act under FDA's jurisdiction can be accessed at *http://www.fda.gov/oc/bioterrorism/bioact.html* and *http://www.cfsan.fda.gov/dms/fsbtact.html*.

Dated: May 9, 2005.

Jeffrey Shuren,

Assistant Commissioner for Policy.

[FR Doc. 05–9536 Filed 5–10–05; 4:13 pm]

BILLING CODE 4160–01–S

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

21 CFR Parts 1300, 1301, 1304, and 1307

[Docket No. DEA–240F]

RIN 1117–AA75

Preventing the Accumulation of Surplus Controlled Substances at Long Term Care Facilities

AGENCY: Drug Enforcement Administration (DEA), Justice.

ACTION: Final rule.

SUMMARY: DEA is amending its regulations to allow, where State laws permit, for retail pharmacy installation of automated dispensing systems at long term care facilities. Automated dispensing systems would allow dispensing of single dosage units and mitigate the problem of excess stocks and disposal.

DATES: *Effective Date:* This final rule is effective June 13, 2005.

FOR FURTHER INFORMATION CONTACT: Patricia M. Good, Chief, Liaison and Policy Section, Office of Diversion Control, Drug Enforcement Administration, Washington, DC 20537, Telephone (202) 307–7297.

SUPPLEMENTARY INFORMATION:

I. Background

Legal Authority

DEA enforces the Controlled Substances Act (CSA) (21 U.S.C. 801 *et seq.*), as amended. DEA regulations implementing this statute are published in Title 21 of the Code of Federal Regulations (CFR), part 1300 to 1399. These regulations are designed to establish a framework for the legal distribution of controlled substances to deter their diversion to illegal purposes and to ensure that there is a sufficient supply of these drugs for legitimate medical purposes. Controlled substances are those substances listed in the schedules of the CSA and 21 CFR 1308.11–1308.15, and generally include narcotics, stimulants, depressants, hallucinogens, and anabolic steroids that have a high potential for abuse and dependency. DEA's regulations require that persons involved in the manufacture, distribution, research, dispensing, import, and export of controlled substances register with DEA, keep track of all stocks of controlled substances, and maintain records to account for all controlled substances received, distributed, or otherwise disposed of.

Controlled Substances at Long Term Care Facilities (LTCFs)

DEA defines a long term care facility as ''a nursing home, retirement care, mental care or other facility or institution which provides extended health care to resident patients'' (21 CFR 1300.01(b)(25)). Patients at LTCFs take numerous medications, including controlled substances. Unlike hospitals, LTCFs are rarely DEA registrants, (although DEA regulations do allow an LTCF to register if licensed by its State to handle controlled substances). Patients at these facilities are usually seen by their personal physicians, who prescribe any necessary medication. These prescriptions are filled by retail pharmacies and delivered to the LTCFs for patients' use. Because LTCFs usually are not registrants and generally do not have physicians or pharmacists on staff, they may not order and maintain stocks of controlled substances to be dispensed under the order of a practitioner as occurs in hospitals. Instead, the controlled substance medications are dispensed under a prescription to the specific patients by a provider pharmacy; the LTCF holds the drugs in a custodial manner for administration to the patient. DEA permits pharmacies to dispense a Schedule II prescription for a LTCF patient on a daily or dosage unit basis rather than dispense the entire quantity prescribed. Reimbursement rules under Medicare and Medicaid and other third party payers, however, make daily dispensing financially unattractive for pharmacies; pharmacies are allowed a limited number of dispensing fees plus the calculated cost of the medication per month. Consequently, pharmacies routinely dispense the entire prescription to the patient at once; the LTCF maintains the drugs and ensures that they are taken as prescribed.

A result of this dispensing practice is that when patients leave the facility or their medications change, the LTCF may be left with excess controlled substances, which must be disposed of to avoid diversion. Because they are not registrants, the LTCFs may not transfer the substances to either the pharmacy that supplied them or to a reverse distributor for disposal. The LTCF must dispose of the excess controlled substances directly.

DEA's Proposal

To address the issue of excess controlled substances in LTCFs, DEA issued a Notice of Proposed Rulemaking (NPRM) (68 FR 62255; November 3, 2003) proposing to allow a provider pharmacy to register at the site of the LTCF and store controlled substances in an automated dispensing system (ADS). An ADS is conceptually similar to a vending machine. A pharmacy stores bulk drugs in the machine in separate bins or containers and programs and controls the ADS remotely. Only authorized staff at the LTCF would have access to its contents, which are dispensed on a single-dose basis at the time of administration under a prescription. The ADS electronically records each dispensing, thus maintaining dispensing records for the pharmacy. Because the drugs are not considered dispensed until the system provides them, drugs in the ADS are counted as pharmacy stock. If patients do not take all of the drugs prescribed, the excess can be dispensed to other patients.

DEA's proposal allowed the use of automated dispensing systems as an option, not a requirement. DEA recognizes that there are reasons why ADSs may not work in many circumstances, but believes that some LTCFs will find ADSs a viable solution for preventing accumulation of excess controlled substances.

Current Federal law does not prohibit the use of ADSs for storage and dispensing of controlled substances at LTCFs where the LTCF itself is a DEA registrant. However, to allow the use of

an ADS when the LTCF is not a registrant, several regulatory revisions are required. In the NPRM, DEA proposed the following:

- Addition of a definition of automated dispensing system to § 1300.01.
- Modification of § 1301.17 to incorporate an additional ''special procedure'' for the type of registrations that are the subject of this notice. Specifically, pharmacies applying for a separate registration to operate an ADS at a LTCF will need to provide as part of their registration application an affidavit attesting to the existence of a State license, permit, or other authorization for activities at the LTCF.

In general, States currently do not authorize (by license, permit, or other authorization) a provider pharmacy to function at the location of the LTCF using an ADS. States generally have not established policies and procedures regarding system security, access, and the like. States will need to amend their laws and regulations to fully implement this change in DEA regulations within their jurisdictions.

- Addition of a new § 1301.27 to provide that only registered pharmacies may operate automated dispensing systems at long term care facilities. The section would further indicate that a pharmacy must maintain a separate registration at each long term care facility location at which automated dispensing systems are installed and operated, and that if more than one pharmacy operates an automated dispensing system at a long term care facility, each pharmacy must maintain its own separate registration at that facility. Finally, this section indicates that pharmacies applying for separate registrations to install and operate automated dispensing systems at long term care facilities would be exempt from application fees for those separate registrations.
- Modification of § 1304.04 to permit a registered pharmacy with one or more associated registrations at LTCFs to keep all records for those LTCF locations at the pharmacy site or other approved central location.
- Since the provider pharmacy would likely be ordering controlled substances for multiple LTCFs that it services, modification of § 1307.11(b), which limits total distribution by a practitioner to 5 percent of all controlled substances dispensed in the course of a year to provide an exemption for this activity.

II. Comments Received in Response to the NPRM Published November 3, 2003

DEA received seven comments in response to the NPRM. The comments were all supportive of DEA efforts to address the issues associated with surplus controlled substances at LTCFs.

One commenter cited benefits of the proposed approach in addition to those noted by DEA in the NPRM. This commenter also suggested that DEA and other Federal entities should do more than simply allow the use of ADSs, but rather ''encourage and enable'' LTCFs to use them. These additional benefits included the following:

- Private pay nursing home consumers will benefit from more efficient dispensing of controlled substance medications through the use of ADSs.
- The benefits of using ADSs are even greater if they are used to dispense both controlled and noncontrolled substances.
- Evidence from a pilot study in one State indicates that ADSs not only saved money, but also reduced opportunities for errors and abuse and added a level of security to the existing system.
- Dispensing machines may reduce the incidents of hospitalization for acute and psychiatric care because of the ability to order and dispense medications more quickly.

Several commenters also noted, as DEA had noted in its NPRM, that a complete solution to this problem involves policies and requirements outside the jurisdiction of DEA, particularly in the area of reimbursements. In addition, one commenter reiterated a number of practical limitations to what DEA proposed, including the substantial regulatory barriers that exist at the State level, the inability to anticipate (and store) all of the controlled substances that might be needed at an LTCF, and nurse staffing shortages at LTCFs and the impact that might have on security and safety with ADSs. Nevertheless, these commenters supported the efforts of DEA to deal with the issue of surplus controlled substances at LTCFs.

At the same time, several commenters offered suggestions or asked questions regarding the DEA proposal. These comments are addressed below.

Two commenters pointed to DEA's use of the term ''retail pharmacy'' as being too narrow, and noted that most States allow other types of pharmacies to service LTCFs. DEA does not intend to limit the types of retail pharmacies that are eligible under this rule. As part of their licensing process, States may have a more limited definition of ''retail pharmacy'' or multiple categories of pharmacy licenses. These regulations apply to those retail pharmacies registered with DEA, regardless of the type of State license the pharmacy holds. Therefore, DEA is clarifying the fact that only retail pharmacies are permitted to operate ADSs at LTCFs. DEA wishes to note that pharmacies registered with DEA solely as central fill pharmacies are not permitted to operate ADSs at LTCFs.

One commenter asked whether the proposed rule prohibited access by a nurse to emergency supply controlled substances from an ADS prior to communication of a prescription to the pharmacy by a physician. Some State programs currently allow access to controlled substances from emergency kits that are kept at LTCFs. It will be up to each State to decide whether they will allow the access described by the commenter to occur at an LTCF where an ADS has been installed. DEA can foresee that permitting emergency access to an ADS prior to communication from the physician to the pharmacy would likely entail some special programming of the machine to ensure, among other things, proper control of its inventory. States will need to establish appropriate requirements/procedures to ensure that emergency use of controlled substances in ADSs does not create new opportunities for diversion of those substances.

Another commenter questioned the need for a separate pharmacy registration at the LTCF where its ADS is located. The commenter noted that there would be (superfluous) recordkeeping requirements that would flow between these two registered sites of the same pharmacy when controlled substances are stocked in the ADS. The commenter further suggested that they believed an ADS at an LTCF could be considered a secondary place of business under the statute or that another exception (to separate registration requirements) could be added to § 1301.12. DEA disagrees. Because this is a separate physical location and controlled substances are being stored and dispensed at this separate physical location, DEA believes it is consistent with the law to require a separate registration. Also, the exception suggested by the commenter is unlike the other exceptions now included in the regulations, which focus on settings where controlled substances are not distributed or dispensed and (except for a warehouse) where controlled substances are not stored.

There will be additional recordkeeping requirements as a result of having a separate registration, but this is simply an essential requirement of DEA's diversion control program. DEA has attempted to minimize the burden associated with a separate registration

by exempting the additional registrations from application fees.

Another commenter expressed a related concern, suggesting that by requiring registration at each site, a pharmacy was now accountable to DEA for diversion that might result because of LTCF personnel. DEA does not currently hold pharmacies supplying LTCFs accountable for diversion of dispensed medications by LTCF staff and does not believe it is imposing a different or greater burden on pharmacies that choose to register and place an ADS at an LTCF.

DEA does believe that the use of ADSs can reduce certain types of diversion opportunities present at LTCFs and improve overall security regarding controlled substances. In addition, DEA can foresee that, with an ADS, a pharmacy may be able to more readily assist an LTCF in investigating diversion because of the automatic tracking and information collection that will occur in routine use of its on-site system.

Two commenters expressed concern that rental payments for an ADS paid by an LTCF to a pharmacy might run afoul of Federal anti-kickback statutes if they are not ''fair market'' rental payments. Although this is not an issue within DEA's purview, DEA would suggest that each State currently has a policy/approach for handling equipment rental/purchase issues within their jurisdiction and that is where an LTCF should look for guidance. States also may address this issue when establishing policies and protocols for use of ADSs. Presumably, in at least some cases rental payments may be required. If any required payments are greater than the financial and other benefits an LTCF receives by using an ADS, then the situation is probably not one where use of an ADS is appropriate. As DEA stated in its proposal, the use of ADSs is an option, not a requirement, and there are reasons why ADSs may not work in many circumstances.

One commenter expressed concern that use of an ADS would require changes to third-party and Medicaid billing practices, noting that most payment systems currently bill when the medication leaves the pharmacy, not after actual use by the LTCF resident or at the end of the month. Again, this is not an issue within DEA's control. However, DEA notes that the controlled substances still belong to the pharmacy until they are actually dispensed from the machine. Regarding billing practices, DEA urges all parties involved to think creatively about this and look at options for altering existing billing systems where ADSs are used. There may be potential financial and security benefits to using these systems and DEA urges other changes be made, where possible, to promote their use.

Finally, this same commenter asked whether multiple pharmacies can share an ADS at an LTCF. DEA would not object to multiple pharmacies maintaining separate ADS' at an LTCF location; however, multiple pharmacies cannot share a single ADS because of the accountability issues surrounding the controlled substances. This would be tantamount to two registered pharmacies sharing one registered location and one storage/dispensing system, which is unacceptable to DEA. The sharing of an ADS by two registered pharmacies would cause stocks of controlled substances to be commingled, making inventory, recordkeeping, reporting and accountability requirements almost impossible to administer.

Regulatory Certifications

Regulatory Flexibility Act

The Deputy Assistant Administrator, Office of Diversion Control, hereby certifies that this rulemaking has been drafted in accordance with the Regulatory Flexibility Act (5 U.S.C. 605(b)), has reviewed this regulation, and by approving it certifies that this regulation will not have a significant economic impact on a substantial number of small business entities. This rule provides the option of using an automated dispensing system to dispense controlled substances to patients at long term care facilities. Facilities that currently use automated dispensing systems for the dispensing of noncontrolled substances and, where permitted by DEA registration, for controlled substances report in industry literature that, while there are costs associated with the lease or purchase of an automated dispensing system, automated dispensing systems have the following benefits:

- Significantly reduce drug waste. Various studies over the past ten years have indicated that between 4 and 10 percent of medications at long term care facilities are wasted. Additional reports indicate that the use of an automated dispensing system reduces this waste by 90 percent.
- Significant cost savings for payers. As noted previously, automated dispensing systems have the potential to reduce the cost of medications dispensed because medications are dispensed in a ''just in time'' manner for administration rather than dispensing a larger quantity of medication less frequently, which can create waste.
- Reduce nursing and pharmacy labor costs. Nurses and pharmacy personnel no longer must prepare medications for dispensing to individual patients. Time is also saved by nursing staff due to the fact that medication administration records are now maintained electronically. Often, this time is then redirected to providing patient care.
- Reduce the potential for medication dispensing and administration errors. Automated dispensing systems provide greater accuracy in the dispensing and administration of medications.

Because the rule does not require the use of automated dispensing systems, DEA believes that only retail pharmacies and LTCFs that find use of these systems cost-effective will adopt this approach.

Executive Order 12866

The Deputy Assistant Administrator, Office of Diversion Control, further certifies that this rulemaking has been drafted in accordance with the principles in Executive Order 12866 Section 1(b). It has been determined that this is a significant regulatory action. Therefore, this action has been reviewed by the Office of Management and Budget. This final rule permits the installation of automated dispensing systems at long term care facilities by retail provider pharmacies, so long as State regulations permit such installation. The use of automated dispensing systems by long term care facilities provides another alternative to address the problem of accumulation of surplus controlled substances at long term care facilities. DEA believes that persons choosing to utilize this method of dispensing controlled substances to patients at long term care facilities may realize cost savings. More importantly to DEA, the use of such systems should reduce the accumulation of excess controlled substances at these facilities, thereby reducing the potential for diversion of these controlled substances.

Paperwork Reduction Act

This rule requires a retail pharmacy currently registered with DEA to apply for separate registration at the location of the long term care facility at which it intends to install and operate an automated dispensing system. Application for registration is made using currently existing DEA registration forms (DEA Form 224 for registration and 224A for registration renewal). DEA estimates that approximately 100 persons per year will apply for registration to operate automated dispensing systems at long term care facilities. Therefore, DEA has revised its OMB-approved information

collection (OMB 1117–0014) to reflect this increased burden due to this program change.

Further, within this rulemaking DEA is requiring that, at the time of application for this separate registration at the long term care facility by the retail pharmacy, the applicant must include with their application for registration (DEA Form 224) an affidavit as to the existence of State authorization to operate the automated dispensing system at the long term care facility. DEA has provided a format for the affidavit as part of its regulations. This affidavit is exempt from the requirements of the Paperwork Reduction Act (5 CFR 1320.3(h)(1)).

Executive Order 12988

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

Executive Order 13132

This final rule does not preempt or modify any provision of State law; nor does it impose enforcement responsibilities on any State; nor does it diminish the power of any State to enforce its own laws. Accordingly, this rulemaking does not have federalism implications warranting the application of Executive Order 13132.

Unfunded Mandates Reform Act of 1995

This rule will not result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of $115,000,000 or more (adjusted for inflation) in any one year, and will not significantly or uniquely affect small governments. Therefore, no actions were deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995.

Small Business Regulatory Enforcement Fairness Act

This final rule is not a major rule as defined by Section 804 of the Small Business Regulatory Enforcement Fairness Act of 1996. This rule will not result in an annual effect on the economy of $100,000,000 or more; a major increase in costs or prices; or significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based companies to compete with foreign-based companies in domestic and export markets.

List of Subjects

21 CFR Part 1300

Definitions, Drug traffic control.

21 CFR Part 1301

Administrative practice and procedure, Drug traffic control, Security measures.

21 CFR Part 1304

Drug traffic control, Prescription drugs.

21 CFR Part 1307

Drug traffic control.

■ For the reasons set out above, 21 CFR parts 1300, 1301, 1304, and 1307 are amended as follows:

PART 1300—DEFINITIONS

■ 1. The authority citation for part 1300 continues to read as follows:

Authority: 21 U.S.C. 802, 871(b), 951, 958(f).

■ 2. Section 1300.01 is amended by adding a new paragraph (b)(45) to read as follows:

§ 1300.01 Definitions relating to controlled substances.

* * * * *

(b) * * *

(45) The term automated dispensing system means a mechanical system that performs operations or activities, other than compounding or administration, relative to the storage, packaging, counting, labeling, and dispensing of medications, and which collects, controls, and maintains all transaction information.

PART 1301—REGISTRATION OF MANUFACTURERS, DISTRIBUTORS, AND DISPENSERS OF CONTROLLED SUBSTANCES

■ 3. The authority citation for part 1301 continues to read as follows:

Authority: 21 U.S.C. 821, 822, 823, 824, 871(b), 875, 877, 951, 952, 953, 956, 957.

■ 4. Section 1301.17 is amended by redesignating paragraph (c) as paragraph (d) and adding new paragraph (c) to read as follows:

§ 1301.17 Special procedures for certain applications.

* * * * *

(c) If at the time of application for a separate registration at a long term care facility, the retail pharmacy has been issued a license, permit, or other form of authorization from the appropriate State agency to install and operate an automated dispensing system for the dispensing of controlled substances at the long term care facility, the applicant must include with his/her application for registration (DEA Form 224) an affidavit as to the existence of the State authorization. Exact language for this affidavit may be found at the DEA Diversion Control Program Web site. The affidavit must include the following information:

(1) The name and title of the corporate officer or official signing the affidavit;

(2) The name of the corporation, partnership or sole proprietorship operating the retail pharmacy;

(3) The name and complete address (including city, state, and Zip code) of the retail pharmacy;

(4) The name and complete address (including city, state, and Zip code) of the long term care facility at which DEA registration is sought;

(5) Certification that the named retail pharmacy has been authorized by the state Board of Pharmacy or licensing agency to install and operate an automated dispensing system for the dispensing of controlled substances at the named long term care facility (including the license or permit number, if applicable);

(6) The date on which the authorization was issued;

(7) Statements attesting to the following:

(i) The affidavit is submitted to obtain a Drug Enforcement Administration registration number;

(ii) If any material information is false, the Administrator may commence proceedings to deny the application under section 304 of the Act (21 U.S.C. 824(a));

(iii) Any false or fraudulent material information contained in this affidavit may subject the person signing this affidavit and the above-named corporation/partnership/business to prosecution under section 403 of the Act (21 U.S.C. 843);

(8) Signature of the person authorized to sign the Application for Registration for the named retail pharmacy;

(9) Notarization of the affidavit.

* * * * *

■ 5. Section 1301.27 is added to read as follows:

§ 1301.27 Separate registration by retail pharmacies for installation and operation of automated dispensing systems at long term care facilities.

(a) A retail pharmacy may install and operate automated dispensing systems, as defined in § 1300.01 of this chapter, at long term care facilities, under the requirements of § 1301.17. No person other than a registered retail pharmacy may install and operate an automated dispensing system at a long term care facility.

(b) Retail pharmacies installing and operating automated dispensing systems at long term care facilities must

maintain a separate registration at the location of each long term care facility at which automated dispensing systems are located. If more than one registered retail pharmacy operates automated dispensing systems at the same long term care facility, each retail pharmacy must maintain a registration at the long term care facility.

(c) A registered retail pharmacy applying for a separate registration to operate an automated dispensing system for the dispensing of controlled substances at a long term care facility is exempt from application fees for any such additional registrations.

PART 1304—RECORDS AND REPORTS OF REGISTRANTS

■ 6. The authority citation for part 1304 continues to read as follows:

Authority: 21 U.S.C. 821, 827, 871(b), 958(e), 965, unless otherwise noted.

■ 7. Section 1304.04 is amended by revising paragraph (a) to read as follows:

§ 1304.04 Maintenance of records and inventories.

(a) Except as provided in paragraphs (a)(1) and (a)(2) of this section, every inventory and other records required to be kept under this part must be kept by the registrant and be available, for at least 2 years from the date of such inventory or records, for inspection and copying by authorized employees of the Administration.

(1) Financial and shipping records (such as invoices and packing slips but not executed order forms subject to §§ 1305.17 and 1305.27 of this chapter) may be kept at a central location, rather than at the registered location, if the registrant has notified the Administration of his intention to keep central records. Written notification must be submitted by registered or certified mail, return receipt requested, in triplicate, to the Special Agent in Charge of the Administration in the area in which the registrant is located. Unless the registrant is informed by the Special Agent in Charge that permission to keep central records is denied, the registrant may maintain central records commencing 14 days after receipt of his notification by the Special Agent in Charge. All notifications must include the following:

(i) The nature of the records to be kept centrally.

(ii) The exact location where the records will be kept.

(iii) The name, address, DEA registration number and type of DEA registration of the registrant whose records are being maintained centrally.

(iv) Whether central records will be maintained in a manual, or computer readable, form.

(2) A registered retail pharmacy that possesses additional registrations for automated dispensing systems at long term care facilities may keep all records required by this part for those additional registered sites at the retail pharmacy or other approved central location.

* * * * *

PART 1307—MISCELLANEOUS

■ 8. The authority citation for part 1307 continues to read as follows:

Authority: 21 U.S.C. 821, 822(d), 871(b), unless otherwise noted.

■ 9. Section 1307.11 is amended by adding a new paragraph (c) to read as follows:

§ 1307.11 Distribution by dispenser to another practitioner or reverse distributor.

* * * * *

(c) The distributions that a registered retail pharmacy makes to automated dispensing systems at long term care facilities for which the retail pharmacy also holds registrations do not count toward the 5 percent limit in paragraphs (a)(1)(iv) and (b) of this section.

Dated: May 5, 2005.

William J. Walker,

Deputy Assistant Administrator, Office of Diversion Control.

[FR Doc. 05–9538 Filed 5–12–05; 8:45 am]

BILLING CODE 4410–09–P

AGENCY FOR INTERNATIONAL DEVELOPMENT

22 CFR Part 203

Registration of Agencies for Voluntary Foreign Aid; Summary of Comments

AGENCY: U.S. Agency for International Development, USAID.

ACTION: Final rule.

SUMMARY: USAID is revising Part 203 in its entirety to clarify the purposes of Registration and to emphasize that organizations must be private and voluntary in nature in order to be registered.

DATES: *Effective Date:* May 13, 2005.

FOR FURTHER INFORMATION CONTACT: Mary Q. Newton, Registrar, Office of Private Voluntary Cooperation—American Schools & Hospitals Abroad; telephone: 202–712–4747; telefax: 202–216–3041 or e-mail: *mnewton@usaid.gov*.

SUPPLEMENTARY INFORMATION: On May 7, 2002, the Agency published in the **Federal Register** a proposed revision of Part 203.

The comment period was May 8, 2003, to July 8, 2002.

The Agency received comments from eleven private voluntary organizations (PVOs) as well as comments from two cooperative development organizations (CDOs). The following summarizes the principal comments and actions taken:

1. Annual Documentation Requirements (see § 203.5). For PVOs submitting an Office of Management and Budget (OMB) Circular A–133 Audit, the due date for submitting annual documents was changed from six months to nine months following the organization's fiscal year end to take into account the time required for the registrant to prepare the OMB Circular A–133 audit.

2. Submission of Documents. A comment expressed opposition to submitting duplicate documents to various offices within USAID. The words ''the same or'' were deleted from 203.4(d). The sentence now reads: ''Other USAID officials may request similar information at a later date for purposes of determining the PVO's eligibility for a particular grant or cooperative agreement.''

3. Registration Status—Transition Provisions. PVOs currently registered will continue to be registered under the new rule. The new annual documentation requirements are in effect as of the date of the new rule. The previous rule and the new rule are available on the USAID Web site at *http://www.usaid.gov* Keyword: PVO Registration. New applicants will be required to submit their applications and documentation under the revised Conditions of Registration and new rules.

4. Registration of CDOs. Two comments were made with regard to the elimination of Registration eligibility for IRS 501(c)(4) and 501(c)(6) organizations, specifically cooperative development organizations (CDOs). The Agency's intent is not to eliminate CDOs from the U.S. PVO Registry at *http://www.usaid.gov* Keyword: Registry. Therefore, CDOs will continue to be listed in the Registry and will continue to be required to meet the annual documentation requirements in § 203.5. (see § 203.12)

5. AID Form 1550–2. A comment requested that PVOs not currently receiving funding from the U.S. Government for overseas programs not be required to submit the AID Form 1550–2. The suggested change was not adopted since AID Form 1550–2 provides current demographic information on each PVO as well as

financial information. The AID Form 1550–2 has a two-fold purpose: collecting data required to determine whether the organization meets USAID's Conditions of Registration and provide USAID with the information for computing the amount of USAID funding made available to PVOs. Until an applicant completes the AID Form 1550–2 in its entirety, the Agency cannot determine whether that applicant meets the Conditions of Registration.

6. Registration of Non-U.S. PVOs. One comment concerned the Registration on non-U.S. PVOs. There are two types of non-U.S. PVOs: Local and International. A ''Local PVO'' is a non-U.S. PVO operating in the same foreign country in which it is organized. Local PVOs are not required to register with USAID/Washington. An ''International PVO'' is a non-U.S. PVO that performs development work in one or more countries other than the country in which it is domiciled. International PVOs are required to register with USAID. The Registration procedures for International PVOs have been added (see § 203.6).

List of Subjects in 22 CFR Part 203

Foreign aid, Nonprofit organizations.

■ Accordingly, 22 CFR Part 203 is revised as follows.

PART 203—REGISTRATION OF PRIVATE VOLUNTARY ORGANIZATIONS (PVOs)

Sec.

203.1 Purpose.
203.2 Definitions.
203.3 U.S. PVO conditions of registration.
203.4 U.S. PVO initial documentation requirements.
203.5 U S. PVO annual documentation requirements.
203.6 IPVO conditions of registration.
203.7 IPVO initial documentation requirements.
203.8 IPVO annual documentation requirements.
203.9 Denial of registration.
203.10 Termination of registration.
203.11 Access to records and communications.
203.12 Cooperative Development Organizations (CDOs).
203.13 Delegation of authority.

Authority: Sec. 621, Foreign Assistance Act of 1961, as amended (22 U.S.C. 2381).

§ 203.1 Purpose.

(a) USAID registers PVOs to:

(1) Meet statutory and regulatory requirements that a U.S. PVO be registered with USAID as a condition for USAID funding.

(2) Provide USAID with information for computing the amount of USAID funding made available to PVOs.

(b) It is not the purpose of registration to allow or enable registered PVOs to make any representation to the public concerning the meaning of being registered with USAID. Promotional materials or advertisements suggesting otherwise will be grounds for removal from the USAID PVO Registry.

(c) Registration does not bring an organization within the Ambassador's authority and responsibility for the security of U.S. Government operations and personnel abroad.

§ 203.2 Definitions.

As used in this part:

(a) *Cooperative Development Organization (CDO)* means an organization designated by USAID as a voluntary, independent business enterprise formed to meet specific needs of its members through a common venture.

(b) *Foreign Assistance Act (FAA)* means the Foreign Assistance Act of 1961, as amended, 22 U.S.C. 2151, *et seq.*

(c) *General Public* means citizens and nongovernmental organizations (NGOs). The general public does not include government agencies in the United States or abroad, or public international organizations such as the United Nations and the World Health Organization.

(d) *Headquarters* means the principal executive office where legal, accounting, and administrative information may be accessed in the daily course of conducting business.

(e) *International Private Voluntary Organization (IPVO)* means an entity that:

(1) Is non-U.S. based in that it is organized under the laws of the country in which it is domiciled;

(2) Is a private nongovernmental organization (NGO) that solicits and receives cash contributions from the general public;

(3) Is a charitable organization in that it is nonprofit and tax exempt under the laws of its country of domicile and operation, and is not a university, college, accredited degree-granting institution of education, private foundation, hospital, organization engaged exclusively in research or scientific activities, church, synagogue, mosque or other similar entities organized primarily for religious purposes; and

(4) Conducts, or anticipates conducting, program activities in one or more countries other than its country of origin that are consistent with the general purposes of the Foreign Assistance Act and/or Public Law 480.

(5) Is not recognized as a Public International Organization according to USAID's Automated Directives System (ADS) 308.3.

(f) *Local Private Voluntary Organization (LPVO)* means a non-U.S. based PVO that meets the definition of an International Private Voluntary Organization, except that it operates only in the same foreign country in which it is organized. LPVOs are not required to register with USAID/Washington but USAID Missions may require some other eligibility method when making awards.

(g) *Non-U.S. Private Voluntary Organization (Non-U.S. PVO)* means an entity that meets the definition of a U.S. PVO, but is not headquartered in the United States. Non-U.S. PVOs include both Local Private Voluntary Organizations and International Private Voluntary Organizations.

(h) *Nongovernmental Organization (NGO)* means any nongovernmental organization or entity, whether nonprofit or profit-making.

(i) *Nonprofit organization* means any corporation, trust, association, cooperative or other organization that is operated primarily for service, charitable, scientific, educational or other similar purposes; is not organized for profit; and uses its net proceeds to maintain, improve, and/or expands its operations.

(j) *Private Voluntary Organization (PVO)* See U.S. Private Voluntary Organization, International Private Voluntary Organization, and Local Private Voluntary Organization.

(k) *Public International Organization (PIO)* means a non-U.S. based organization (*i.e.*, composed principally of governments) in which the U.S. participates. (See USAID's Automated Directives System (ADS) 308.3).

(l) *Public Law 480* means the Agricultural Trade Development and Assistance Act of 1954, as amended, 7 U.S.C. 1691, *et seq.*

(m) *Solicits* means to undertake a substantial effort to obtain donations.

(n) *Supporting Services* means the total of general and administration expenses plus fundraising expenses.

(o) *USAID* means the U.S. Agency for International Development.

(p) *U.S. Private Voluntary Organization (U.S. PVO)* means an entity that:

(1) Is organized under the laws of the United States and headquartered in the United States;

(2) Is a nongovernmental organization (NGO) that solicits and receives cash

contributions from the U.S. general public;

(3) Is a charitable organization in that it is nonprofit and exempt from Federal income taxes under section 501(c)(3) of the Internal Revenue Code, and is not a university, college, accredited degree-granting institution of education, private foundation, hospital, organization established by a major political party in the United States, organization established, funded and audited by the U.S. Congress, organization engaged exclusively in research or scientific activities, church, synagogue, mosque or other similar entity organized primarily for religious purposes; and

(4) Conducts, or anticipates conducting, overseas program activities that are consistent with the general purposes of the Foreign Assistance Act and/or Public Law 480.

§ 203.3 U.S. PVO conditions of registration.

There are eight Conditions of Registration for U.S. organizations. The first four Conditions relate to whether an organization meets the definition of a U.S. PVO, as set forth in § 203.2 (p), while the last four Conditions establish standards by which the U.S. PVO is evaluated.

An applicant must be registered with USAID as a U.S. PVO if USAID finds that the applicant has satisfied all of the following Conditions:

(a) *Condition No. 1 (U.S. based).* Is U.S. based in that it:

(1) Is organized under the laws of the United States; and

(2) Has its headquarters in the United States.

(b) *Condition No. 2 (Private).* Is a nongovernmental organization (NGO) and solicits and receives cash contributions from the U.S. general public.

(c) *Condition No. 3 (Voluntary).* Is a charitable organization in that it:

(1) Is nonprofit and exempt from Federal income taxes under Section 501(C)(3) of the Internal Revenue Code; and

(2) Is not a university, college, accredited degree-granting institution of education, private foundation, hospital, organization established by a major political party in the United States, organization established, funded and audited by the U.S. Congress, organization engaged exclusively in research or scientific activities, church, synagogue, mosque or other similar entity organized primarily for religious purposes.

(d) *Condition No. 4 (Overseas Program Activities).* Conducts, or anticipates conducting, overseas program activities that are consistent with the general purposes of the Foreign Assistance Act and/or Public Law 480.

(e) *Condition No. 5 (Board of Directors).* Has a governing body:

(1) That meets at least annually;

(2) Whose members do not receive any form of income for serving on the board; and

(3) Whose majority is not composed of the PVO's officers or staff members.

(f) *Condition No. 6 (Financial Viability).* That it:

(1) Accounts for its funds in accordance with generally accepted accounting principles (GAAP);

(2) Has a sound financial position;

(3) Provides its financial statements to the public upon request; and

(4) Has been incorporated for not less than 18 months.

(g) *Condition No. 7 (Program Activities vs. Supporting Services).* That it:

(1) Expends and distributes its funds in accordance with the annual report of program activities;

(2) Does not expend more than 40 percent of total expenses on supporting services.

(3) In order to maintain its registration, conducts international program activities within the last three years. For example, if a U.S. PVO did not have any international activities for 2004, the current year, or 2003, but did have activities in 2002, then it would remain registered. However, if it did not have any international activities in 2005, USAID would remove it from the Registry in 2006 because for the previous three years (2003, 2004, 2005), it did not conduct any international activities.

(h) *Condition No. 8 (General Eligibility).* It is not:

(1) Suspended or debarred by an agency of the U.S. Government;

(2) Designated as a foreign terrorist organization by the Secretary of State, pursuant to Section 219 of the Immigration and Nationality Act, as amended; or

(3) The subject of a decision by the Department of State to the effect that registration or a financial relationship between USAID and the organization is contrary to the national defense, national security, or foreign policy interests of the United States.

§ 203.4 U.S. PVO initial documentation requirements.

(a) So that USAID can determine whether an applicant meets the Conditions of Registration, an application must be submitted in duplicate. The application instructions and forms packet are available at USAID Web site *http://www.usaid.gov* Keyword: PVO Registration. The completed application must include:

(1) A cover letter with

(i) The reason for applying for registration; and

(ii) A description of current or intended overseas program activities;

(2) Articles of incorporation on state letterhead with state seal and authorizing state official's signature;

(3) Bylaws establishing the applicant's corporate structure;

(4) IRS Form 990 and a copy of an IRS letter of tax exemption;

(5) Audited financial statements for the most recent fiscal year prepared on an accrual basis in accordance with generally accepted accounting principles (GAAP) by an independent certified public accountant (CPA); an Office of Management and Budget (OMB) Circular A–133 audit, if applicable;

(6) Annual report or similar document that describes overall program activities for the same year as the audit, including a list of board members;

(7) AID Form 1550–2, PVO Annual Return; and

(8) AID Form 200–1, PVO Classification Form.

(b) In addition, each applicant must submit such other information as USAID may reasonably require to determine whether the organization meets the Conditions of Registration.

(c) USAID may revise this list of documents from time to time.

(d) Other USAID officials may request information similar to that submitted under these regulations for other purposes; for example, to determine an organization's eligibility for a particular grant or cooperative agreement.

(e) The completed application must be sent in duplicate to the USAID Registrar, Office of Private Voluntary Cooperation—American Schools & Hospitals Abroad, 1300 Pennsylvania Avenue, NW., Washington, DC 20523–7600.

§ 203.5 U.S. PVO annual documentation requirements.

(a) To maintain its registration, each registered PVO must submit documents and forms annually. The submission instructions and forms packet are available at USAID Web site *www.usaid.gov* Keyword: PVO Registration. The completed submission must include:

(1) Audited financial statements for the most recent fiscal year prepared on an Accrual basis in accordance with GAAP by an independent CPA; an OMB Circular A–133 audit, if applicable; or unaudited financial statements if total

Support and revenue is less than $50,000.

(2) Annual report or similar document that describes overall program activities for the same year as the audit, including a list of board members;

(3) AID Form 1550–2, PVO Annual Return; and

(4) AID Form 200–1, PVO Classification Form.

(b) PVOs also must submit any amendments, if applicable, to its articles of incorporation, or bylaws and any changes in the tax-exempt status.

(c) Submission is due within six months after the close of the PVO's fiscal year if the PVO does not prepare an OMB Circular A–133 audit.

(d) Submission is due within nine months after the close of the PVO's fiscal year if the PVO does prepare an OMB Circular A–133 audit.

(e) In addition, each registrant must submit such other information as USAID may reasonably require to determine that the organization continues to meet the Conditions of Registration.

(f) USAID may revise this list of documents from time to time.

(g) Other USAID officials may request information similar to that submitted under these regulations for other purposes; for example, to determine the PVO's eligibility for a particular grant or cooperative agreement.

(h) The completed submission must be sent annually to the USAID Registrar, Office of Private Voluntary Cooperation—American Schools & Hospitals Abroad, 1300 Pennsylvania Avenue, NW., Washington, DC 20523–7600.

§ 203.6 IPVO conditions of registration.

There are eight Conditions of Registration for international organizations. The first four Conditions relate to whether an organization meets the definition of an IPVO, as set forth in § 203.2(e), while the last four Conditions establish standards by which the IPVO is evaluated. An applicant must be registered with USAID as an IPVO if USAID finds that the applicant has satisfied all of the following Conditions:

(a) *Condition No. 1 (Non-U.S based).* Is non-U.S. based in that it:

(1) Is organized under the laws of the country in which it is domiciled; and

(2) Has its headquarters in the same country.

(b) *Condition No. 2 (Private).* Is a nongovernmental organization (NGO) and solicits and receives cash contributions from the general public.

(c) *Condition No. 3 (Voluntary).* Is a charitable organization in that it:

(1) Is nonprofit and tax exempt under the laws of its country of domicile and operation;

(2) Is not a university, college, accredited degree-granting institution of education, private foundation, hospital, organization engaged exclusively in research or scientific activities, church, synagogue, mosque or other similar entity organized primarily for religious purposes; and

(3) Is not recognized as a Public International Organization according to USAID's ADS 308.3.

(d) *Condition No. 4 (International Program Activities).* Conducts, or anticipates conducting, program activities in one or more countries other than its country of origin and that are consistent with the general purposes of the Foreign Assistance Act and/or Public Law 480.

(e) *Condition No. 5 (Board of Directors).* Has a governing body:

(1) That meets at least annually;

(2) Whose members do not receive any form of income for serving on the board; and

(3) Whose majority is not composed of the IPVO's officers or staff members.

(f) *Condition No. 6 (Financial Viability).* That it:

(1) Accounts for its funds in accordance with generally accepted accounting principles (GAAP) or generally accepted accounting standards of IPVO's country of domicile.

(2) Has a sound financial position;

(3) Provides its financial statements to the public upon request; and

(4) Has been incorporated for not less than 18 months.

(g) *Condition No. 7 (Program Activities vs. Supporting Services).* That it:

(1) Expends and distributes its funds in accordance with the annual report of program activities;

(2) Does not expend more than 40 percent of total expenses on supporting services; and

(3) In order to maintain its registration, conducts international program activities within the last three years. For example, if an IPVO did not have any international activities for 2004, the current year, or 2003, but did have activities in 2002, then it would remain registered. However, if it did not have any international activities in 2005, USAID would remove it from the Registry in 2006 because for the previous three years (2003, 2004, 2005), it did not conduct any international activities.

(h) *Condition No. 8 (General Eligibility).* It is not:

(1) Suspended or debarred by an agency of the U.S. Government;

(2) Designated as a foreign terrorist organization by the Secretary of State, pursuant to Section 219 of the Immigration and Nationality Act, as amended; or

(3) The subject of a decision by the Department of State to the effect that registration or a financial relationship between USAID and the organization is contrary to the national defense, national security, or foreign policy interests of the United States.

§ 203.7 IPVO initial documentation requirements.

(a) So that USAID can determine whether an applicant meets the Conditions of Registration, an application must be submitted in duplicate and in English. The application instructions and forms packet are available at USAID Web site *http://www.usaid.gov* Keyword: PVO Registration. The completed application must include:

(1) A cover letter with

(i) The reason for applying for registration; and

(ii) A description of current or intended program activities abroad;

(2) Articles of incorporation or charter establishing the IPVO's legal status under the laws of the country in which it is domiciled;

(3) Bylaws or other documents establishing the applicant's corporate structure;

(4) Statement of tax exemption or a comparable document from the country of its origin;

(5) Audited financial statements for the most recent fiscal year prepared on an accrual basis in accordance with generally accepted accounting principles (GAAP) or generally accepted accounting standards for IPVO's country of domicile by an independent certified public accountant (CPA) and in *U.S. dollars*;

(6) Annual report or similar document that describes overall program activities for the same year as the audit, including a list of board members;

(7) International Executive Contact Data Sheet; and

(8) AID Form 200–1, PVO Classification Form.

(b) In addition, each applicant must submit such other information as USAID may reasonably require to determine whether the organization meets the Conditions of Registration.

(c) USAID may revise this list of documents from time to time.

(d) Other USAID officials may request information similar to that submitted under these regulations for other purposes; for example, to determine an organization's eligibility for a particular grant or cooperative agreement.

(e) The completed application must be sent in duplicate to the USAID Registrar, Office of Private Voluntary Cooperation—American Schools & Hospitals Abroad, 1300 Pennsylvania Avenue, NW., Washington, DC 20523–7600.

§ 203.8 IPVO annual documentation requirements.

(a) To maintain its registration, each registered IPVO must submit documents and forms, in English, annually. The submission instructions and forms packet are available at USAID Web site *www.usaid.gov* Keyword: PVO Registration. The completed submission must include:

(1) Audited financial statements for the most recent fiscal year prepared on an accrual basis in accordance with GAAP or generally accepted accounting standards for IPVO's country of domicile by an independent CPA; or unaudited financial statements if total support and revenue is less than $50,000 in *U.S. dollars*;

(2) Annual report or similar document that describes overall program activities for the same year as the audit, including a list of board members;

(3) International Executive Contact Data Sheet; and

(4) AID Form 200–1, PVO Classification Form.

(b) IPVOs also must submit any amendments, if applicable, to its articles of incorporation, charter, or bylaws and any changes in the tax-exempt status.

(c) Submission is due within six months after the close of the IPVO's fiscal year.

(d) In addition, each registrant must submit such other information as USAID may reasonably require to determine that the organization continues to meet the Conditions of Registration.

(e) USAID may revise this list of documents from time to time.

(f) Other USAID officials may request information similar to that submitted under these regulations for other purposes; for example, to determine the IPVO's eligibility for a particular grant or cooperative agreement.

(g) The completed submission must be sent annually in English to the USAID Registrar, Office of Private Voluntary Cooperation—American Schools & Hospitals Abroad, 1300 Pennsylvania Avenue, NW., Washington, DC 20523–7600.

§ 203.9 Denial of registration.

(a) *Notification of denial of registration.* Denial of registration by USAID will include written notice to the applicant stating the grounds for the denial.

(b) *Reconsideration.* Within 30 days after receipt of a denial notification an organization may request that its application be reconsidered. USAID will consider the request and inform the applicant in writing of USAID's subsequent decision.

(c) *Resubmission.* An organization may at any time submit a new application for registration.

§ 203.10 Termination of registration.

(a) *Reasons.* USAID may terminate registration for any of the following reasons if the registrant:

(1) Relinquishes its registration status voluntarily upon written notice to USAID;

(2) Fails to comply with the documentation requirements or the Conditions of Registration;

(3) Uses promotional material or advertisements suggesting that its USAID registration is an endorsement; or

(4) Refuses to transfer to USAID any records, documents, copies of such records or documents, or information referred to in this regulation and within the registrant's control within a reasonable time after USAID request them.

(b) *Notification of termination of registration.* Termination by USAID will include written notice to the registrant stating the grounds for the termination.

(c) *Reconsideration.* Within 30 days after receipt of a termination notification an organization may request that its termination be reconsidered. USAID will consider the request and inform the registrant in writing of USAID's subsequent decision. In addition, USAID may, at its own discretion, reconsider a termination of registration at any time.

(d) *Resubmission.* An organization may at any time submit a new application for registration.

§ 203.11 Access to records and communications.

(a) All records, reports, and other documents that are made available to USAID pursuant to this regulation must be made available for public inspection and copying, pursuant to the Freedom of Information Act and other applicable laws.

(b) Communications from USAID will only be sent to the applicant's or registrant's headquarters.

§ 203.12 Cooperative Development Organizations (CDOs).

CDOs are not PVOs for purposes of registration under this part. CDOs as part of the larger PVO community will continue to be listed in the U.S. PVO Registry at *www.usaid.gov* Keyword: Registry and will continue to be eligible for assistance that is otherwise available to registered U.S. PVOs. In order to be listed in the Registry as a CDO, the CDO must comply with the annual documentation requirements of § 203.5. A CDO applying for registration or registered under this part as a U.S. PVO must comply with the requirements of this part.

§ 203.13 Delegation of authority.

The Administrator of USAID or his/her designee may delegate authority to the Assistant Administrator of the Bureau for Democracy, Conflict and Humanitarian Assistance to administer the registration process and, in particular, the authority to waive, withdraw, or amend any or all of the provisions within this part.

Dated: May 5, 2005.

Mary Newton,

Registrar, Private Voluntary Cooperation—American Schools & Hospitals Abroad, Bureau for Democracy, Conflict and Humanitarian Assistance.

[FR Doc. 05–9544 Filed 5–12–05; 8:45 am]

BILLING CODE 6116–01–P

PENSION BENEFIT GUARANTY CORPORATION

29 CFR Parts 4022 and 4044

Benefits Payable in Terminated Single-Employer Plans; Allocation of Assets in Single-Employer Plans; Interest Assumptions for Valuing and Paying Benefits

AGENCY: Pension Benefit Guaranty Corporation.

ACTION: Final rule.

SUMMARY: The Pension Benefit Guaranty Corporation's regulations on Benefits Payable in Terminated Single-Employer Plans and Allocation of Assets in Single-Employer Plans prescribe interest assumptions for valuing and paying benefits under terminating single-employer plans. This final rule amends the regulations to adopt interest assumptions for plans with valuation dates in May 2005. Interest assumptions are also published on the PBGC's Web site (*http://www.pbgc.gov*).

EFFECTIVE DATE: June 1, 2005.

FOR FURTHER INFORMATION CONTACT: Catherine B. Klion, Attorney, Legislative and Regulatory Department, Pension Benefit Guaranty Corporation, 1200 K Street, NW., Washington, DC 20005, 202–326–4024. (TTY/TDD users may call the Federal relay service toll-free at

1–800–877–8339 and ask to be connected to 202–326–4024.)

SUPPLEMENTARY INFORMATION: The PBGC's regulations prescribe actuarial assumptions—including interest assumptions—for valuing and paying plan benefits of terminating single-employer plans covered by title IV of the Employee Retirement Income Security Act of 1974. The interest assumptions are intended to reflect current conditions in the financial and annuity markets.

Three sets of interest assumptions are prescribed: (1) A set for the valuation of benefits for allocation purposes under section 4044 (found in Appendix B to Part 4044), (2) a set for the PBGC to use to determine whether a benefit is payable as a lump sum and to determine lump-sum amounts to be paid by the PBGC (found in Appendix B to Part 4022), and (3) a set for private-sector pension practitioners to refer to if they wish to use lump-sum interest rates determined using the PBGC's historical methodology (found in Appendix C to Part 4022).

Accordingly, this amendment (1) adds to Appendix B to Part 4044 the interest assumptions for valuing benefits for allocation purposes in plans with valuation dates during June 2005, (2) adds to Appendix B to Part 4022 the interest assumptions for the PBGC to use for its own lump-sum payments in plans with valuation dates during June 2005, and (3) adds to Appendix C to Part 4022 the interest assumptions for private-sector pension practitioners to refer to if they wish to use lump-sum interest rates determined using the PBGC's historical methodology for valuation dates during June 2005.

For valuation of benefits for allocation purposes, the interest assumptions that the PBGC will use (set forth in Appendix B to part 4044) will be 3.70 percent for the first 20 years following the valuation date and 4.75 percent thereafter. These interest assumptions represent a decrease (from those in effect for May 2005) of 0.20 percent for the first 20 years following the valuation date and are otherwise unchanged.

The interest assumptions that the PBGC will use for its own lump-sum payments (set forth in Appendix B to part 4022) will be 2.50 percent for the period during which a benefit is in pay status and 4.00 percent during any years preceding the benefit's placement in pay status. These interest assumptions represent a decrease (from those in effect for May 2005) of 0.25 percent for the period during which a benefit is in pay status and are otherwise unchanged.

For private-sector payments, the interest assumptions (set forth in Appendix C to part 4022) will be the same as those used by the PBGC for determining and paying lump sums (set forth in Appendix B to part 4022).

The PBGC has determined that notice and public comment on this amendment are impracticable and contrary to the public interest. This finding is based on the need to determine and issue new interest assumptions promptly so that the assumptions can reflect, as accurately as possible, current market conditions.

Because of the need to provide immediate guidance for the valuation and payment of benefits in plans with valuation dates during June 2005, the PBGC finds that good cause exists for making the assumptions set forth in this amendment effective less than 30 days after publication.

The PBGC has determined that this action is not a ''significant regulatory action'' under the criteria set forth in Executive Order 12866.

Because no general notice of proposed rulemaking is required for this amendment, the Regulatory Flexibility Act of 1980 does not apply. See 5 U.S.C. 601(2).

List of Subjects

29 CFR Part 4022

Employee benefit plans, Pension insurance, Pensions, Reporting and recordkeeping requirements.

29 CFR Part 4044

Employee benefit plans, Pension insurance, Pensions.

■ In consideration of the foregoing, 29 CFR parts 4022 and 4044 are amended as follows:

PART 4022—BENEFITS PAYABLE IN TERMINATED SINGLE-EMPLOYER PLANS

■ 1. The authority citation for part 4022 continues to read as follows:

Authority: 29 U.S.C. 1302, 1322, 1322b, 1341(c)(3)(D), and 1344.

■ 2. In appendix B to part 4022, Rate Set 140, as set forth below, is added to the table. (The introductory text of the table is omitted.)

Appendix B to Part 4022—Lump Sum Interest Rates For PBGC Payments

* * * * *

Rate set	For plans with a valuation date		Immediate annuity rate (percent)	Deferred annuities (percent)				
	On or after	Before		i_1	i_2	i_3	n_1	n_2
*	*		*	*	*	*		*
140	6–1–05	7–1–05	2.50	4.00	4.00	4.00	7	8

■ 3. In appendix C to part 4022, Rate Set 140, as set forth below, is added to the table. (The introductory text of the table is omitted.)

Appendix C to Part 4022—Lump Sum Interest Rates For Private-Sector Payments

* * * * *

Rate set	For plans with a valuation date		Immediate annuity rate (percent)	Deferred annuities (percent)				
	On or after	Before		i_1	i_2	i_3	n_1	n_2
*	*		*	*	*	*		*
140	6–1–05	7–1–05	2.50	4.00	4.00	4.00	7	8

PART 4044—ALLOCATION OF ASSETS IN SINGLE-EMPLOYER PLANS

■ 4. The authority citation for part 4044 continues to read as follows:

Authority: 29 U.S.C. 1301(a), 1302(b)(3), 1341, 1344, 1362.

■ 5. In appendix B to part 4044, a new entry, as set forth below, is added to the table. (The introductory text of the table is omitted.)

Appendix B to Part 4044—Interest Rates Used to Value Benefits

* * * * *

For valuation dates occurring in the month—	The values of i_t are:					
	i_t	for t =	i_t	for t =	i_t	for t =
* * *	*		*	*	*	
June 2005	.0370	1–20	.0475	>20	N/A	N/A

Issued in Washington, DC, on this 6th day of May 2005.

Vincent K. Snowbarger,

Deputy Executive Director, Pension Benefit Guaranty Corporation.

[FR Doc. 05–9548 Filed 5–12–05; 8:45 am]

BILLING CODE 7708–01–P

DEPARTMENT OF THE INTERIOR

Office of Surface Mining Reclamation and Enforcement

30 CFR Part 938

[PA–124–FOR]

Pennsylvania Regulatory Program

AGENCY: Office of Surface Mining Reclamation and Enforcement (OSM), Interior.

ACTION: Final rule; approval of amendment.

SUMMARY: We are approving, with certain exceptions, a proposed amendment to the Pennsylvania program under the Surface Mining Control and Reclamation Act of 1977 (SMCRA or the Act). Pennsylvania proposed to revise its Surface Mining Conservation and Reclamation Act (PASMCRA) and implementing regulations at 25 Pa Code Chapters 86–90 with regard to various issues including bonding, remining and reclamation, postmining discharges, and water supply protection/replacement. Pennsylvania revised its program to provide additional safeguards and clarify ambiguities.

DATES: *Effective Date:* May 13, 2005.

FOR FURTHER INFORMATION CONTACT: George Rieger, Director, Pittsburgh Field Division; Telephone: (717) 782–4036; e-mail: *grieger@osmre.gov.*

SUPPLEMENTARY INFORMATION:

I. Background on the Pennsylvania Program
II. Submission of the Amendment
III. OSM's Findings
IV. Summary and Disposition of Comments
V. OSM's Decision
VI. Effect of Director's Decision
VII. Procedural Determinations

I. Background on the Pennsylvania Program

Section 503(a) of the Act permits a State to assume primacy for the regulation of surface coal mining and reclamation operations on non-Federal and non-Indian lands within its borders by demonstrating that its State program includes, among other things, ''a State law which provides for the regulation of surface coal mining and reclamation operations in accordance with the requirements of the Act * * *; and rules and regulations consistent with regulations issued by the Secretary pursuant to the Act.'' See 30 U.S.C. 1253(a)(1) and (7). On the basis of these criteria, the Secretary of the Interior conditionally approved the Pennsylvania program on July 30, 1982. You can find background information on the Pennsylvania program, including the Secretary's findings, the disposition of comments, and conditions of approval in the July 30, 1982, **Federal Register** (47 FR 33050). You can also find later actions concerning Pennsylvania's program and program amendments at 30 CFR 938.11, 938.12, 938.15 and 938.16.

II. Submission of the Proposed Amendment

By letter dated December 18, 1998 (Administrative Record No. PA 853.01), the Pennsylvania Department of Environmental Protection (PADEP) submitted a proposed amendment to its program covering various issues including bonding, remining and reclamation, postmining discharges, and water supply protection/replacement. The proposal included two documents: ''Provisions of Pennsylvania's Statute—Surface Mining Conservation and Reclamation Act—Submitted for Program Amendment'' and ''Provisions of Pennsylvania's Regulations—25 Pa. Code Chapters 86–90—Submitted for Program Amendment.''

We announced receipt of the proposed amendment in the March 12, 1999 **Federal Register** (64 FR 12269), and in the same document invited public comment and provided an opportunity for a public hearing on the adequacy of the proposed amendment. The public comment period closed on April 12, 1999. Please refer to the March 12, 1999, **Federal Register** for additional background information. In the July 8, 1999 **Federal Register** (64 FR 36828), we reopened the comment period in response to a June 1, 1999, letter (Administrative Record No. PA 853.11) from PADEP regarding deletion of the definition of the term ''best professional judgment'' at 25 Pa. Code 87.202 and 25 Pa. Code 88.502, and the deletion of subsections 25 Pa. Code 87.207(b) and 25 Pa. Code 88.507(b). The reopened public comment period ended on July 23, 1999. We received comments from: the Pennsylvania Historical and Museum Commission dated January 14, 1999 (Administrative Record No. PA 853.03); the United States Department of Agriculture, Natural Resources Conservation Service dated January 19, 1999 (Administrative Record No. PA 853.04); the U.S. Department of Labor, Mine Safety and Health Administration (MSHA), New Stanton, Pennsylvania, Office dated January 20, 1999 (Administrative Record No. PA 853.05); MSHA's Wilkes-Barre, Pennsylvania, Office dated January 26, 1999 (Administrative Record No. PA 853.06); Amerikohl Mining, Inc. dated March 29, 1999 (Administrative Record No. PA 853.08); the Pennsylvania Coal Association dated April 9, 1999 (Administrative Record No. PA 853.09); Schmid and Company Inc., Consulting Ecologists dated April 9, 1999 (Administrative Record No. PA 853.10); and, the U.S. Environmental Protection Agency dated May 25, 2000 (Administrative Record No. PA 853.19).

By letters dated September 22, 1999 (Administrative Record No. PA 853.14), and April 6, 2000 (Administrative Record No. PA 853.17), we requested

clarification from Pennsylvania on various aspects of its amendment. In an October 3, 2002, letter to Pennsylvania (Administrative Record No. PA 853.22), we indicated that some of the issues in our September 22, 1999, and April 6, 2000, letters were no longer valid and that we were withdrawing them. The conclusions in this letter were the result of our internal deliberations and the issues were not removed as the result of information from any other source. Since the issuance of the October 3, 2002, letter, we have had numerous meetings with Pennsylvania to discuss the items remaining from the September 22, 1999, and the April 6, 2000, letters.

The meetings with Pennsylvania resulted in Pennsylvania providing us with information to clarify the meaning of various parts of its amendment. We prepared a document listing those clarifications and placed it in the administrative record (Administrative Record No. PA 853.25). Additionally, Pennsylvania submitted two letters to us modifying the December 18, 1998, amendment. Those letters were dated December 23, 2003 (Administrative Record No. PA 853.23), and April 13, 2004 (Administrative Record No. PA 853.24). Based on Pennsylvania's revisions and additional explanatory information for its amendment, we reopened the public comment period in the November 24, 2004, **Federal Register** (69 FR 68285) (Administrative Record No. PA 853.26). The public comment period ended on December 9, 2004. In response to the November 24, 2004, request for comments, we received letters from: the U.S. Environmental Protection Agency dated December 27, 2004 (Administrative Record No. PA 853.29); MSHA's Arlington, Virginia, Office dated December 20, 2004 (Administrative Record No. PA 853.28); MSHA's Wilkes-Barre, Pennsylvania, Office dated January 7, 2005 (Administrative Record No. PA 853.30); and, Citizens for Pennsylvania's Future dated January 18, 2005 (Administrative Record No. PA 853.31).

III. OSM's Findings

In the amendment, Pennsylvania modified its Surface Mining Conservation and Reclamation Act (PASMCRA) and portions of its regulations at 25 Pa. Code Chapter 86, Surface and Underground Coal Mining: General; 25 Pa. Code Chapter 87, Surface Mining of Coal; 25 Pa. Code Chapter 88, Anthracite Coal; 25 Pa. Code Chapter 89, Underground Mining of Coal and Coal Preparation Facilities; and, 25 Pa. Code Chapter 90, Coal Refuse Disposal. In some cases, Pennsylvania made the same modifications to regulations in several different Chapters. In those cases, we discussed all the similar regulations together. Our discussion of the amendment appears below by the applicable sections of PASMCRA followed by the applicable sections of the Pennsylvania regulations.

PASMCRA

Section 3, Definitions of the terms ''government financed reclamation contract,'' ''no-cost reclamation contract,'' and ''surface mining activities'' were previously approved in the March 26, 1999, and June 8, 1999, editions of the **Federal Register** (64 FR 14610, 64 FR 30387, respectively). Therefore, these statutory provisions are not a part of this rulemaking.

Section 3, Definition of the term ''total project costs.'' Pennsylvania added this definition for use in Section 4.8 of PASMCRA. Pennsylvania defines the term to mean the entire cost of performing a government financed reclamation contract as determined by Pennsylvania even if the cost is assumed by the contractor pursuant to a no-cost contract with PADEP. When we reviewed the statutory provisions listed above in 1999, we should also have requested that PADEP separately submit the definition of ''total project costs,'' but inadvertently neglected to do so. There is no comparable definition in the Federal regulations. However, so long as it is applied in a manner consistent with our March 26, 1999, decision (64 FR 14610), as amended by our June 8, 1999, decision (64 FR 30387), the definition is not inconsistent with the Federal regulations at 30 CFR part 707 that provide for government-financed construction. Therefore, we are approving it.

Section 3.1. This section contains the requirements for obtaining a license to mine coal. Section 3.1(a) was amended to require anyone mining coal to obtain a license and to provide the requirements for obtaining a license. Section 3.1(b) which provides the circumstances under which Pennsylvania will not issue or renew a mining license was amended to specify that it applies to any person who mines coal by the surface mining method. Section 3.1(c) which requires an application for a license, renewal or permit to be accompanied by a certificate of public liability insurance was amended to change references from surface mining operations to surface mining activities. The changes Pennsylvania made make it clear that certain licensing provisions apply to all who mine coal where formerly they only applied to surface mine operators. There are no licensing requirements in the Federal regulations. However, these requirements are not inconsistent with the application and permitting requirements of the Federal regulations. Therefore, we are approving them.

Section 3.1(d) was amended to add a provision that a permit will be denied to certain entities engaged in mining coal if they control or have controlled mining operations with a demonstrated pattern of willful violations. This provision is no less stringent than the corresponding portion of Section 510(c) of SMCRA, and we are therefore approving it.

Section 4(a) was modified to require that before anyone can mine coal, a permit must be obtained. Previously, the requirement was that anyone wishing to mine minerals was required to obtain a permit. This provision, as amended, remains no less stringent than Section 506(a) of SMCRA, 30 U.S.C. 1256(a), and therefore, we are approving it.

Section 4(a)(2)(C) was modified to provide that for areas previously disturbed by surface mining activities that were not reclaimed to the standards of PASMCRA and are proposed to be remined, Pennsylvania may approve a vegetative cover which may not be less than the vegetative cover existing before the redisturbance and must be adequate to control erosion and achieve the postmining land use. This subsection is no less effective than the ground cover revegetation requirements of the Federal regulations at 30 CFR 816.116(a) and (b)(5). Therefore, we are approving this subsection.

Section 4(d) was modified by deleting existing language and adding language that expressly describes other forms of collateral or bonds that are acceptable. The amendment adds life insurance policies to the list of acceptable forms of collateral bonds. The life insurance policy must be fully paid and noncancelable with a cash surrender value irrevocably assigned to PADEP at least equal to the amount of the required bonds. In addition, the policy cannot be borrowed against and cannot be utilized for any purpose other than assuring reclamation. While the Federal regulations at 30 CFR 800.21, governing collateral bonds, do not specifically provide for the use of insurance policies, we find that these policies present no greater risks than those inherent in other forms of collateral bonding. Therefore, we conclude that the addition of life insurance policies as collateral bonds to Section 4(d) will not render the Pennsylvania program less effective than 30 CFR 800.21 in meeting the bonding requirements of Section 509

of SMCRA, and this addition is hereby approved.

Section 4(d) also expressly adds annuities and trust funds to the list of acceptable collateral bonds. The annuity or trust fund must irrevocably name PADEP as beneficiary. The implementing regulations at 25 Pa. Code 86.158(f) expressly provide additional conditions on the use of trust funds and annuities. As is the case with whole life insurance policies, there are no specific provisions addressing trust funds or annuities in the Federal collateral bonding regulations at 30 CFR 800.21. However, they are an acceptable form of collateral and, with the safeguards included in the State's regulations, trust funds and annuities present no greater risks, and are, therefore, no less effective than the forms of collateral bonding expressly contained in 30 CFR 800.21. Therefore, we conclude that the addition of annuities or trust funds as types of collateral bond to Section 4(d) will not render the Pennsylvania program less effective than 30 CFR 800.21 in meeting the bonding requirements of Section 509 of SMCRA, and the addition is hereby approved.

Section 4(d.2) expressly provides for the establishment of alternative financial assurance mechanisms including site-specific trust funds for the perpetual treatment of post mining discharges. Again, while Federal rules do not expressly include site-specific trust funds, we have determined that a fund that provides for the perpetual treatment of post mining discharges functions as a collateral bond and, as such, is no less effective than the Federal regulations regarding collateral bonds. Therefore, we are approving Section 4(d.2). For a more detailed analysis of site-specific trust funds, please refer to our finding below pertaining to 25 Pa. Code 86.158(f).

Section 4(g) was modified to provide that any person having an interest in the bond (including PADEP) may request bond release. While the Federal regulations do not explicitly provide for the filing of release applications by persons other than the permittee, it is not unreasonable to allow such applications, and to grant the request where the permittee has met all of the criteria for bond release. Therefore, we have determined that this change is no less effective than the Federal requirements at 30 CFR 800.40 regarding bond release and we are approving it.

Section 4(g)(1) was modified to provide that operators may receive Stage 1 bond release if, among other things, they have provided for the treatment of pollutional discharges. While this provision has no precise Federal counterpart, it is consistent with Section 519(b) of SMCRA which requires the regulatory authority to evaluate ''whether pollution of surface and subsurface water is occurring, the probability of continuance of such pollution, and the estimated cost of abating such pollution.'' Therefore, we are approving the change to Section 4(g)(1).

Section 4(g)(3) was modified to expressly indicate that the remaining portion of the bond could be released in whole or part at Stage 3 when the operator has completed successfully all mining and reclamation activities and has made provisions with PADEP for the sound future treatment of any pollutional discharges. That portion of the permit required for post-mining water treatment remains under bond as part of the provisions for future treatment of any pollutional discharges. Therefore, this is a form of partial bond release as provided for in 30 CFR 800.40(c) and can be approved.

Additionally, Pennsylvania's regulations at 25 Pa. Code 86.151(j), which provides that release of bonds does not alleviate the operator's responsibility to treat discharges of mine drainage emanating from, or hydrologically connected to, the site to the standards in the permit, PASMCRA, the Clean Stream Law, the Federal Water Pollution Control Act (or Clean Water Act) and the rules and regulations thereunder, provides guidance as to what qualifies as sound future treatment.

Section 4(g)(3) was also amended by deleting bond release language applicable to noncoal surface mining operations. Since SMCRA contains no counterpart to this language, the deletion of the language does not render the Pennsylvania program inconsistent with SMCRA or the implementing Federal regulations.

For the above noted reasons, we are approving the amendments to Section 4(g)(3).

Sections 4(g.1), (g.2), and (g.3). These new sections pertain to Stage 2 bond release at sites with pollutional discharges, and bond release at sites with ''minimal-impact post-mining discharges.'' In its letter of December 23, 2003, Pennsylvania requested that we remove these sections from this program amendment, because its definition of ''minimal impact postmining discharges'' and the regulations for postmining discharges were not included in the proposed program amendment. We are hereby granting that request; therefore, we will take no further action in this rulemaking with respect to proposed Sections 4(g.1), (g.2), and (g.3).

Section 4(h) is amended to require that in the event of bond forfeiture, payment of the forfeited bond must be made to PADEP within 30 days of notice of forfeiture, with the bond then being held in escrow with any interest accruing to PADEP pending resolution of any appeals. If any portion of the bond is determined by a court to have been improperly forfeited, the interest accruing proportionately to that amount shall be returned to the surety. While neither SMCRA nor the Federal regulations provide specifically for the return of funds to the surety in the event that a court decides that the regulatory authority was not entitled to the entire amount of the bond, we find this provision to be consistent with the Federal regulation at 30 CFR 800.50(d)(2) which requires the return of the portion of the bond in excess of that needed for reclamation. Section 4(h) is also amended to allow for surety reclamation of a site in lieu of paying the bond amount to PADEP. This portion of the amendment is no less effective than the Federal regulations governing surety reclamation at 30 CFR 800.50(a)(2)(ii). For these reasons, we are approving the changes to Section 4(h).

Section 4.2(f) was modified to include provisions for restoration or replacement of water supplies affected by surface mining activities. Formerly, this section only required surface mine operators to restore or replace water supplies they affect. Subsection (f)(1) now requires that, in addition to surface mine operators, any person engaged in government financed reclamation must restore or replace a water supply when they adversely affect the supply. Section 528 of SMCRA provides that the requirements of the Act are not applicable to sites where coal removal is part of government financed construction. Therefore, that portion of Pennsylvania's statute requiring restoration or replacement of water supplies by persons engaged in government financed reclamation is more stringent than the Federal provisions and we are approving these provisions as it applies to persons engaged in government financed reclamation.

Section 4.2(f)(1) also provides that adversely affected water supplies must be replaced with an alternate source of water adequate in quantity and quality for the purposes served by the supply. This language is no less stringent than the Federal statutory provisions contained in sections 717(b) of SMCRA that requires a surface coal mine

operator to replace a water supply that has been affected by surface coal mine operations. Therefore, it can be approved even though it lacks the specificity contained in the Federal regulations at 30 CFR 701.5, which define the term, ''replacement of water supply,'' to include the provision of water supply on both a temporary and permanent basis equivalent to premining quality and quantity. Pennsylvania's implementing regulation to this statutory provision is addressed later in this rulemaking (see 25 Pa. Code 87.119 and 88.107 below).

Section 4.2(f)(2) provides that a surface mine operator or mine owner is responsible without proof of fault, negligence or causation for all pollution, except bacterial contamination, and diminution of public or private water supplies within 1000 linear feet of the boundaries of the areas bonded and affected by coal mining operations, areas of overburden removal, and storage and support areas except for haul and access roads. This section also provides for five defenses to the presumption of liability: (1) The mine operator or owner was denied access to conduct a pre-mining water supply survey; (2) the water supply is not within 1,000 linear feet of the boundaries of the areas bonded and affected by coal mining operations, overburden removal/storage areas and support areas [excluding haul and access roads]; (3) a pre-permit water supply survey shows that the pollution/diminution existed prior to the surface mining activities; (4) the pollution/diminution occurred as a result of some cause other than surface mining activities; and, (5) the mine operator or owner was denied access to determine the cause of the pollution/diminution or to replace/restore the water supply. Neither SMCRA nor the Federal regulations provide for a similar presumption. In its amendment submission, Pennsylvania indicated that with or without the rebuttable presumption of liability, a mine operator is liable for replacing or restoring a water supply contaminated or diminished by the operator's surface mining activities. We are approving this subsection because it is not inconsistent with Section 717(b) of SMCRA and the Federal regulations in that it does not diminish an operator's obligation to restore or replace water supplies affected by surface mining.

Section 4.2(f)(3) provides for the immediate replacement of a water supply used for potable or domestic purposes when that supply is required to protect public health or safety. If an operator has appealed or failed to comply with an order issued under this section, PADEP may use money from the Surface Mining Conservation and Reclamation Fund to restore or replace the affected water supply. The section also requires the Secretary of PADEP to recover the costs of restoration or replacement from the responsible owners or operators. Section 525(c) of SMCRA, 30 CFR 843.16 and 35 Pa. Stat. 7514 (d) provide that an appeal of an order does not stay that order unless a request for temporary relief is granted. While there is no provision in the Federal program expressly allowing an agency to fund the restoration/replacement of temporary water supplies, we are approving this provision because it is not inconsistent with SMCRA and the Federal regulations in ensuring the restoration or replacement of affected water supplies and because it holds the operator responsible for replacing water supplies affected by coal mining operations through a cost recovery action.

Section 4.2(f)(4) allows an operator or an owner thirty days to appeal an order to replace a water supply. This language is no less effective than the Federal regulations at 30 CFR 843.16 (implementing 30 CFR 840.13), which allow a person issued an order to file an appeal within 30 days after receiving the order.

Section 4.2(f)(4) also provides that an order issued under this section which is appealed will not be used to block issuance of new permits. This provision is no less effective than the Federal regulation at 30 CFR 773.14(b)(4), which provides that a regulatory authority may issue a provisional permit if an operator is pursuing a good faith administrative or judicial appeal contesting the validity of a violation.

Section 4.2(f)(4) also provides that an order to replace an affected water supply which is appealed by the operator cannot be used to block the release of bonds when a stage of reclamation is completed. Pennsylvania's provision allows bond release even though an order to restore or replace the water supply remains unabated. Section 519(c)(3) of SMCRA and 30 CFR 800.40(c)(3) prohibit the release of the Phase 3 bond (the final portion of the bond) before the reclamation requirements of SMCRA and the permit are fully met. Pennsylvania's proposed changes do not specify or limit what stage of bond may be released, which we find is less stringent than SMCRA and less effective than the Federal regulations. Accordingly, to the extent that these changes allow Phase 3 bond release, the changes to Section 4.2(f)(4) are not approved and to the extent these changes allow Phase 1 or Phase 2 bond release after successful completion of the reclamation requirements of the applicable Phase, they are approved.

Section 4.2(f)(5) has been subsequently repealed by Pennsylvania in House Bill 393 (see 66 FR 57662, 57664 [November 16, 2001] for OSM's approval of Pennsylvania's repeal of this section). Therefore, this section is not a part of this rulemaking.

Section 4.2(f)(6) provides that nothing in this section prevents anyone who claims water pollution or diminution of a water supply from pursuing any other remedy that may be provided for in law or equity. There is no Federal counterpart to this provision. The affected parties have the full protection of PASMCRA while they are pursuing other remedies. Since the protections of PASMCRA are not affected by this subsection, we have determined that this provision is not inconsistent with SMCRA or the Federal regulations and we are approving it.

Section 4.2(f)(7) provides that a surface mining operation conducted under a permit issued before the effective date of this Act shall not be subject to the provisions of clauses (2), (3), (4), (5), and (6) of Section 4.2(f) but shall be subject to clause (1). Because Subsection (1) requires the replacement of water supplies, we have determined that Section 4.2(f)(7) is no less stringent than Section 717(b) of SMCRA and we are approving it to the extent noted in our discussions above.

Section 4.2(i) was added to provide access for PADEP and its agents to places where surface mining activities are being conducted to conduct inspections and take any materials for analysis. This provision, in concert with Section 18.9 of PASMCRA, is no less effective than the Federal regulations at 30 CFR 840.12(a), which provide for right of entry. Therefore, we are approving this section.

Section 4.6(i) provides bond release requirements for mining of previously affected areas. This section was modified in several respects. The modifications render this bond release provision the same as specified elsewhere in PASMCRA. At Stage 1, up to sixty percent of the bond may be released, whereas before it was up to fifty percent. At Stage 2, the amount of bond permitted to be released is amended from thirty-five percent to ''[a]n additional amount of bond but retaining an amount sufficient to cover the cost to the Commonwealth of reestablishing vegetation if completed by a third party * * *.'' A Stage 2

release criterion was modified to allow an operator to get such a release where it can show, among other things, that it has not caused the baseline pollution load of a discharge to be exceeded for a twelve month period prior to the date of bond release application and until the release is approved. While some of these changes have no precise Federal counterparts, they are all consistent with the bond release requirements of the Federal regulations at 30 CFR 800.40. Moreover, the bond release amount modifications for Stages 1 and 2 are no less effective than corresponding portions of the Federal regulations at 30 CFR 800.40(c)(1) and (c)(2), respectively. Therefore, we are approving the changes to this section.

Section 4.6(j) provides the standards of success for vegetative cover as a result of the reclamation of a previously mined site. The section was modified to allow PADEP to require a higher standard of vegetation success where it determines that such a standard is integral to the proposed pollution abatement plan. Pennsylvania's modification of this section makes it more stringent than the Federal requirements because it allows PADEP to set a higher standard than that contained in the Federal regulations at 30 CFR 816.116(a) and (b)(5) if it deems it necessary. Therefore, we are approving this section.

Section 4.7 provides for the anthracite mine operators emergency bond fund. This section was modified by Pennsylvania to open the emergency bond fund to anthracite surface mine operators. Among other things, these amendments will require anthracite surface mine operators that are unable to post bond for certain reasons to pay a twenty-five cents per ton fee, which is used to reclaim their operations if they are subsequently abandoned. No permits may be issued to an anthracite operator who does not post an adequate bond until the operator files at least $1,000.00 with PADEP and borrows from the emergency bond fund an amount sufficient to cover the remainder of the bond obligation.

Significantly, fees paid by an operator may only be used to secure the reclamation obligations of that operator. Thus, the emergency bond fund is not an alternative bonding system; rather, it is an adjunct to the conventional bonding system for anthracite mining operations. This section was formerly approved by OSM, and allowing anthracite surface mine operators to use the fund does not make it inconsistent with Section 509 of SMCRA, since no permit may be issued without adequate bonds being posted, in the form of a loan from the emergency bond fund. Therefore, we are approving the amendments to this section.

Section 4.8 was added to PASMCRA by this amendment. This section was submitted separately by PADEP, at our request, in conjunction with our review of Pennsylvania's 1997 revisions to its Abandoned Mine Land Reclamation (AMLR) Plan. Our decisions on this provision were announced in the March 26, 1999, and June 8, 1999, editions of the **Federal Register** (64 FR 14610, 64 FR 30387, respectively). Therefore, this section is not a part of this rulemaking.

Section 4.10 establishes the Remining Operator's Assistance Program (ROAP). While this section was not part of Pennsylvania's original 1998 amendment submission, Pennsylvania requested that it be added in its letter to us of April 13, 2004 (Administrative Record No. PA 853.24). The ROAP, which is funded by Pennsylvania's Remining Environmental Enhancement Fund, will allow PADEP to assist and pay for the preparation of applications for licensed mine operators to obtain permits for remining abandoned mine land, including land subject to bond forfeitures, and coal refuse piles. Section 4.10 also authorized the Pennsylvania Environmental Quality Board (EQB) to promulgate regulations to expand the ROAP beyond its interim scope, which was coextensive with assistance provided under the State's Small Operator Assistance Program (SOAP). While Section 4.10 has no Federal counterpart, we find that its addition to the Pennsylvania program should further the State's goal of promoting the remining and subsequent reclamation of previously mined, unreclaimed areas, and will not render the program inconsistent with SMCRA or the implementing Federal regulations. Therefore, we are approving Section 4.10.

Section 4.11 authorizes the EQB to promulgate regulations that will constitute an interim reclamation and remining program that provides incentives and assistance to reclaim abandoned mine lands and lands subject to bond forfeiture. PADEP is authorized to expend moneys from the Remining Environmental Enhancement Fund for this program. Proposed and final regulations must include, without limitation, the following elements: Encouragement of reclamation of abandoned mine lands by active surface coal mine operators; encouragement of the recovery of remaining coal resources on abandoned mine lands and maximization of reclamation of such lands; development of an operator qualification system; and, encouragement of local government participation in abandoned mine land agreements. Section 4.11 requires PADEP to prepare an annual report to the environmental committees of the Pennsylvania Senate and House of Representatives. The report must include, without limitation, the following components: The number and names of operators participating in the programs created by Sections 4.8, 4.9, 4.10, 4.12, 4.13, and 18; the number of acres of reclaimed abandoned mine land, reclaimed coal refuse piles, and reclaimed bond forfeiture land; the dollar value of this reclamation; recommendations for providing additional incentives for reclamation of previously mined areas; and, any comments on the annual report submitted by the Mining and Reclamation Advisory Board. This section was not part of Pennsylvania's original 1998 amendment submission, but Pennsylvania requested that it be added in its letter to us of April 13, 2004 (Administrative Record No. PA 853.24). While Section 4.11 has no Federal counterpart, we find that its addition to the Pennsylvania program should further the State's goal of promoting the remining and subsequent reclamation of previously mined, unreclaimed areas, and will not render the program inconsistent with SMCRA or the implementing Federal regulations. Therefore, we are approving Section 4.11.

Section 4.12 provides for financial guarantees to insure reclamation. Pursuant to this section, Pennsylvania has established a Remining Financial Assurance Fund to financially assure bonding obligations for an operator engaged in remining. The section requires the EQB to promulgate regulations providing criteria for operator and site eligibility, methods for paying into the fund, the limits of use of the fund, and the procedures to follow in the event of bond forfeiture. Under this incentives program, PADEP will reserve a portion of the financial guarantees special account in the Remining Financial Assurance Fund as collateral for reclamation obligations on the remining area. Payments cannot be made from the fund until the fund is actuarially sound. The special account is funded by an initial deposit of $5 Million, as specified in Section 18(a.2) of PASMCRA, which is discussed below, and by annual payments from participating operators, as set forth in 25 Pa. Code 86.283(a). Operators making such payments are excused from the requirement to post a bond with respect to any permit for which the payments

are made. We find that these remining incentives are not inconsistent with the provisions of SMCRA, since they do not alter the basic Pennsylvania program requirement to secure a bond for surface and underground coal mining operations. Therefore, we are approving this section except for Section 4.12(b) as noted below.

Because of Section 4.12(b), which states that payments to the Remining Environmental Enhancement Fund will be reserved in a special account to be used in case of operator forfeiture and 25 Pa. Code 86.281(e), as discussed below, which states that ''additional funds from the Remining Financial Assurance Fund will be used to complete reclamation'' where the actual reclamation cost exceeds the financial guarantee amount reserved for a given permit, the remining incentives program is a type of alternative bonding system. As we note in our discussion below of 25 Pa. Code 86.281(e), neither the statute nor the regulations meets OSM's criteria for an alternative bonding system. Therefore we are not approving Section 4.12(b) to the extent it creates an alternative bonding system.

Section 4.13 provides for reclamation bond credits. A ''bond credit'' may be issued by PADEP to a licensed mine operator as a reward for the successful completion of voluntary reclamation of abandoned mine lands. The credits may be used against any reclamation bond obligation, in combination with surety or collateral bonds, except as specified in this section and in the implementing regulations at 25 Pa. Code 86.291–86.295. Credits will not be issued to operators who fail to successfully complete the reclamation as set forth in the voluntary reclamation agreements. Credits also may not be issued to operators if the operators, entities directed or controlled by the operators, or entities the operator directs or controls bear any Federal or State reclamation responsibilities for an area proposed to be reclaimed. Bond credit amounts will be underwritten solely with funds from the Remining Financial Assurance Fund established in Section 18(a) of PASMCRA, which is discussed below. The bond credit program is not an alternative bonding system, because PADEP is not obligated to expend more than the permit-specific bond credit amount reserved from the Remining Financial Assurance Fund in the event of forfeiture. Therefore, the program is essentially an adjunct to the State's conventional bonding system. While there is no Federal counterpart to this provision, we find that the allowance of financially guaranteed bond credits within a conventional bonding system does not render the Pennsylvania program less stringent than Section 509 of SMCRA, so long as all applicable bonding requirements contained in the State counterparts to Section 509 and the implementing Federal regulations at 30 CFR part 800 are met. For this reason, we are approving Section 4.13.

Section 18(a) was amended to provide for the Remining Environmental Enhancement Fund and the Remining Financial Assurance Fund. These funds were created for use in the remining and reclamation incentives created by this amendment. Specifically, the Remining Environmental Enhancement Fund is to be used to pay the costs of designating areas suitable for reclamation by remining, and operating the ROAP created in Section 4.10. The Remining Financial Assurance Fund is to be used to pay the costs of the financial guarantees program created in Section 4.12, and the bond credit program created in Section 4.13. Operator qualifications for participating in these programs are also set forth in Section 18(a.3.) There are no equivalent Federal counterparts to these funds. However, because we have found that Sections 4.10, 4.12, 4.13 and all of those sections' implementing regulations do not render the Pennsylvania program inconsistent with SMCRA, we are likewise approving the amendments to Section 18(a), including 18(a.1), (a.2) and (a.3). In its April 13, 2004, letter (Administrative Record No. PA 853.24) to us, PADEP requested the withdrawal of Subsection 18(a.4) from the amendment, because the program it creates, pertaining to areas designated suitable for reclamation through remining, has not yet been developed. Therefore, subsection 18(a.4) is not a part of this rulemaking.

Section 18(f) was amended to allow any licensed mine operator to propose reclamation of a bond forfeiture site. There are no Federal counterparts to Pennsylvania's licensing procedures and there are no restrictions in the Federal regulations on who may propose reclamation of a bond forfeiture site. The amended provisions of Section 18(f) are not inconsistent with SMCRA or the Federal regulations and therefore we are approving them.

Section 18(g) provides the internal rules for Pennsylvania's Mining and Reclamation Advisory Board (Board). This amendment modified rules pertaining to conduct of the Board. There is no Federal counterpart for this provision. However, this section is not inconsistent with the provisions of SMCRA and therefore we are approving it.

Section 18.7 provides for the Small Operator's Assistance Fund. This section was modified to limit Pennsylvania's use of SOAP funds to those uses authorized by SMCRA and OSM. This provision is not inconsistent with Section 507 (c) of SMCRA or the provisions of 30 CFR Part 795 and therefore, we are approving it.

Section 18.9 provides for search warrants. This section was added by this amendment and provides the circumstances under which an agent of PADEP may apply for a search warrant and the conditions under which a warrant may be issued. This section provides that an agent of PADEP may apply for a search warrant to examine any property, premise, place, building, book, record or other physical evidence or to conduct tests and take samples or of seizing books, records or other physical evidence. The Federal regulations at 30 CFR 840.12 provide that a search warrant is not necessary for inspection of mine operations, except that States may require warrants for building searches, nor is a warrant necessary to access or copy records required under the State program. Under the revised Section 18.9, a warrant is not necessary for these activities, but that section gives Pennsylvania the ability to secure a warrant if necessary, such as where the permittee refuses to allow entry. Additionally, Section 4.2(i) provides full entry authorization to employees of PADEP to places where surface mining activities are being conducted and also provides the ability to take samples of materials for analysis without use of a warrant. For these reasons, we have determined that this section is no less effective than the Federal regulations at 30 CFR 840.12(b) and we are approving it.

Section 18.10 was added to PASMCRA to indicate that it shall not be construed to violate any of the requirements of the Clean Water Act of 1977 or SMCRA. This provision is not inconsistent with SMCRA and therefore, we are approving it.

Pennsylvania's Regulations

25 Pa. Code 86.142 Definitions. Pennsylvania added definitions of the terms, ''annuity,'' ''trustee,'' and ''trust fund.'' ''Annuity'' is a ''financial instrument which provides a sum payable periodically over a length of time.'' ''Trustee'' is ''[o]ne in whom some estate, interest or power in or affecting property of any description is vested for the benefit of another.'' ''Trust fund'' is a ''fund held by a trustee which provides moneys to address specific reclamation or

pollution abatement requirements, or both, associated with a mining activity.'' Pennsylvania noted that these terms define new bonding instruments for bonding of surface coal mining operations. While there are no comparable instruments specifically provided for in SMCRA or the Federal regulations, we are approving the addition of trust funds and life insurance policies for use as collateral bonding instruments. The reasons for the approval are more fully set forth in our findings above with respect to PASMCRA Sections 4(d) and 4(d.2), and below at 25 Pa. Code 86.158(e) and (f).

25 Pa. Code 86.151(b). This subsection was modified to add coal preparation plants to the list of operations for which the bond liability period is specified. We are approving this section with the understanding that the period of liability for water pollution will be no less than that required by the Federal regulations at 30 CFR 800.13.

25 Pa. Code 86.151(c). This subsection was modified to clarify the liability provisions for water pollution from coal refuse disposal activities. We are approving this subsection with the same understanding as noted in 25 Pa. Code 86.151(b).

25 Pa. Code 86.151(j). This subsection was added to make it clear that an operator's responsibility to treat discharges is not affected by the release of bond. While this provision has no Federal counterpart, we are approving it pursuant to Section 505(b) of SMCRA, which states that more stringent environmental control and regulation of surface coal mining operations than is provided for by SMCRA or the Federal regulations will not be construed to be inconsistent with the Act.

25 Pa. Code 86.152. This section provides for bond adjustments under the Pennsylvania program. In the amendment, Pennsylvania added a phrase to Subsection (a) that makes it clear that PADEP may require additional bonding if the cost of reclamation, restoration or abatement work increases so that an additional amount of bond is necessary. Additionally, Pennsylvania added a phrase to Subsection (b) that clarifies that a permittee may request a reduction of the required bond amount if the estimated cost to PADEP to complete restoration or abatement responsibilities is reduced.

Pennsylvania subsequently proposed to modify 25 Pa. Code 86.152(a) as part of the changes made in response to our review of its subsidence control regulations. We approved those proposed changes in our December 9, 2004, final rule (69 FR 71528, 71534). The change we approved in the December 9, 2004, final rule eliminates the language change to Subsection (a) that Pennsylvania proposed in its December 18, 1998, submission. Therefore, subsection 86.152(a) is not a part of this rulemaking. Please see the December 9, 2004, final rule for more information on the changes made to 25 Pa. Code 86.152(a).

The changes Pennsylvania proposed at 25 Pa. Code 86.152(b) are no less effective than the bond adjustment requirements of 30 CFR 800.15(c) which provide that a permittee may request reduction of the amount of bond on submission of evidence to the regulatory authority proving that the permittee's method of operation or other circumstances reduces the estimated cost for the regulatory authority to reclaim the bonded area. Therefore, we are approving the changes to 25 Pa. Code 86.152(b).

25 Pa. Code 86.156(b). This section, which requires financial or other institutions to notify PADEP of bankruptcy of the institution or permittee, was expanded to include the new types of collateral bonds allowed by the amendments to PASMCRA (*e.g.*, annuities, trust funds, life or property and casualty insurance). This section contains the same requirements as 30 CFR 800.16(e)(1). The addition of Pennsylvania's new bonding instruments to the notification requirements does not make those requirements any less effective than the requirements in the Federal counterpart and therefore we are approving it.

25 Pa. Code 86.157. Pennsylvania made two changes to this section, which provides terms and conditions for surety bonds. The first change was made to Subsection (3) which now provides that PADEP will not accept a single bond from a surety company for a permittee if the single bond is in excess of the surety company's maximum single risk exposure. Pennsylvania added the phrase, ''* * * from a surety company for a permittee if the single bond * * * '' Pennsylvania also replaced a requirement that PADEP not accept a bond in excess of the surety's maximum single obligation unless the surety company satisfies the law exceeding that limit and replaced it with the requirement that PADEP not accept a bond that exceeds the surety company's maximum single risk exposure. While the provisions of 25 Pa. Code 86.157(3) have no specific Federal counterpart, we find that the provisions are not inconsistent with Section 509 of SMCRA or the bonding regulations at 30 CFR part 800. Therefore, we are approving this subsection.

The second change Pennsylvania made to this section was to delete former Subsection (4). This requirement provided that PADEP will not accept surety bonds from a surety company for any permittee on all permits held by that permittee in excess of three times the company's maximum single obligation. The provisions of former Section 25 Pa. Code 86.157(4) have no Federal counterpart. Therefore, we have determined that deleting that provision will not make the Pennsylvania program inconsistent with SMCRA and as a result we are approving its deletion.

Finally, Pennsylvania modified Subsection (8), formerly known as Subsection (9). This subsection allows a surety the option, subject to approval of PADEP, to perform reclamation under the bond after forfeiture, in lieu of paying the bond amount. The amendment provides that a surety that wishes to avail itself of this option must so notify PADEP within 30 days of receiving the notice of forfeiture, or PADEP may proceed to collect the bond. While this amendment has no specific Federal counterpart, we find that it is consistent with the Federal regulations at 30 CFR 800.50(a)(2)(ii), and it is therefore approved.

25 Pa. Code 86.158. Pennsylvania made three changes to this section which provides terms and conditions for collateral bonds. In Subsection (c)(6), Pennsylvania previously required that PADEP accept certificates of deposit from banks or banking institutions licensed or chartered to do business in Pennsylvania. Pennsylvania is now expressly allowing certificates of deposit from banks or banking institutions licensed or charted in the United States. There is no Federal counterpart to this requirement and we have determined that the change will not make this section inconsistent with SMCRA, or with the Federal regulations at 30 CFR 800.21. Therefore, we are approving it.

The second change Pennsylvania made to 25 Pa. Code 86.158 adds Subsection (e), which provides the requirements for the use of life insurance policies as collateral bonds. Among other things, Subsection (e) requires the policy to be fully paid, with a cash surrender value at least equal to the amount of the required bond. The policy must be irrevocably assigned to PADEP, and cannot be borrowed against or used for any purpose, nor may it bear any existing liens, loans or encumbrances at the time it is assigned to PADEP. While the Federal regulations at 30 CFR 800.21, governing collateral bonds, do not specifically provide for the use of insurance policies, we find

that these policies present no greater risks than those inherent in other forms of collateral bonding. Therefore, we conclude that the addition of Subsection (e) will not render the Pennsylvania program less effective than 30 CFR 800.21 in meeting the bonding requirements of Section 509 of SMCRA, and the subsection is hereby approved.

The third change Pennsylvania made to 25 Pa. Code 86.158 adds Subsection (f), which expressly provides the requirements for the use of annuities or trust funds as collateral bonds. Among other things, this subsection requires that the trust fund or annuity be in an amount determined by PADEP to be sufficient to meet the bonding requirements for the permittee. The trust fund or annuity must irrevocably establish PADEP as its beneficiary. Any financial institution serving as the trustee or issuing the annuity must be a State-chartered or National bank or other financial institution with trust powers, or a trust company with offices in Pennsylvania and examined or regulated by a State or Federal agency. An insurance company issuing an annuity shall be licensed or authorized to do business in Pennsylvania or shall be designated by the Insurance Commissioner as an eligible surplus lines insurer. Trust funds and annuities shall be the property of the Commonwealth of Pennsylvania. Termination of the trust fund or annuity, or release of any funds from either instrument to the permittee may occur only if permitted by PADEP. As is the case with whole life insurance policies, there are no specific provisions for trust funds or annuities in the Federal collateral bonding regulations at 30 CFR 800.21. However, with the safeguards included in the State's provision, it appears that trust funds and annuities present no greater risks than those inherent in those forms of collateral bonding expressly named in 30 CFR 800.21. Therefore, we conclude that the addition of Subsection (f) will not render the Pennsylvania program less effective than 30 CFR 800.21 in meeting the bonding requirements of Section 509 of SMCRA, and the subsection is hereby approved.

25 Pa. Code 86.161. Pennsylvania made one change to this section, which provides the requirements for phased deposits of collateral for long term operations or facilities. Pennsylvania added a sentence to the end of Subsection (3), which expressly allows interest accumulated by phased deposits of collateral to become part of the bond, and to use the interest to reduce the amount of the final phased deposit. While this provision has no precise Federal counterpart, it is consistent with 30 CFR 800.21(d)(2), which provides that interest paid on a cash account shall be applied to the bond value of the account. Also, the addition of this requirement does not make this section less effective than the provisions of 30 CFR 800.17 relating to bonding of long term facilities and structures. Therefore, we are approving the amendment to this section.

25 Pa. Code 86.168. This section provides the terms and conditions for liability insurance. Pennsylvania made several changes to this section. Among the proposed changes are the following requirements: the permittee must submit proof of liability insurance before a surface coal mining license is issued; the insurance must be written on an occurrence basis, and provide protection against bodily, rather than personal, injury; the limits of the rider for protection against explosives must be at least equivalent to the general liability limits of the policy; notification of any substantive policy changes must be made 30 days in advance; the minimum bodily injury and property damage coverages are increased from $300,000 to $500,000 per person and $1 million aggregate; and, that failure to maintain insurance will result in issuance of a notice of intent to suspend the license or permit, followed by 30 days opportunity to submit proof of coverage prior to suspension, rather than issuance of a notice of violation. The changes do not make this section any less effective than the Federal provisions of 30 CFR 800.60. Therefore, we are approving the changes to this section.

25 Pa. Code 86.171. This section provides procedures for seeking bond release. Pennsylvania's change to this section requires operators to include in the advertisement of bond release application whether any postmining pollutional discharges have occurred and requires a description of the type of treatment provided for the discharges. Pennsylvania also changed this regulation to reflect the requirement in PASMCRA that a person other than the permittee may apply for bond release, and that PADEP may release the bond after such an application if all release requirements are met. The changes to the bond release advertisement will ensure that a complete description of the minesite is available to the public for comment. While the Federal regulations do not explicitly provide for the filing of release applications by persons other than the permittee, it is not unreasonable to allow such applications, and to grant the request where the permittee has met all of the criteria for bond release. Therefore, we have determined that these changes are no less effective than the Federal requirements at 30 CFR 800.40 regarding bond release and we are approving them.

25 Pa. Code 86.174. This regulation provides the standards for release of bonds. In Subsection (a), the word ''and'' was changed to ''or,'' and consequently stated that Stage 1 bond release standards were met when, among other things, ''the entire permit area or a permit area has been backfilled or graded to the approximate original contour * * *.'' Because the Federal regulations at 30 CFR 800.40 require that backfilling *and* grading occur prior to the granting of a Stage 1 release, OSM asked Pennsylvania to explain the reason for the change from ''and'' to ''or'' (Administrative Record No. PA 853.17). PADEP responded that the change was made in error, and that a corrective amendment was published in the January 17, 2004, Pennsylvania bulletin. The change to Subsection (d) merely clarifies the point that the bond release standards contained therein are in addition to the release standards contained in subsections (a), (b), and (c) of this section. We find that the change to Subsection (d) does not render 25 Pa. Code 86.174 less effective than the Federal regulations at 30 CFR 800.40, and we are therefore approving it.

25 Pa. Code 86.175. This regulation provides standards for release of bonds. Under Subsection (a), Pennsylvania has replaced a general reference to the provisions permittees must comply with to secure bond release with the specific sections of the regulations permittees must comply with. In Subsection (b)(3), Pennsylvania removed language that indicated amount of bonds remaining at Stage 3 may be released after final inspection and procedures of 25 Pa. Code 86.171 (relating to procedures for seeking release of bond) have been satisfied.

We have found that Pennsylvania has clarified its program by adding the specific sections of the regulations for operator compliance to Subsection (a). Since the referenced regulatory sections are the approved Pennsylvania bond release provisions, the references to them do not render this section less effective than the Federal regulations and we are approving it. Additionally, we have found that the removal of the language from Subsection (b)(3) does not make the release of Stage 3 bonds less effective than the requirements at 30 CFR 800.40(c)(3). Therefore, we are approving these changes.

25 Pa. Code 86.182. This regulation provides procedures for bond

forfeitures. Pennsylvania added new subsections (a)(3) and (d) and renumbered some existing subsections. Pennsylvania added the new subsections to provide requirements for surety reclamation of forfeiture sites. Subsection (a)(3) requires that if forfeiture of the bond is necessary, PADEP must notify the surety to pay the amount of the forfeited bond to PADEP. The money is to be held in escrow with any interest accruing to PADEP pending resolution of any appeals. If a court decides the Commonwealth is not entitled to either a portion of, or the entire amount forfeited, the interest shall accrue proportionately to the surety in the amount determined to be improperly forfeited. Subsection (d) provides that a surety may reclaim the forfeited sites in lieu of paying the amount of the forfeited bond. This section provides time frames for the surety to notify PADEP of its intentions and requires the surety to enter into a consent order and agreement with PADEP if it approves the surety's proposal for reclamation.

While the new Subsection (a)(3), requiring the return of funds to the surety in the event that a court decides that PADEP was not entitled to the entire amount of the bond, has no direct Federal counterpart, we find that it is consistent with the provision at 30 CFR 800.50(d)(2) which requires the return of bond in excess of that needed for reclamation. The new Subsection (d) is no less effective than the Federal regulations governing surety reclamation at 30 CFR 800.50(a)(2)(ii). Therefore, we are approving the amendments to Section 86.182.

25 Pa. Code 86.195. This section of the regulations provides for civil penalties against corporate officers. In Subsection (b), a cross reference was revised from 25 Pa. Code 87.14 to 25 Pa. Code 86.353 (relating to identification of ownership). This change clarifies the intent of PADEP to serve notice of orders for failing to abate violations to each corporate officer listed in the surface mine operator's license application. We have determined that this section is no less effective than the requirements of 30 CFR 843.11(g) which provides for notification of corporate officers of the issuance of cessation orders. Therefore, we are approving this section.

25 Pa. Code 86.251–253, 86.261–270, and 86.281–284. These regulations under Subchapter J, Remining and Reclamation Incentives, were added by Pennsylvania to provide incentives for active coal mine operators to conduct remining and reclamation of abandoned mine lands and bond forfeiture sites by assisting the operators in meeting their obligation to bond these activities. Sections 86.251–86.253 provide definitions of terms used in the programs, the qualifications for operators to participate in the program, and the qualifications for eligibility of projects.

In 25 Pa. Code 86.261–86.270, Pennsylvania has established a Remining Operator Assistance Program (ROAP). While these sections were not part of Pennsylvania's original 1998 amendment submission, Pennsylvania requested that they be added in its letter to us of April 13, 2004 (Administrative Record No. PA 853.24). In the ROAP, which is funded by Pennsylvania's Remining Environmental Enhancement Fund, Pennsylvania will assist operators in preparing applications for remining an area by paying consultants to describe existing resources that could be affected by the remining activities, determine the probable hydrologic consequences on the proposed remining area and the adjacent area, prepare a detailed description of the proposed remining activities, and collect and provide general hydrologic information on the watershed areas. The regulations provide for a description of program services, criteria for an operator's eligibility for participation in the program, PADEP responsibilities, criteria for operator's eligibility for assistance, requirements for applications for assistance, provisions for application approval, notice of approval or denial, requirements for data collection, public records, basic qualifications for consultants and laboratories, and circumstances under which an operator must reimburse Pennsylvania for the cost of the services performed. While these provisions have no Federal counterparts, we find that their addition to the Pennsylvania program should further the State's goal of promoting the remining and subsequent reclamation of previously mined, unreclaimed areas, and will not render the program inconsistent with SMCRA or the implementing Federal regulations.

In 25 Pa. Code 86.281–86.284, Pennsylvania has established a Remining Financial Assurance Fund to financially assure bonding obligations for an operator engaged in remining. The section provides the requirements for an operator's participation, the limits of use of the fund, and the procedures to be followed in the event of bond forfeiture. Under this incentives program, PADEP will reserve a portion of the financial guarantees special account in the Remining Financial Assurance Fund as collateral for reclamation obligations on the remining area. The reserved amount will be the average cost per acre for PADEP to reclaim a mine site multiplied by the number of acres in the remining area. The special account is funded by an initial deposit of $5 million, as specified in Section 18(a.2) of PASMCRA, which is discussed above, and by annual payments from participating operators, as set forth in Section 86.283(a). Operators may not substitute these financial guarantees for existing collateral or surety bonds. Operators approved to participate in the financial guarantees program are not required to pay Pennsylvania's per acre reclamation fee required by 25 Pa. Code 86.17(e) for the remining area. Released bond amounts from a financial guarantee may not be used to cover reclamation obligations on another section of a permit.

We have found that these remining incentives are not inconsistent with the provisions of SMCRA. The basic Pennsylvania program requirement to secure a bond for surface and underground coal mining operations has not been altered by these incentives. As a result we are approving sections 86.251–86.253 (with the following explanation for the definition of ''remining area'' at 25 Pa. Code 86.252), 86.261–270, and 86.281–86.284, except for 25 Pa. Code 86.281(e).

Pennsylvania defines ''remining area,'' at 25 Pa. Code 86.252, as ''[a]n area of land on which remining will take place, *including that amount of previously undisturbed area up to 300 feet from the edge of the unreclaimed area which must be affected to achieve a final grade compatible with adjacent areas. Additional undisturbed land may be within a remining area if the permittee demonstrates that a larger area is needed to accomplish backfilling and grading of the unreclaimed area or is needed for support activities for the remining activity.* (Emphasis added) In its April 6, 2000 letter to PADEP, OSM stated this concern with the underlined language:

> As long as this definition applies only to the incentives provisions enacted at Section 4.12 of the statute, and 25 Pa. Code §§ 86.251–86.284, it is not inconsistent with the Federal regulations at 30 CFR § 816.102. However, it may be inconsistent with this Federal provision if it allows previously unmined areas to be backfilled and graded only in accordance with standards applicable to previously mined areas * * * What reclamation standards apply on the margin area? (Administrative Record No. PA 853.17).

PADEP responded to OSM's concerns by stating that the 300 feet or greater ''margin area'' is solely a financial

incentive for an applicant to consider remining an abandoned mine area. According to PADEP, all normal permitting requirements and performance standards, including backfilling, regrading and revegetation provisions, still apply to the ''margin area.'' With this clarification in hand, we find that the definition of ''remining area'' in 25 Pa. Code 86.252 does not render the Pennsylvania program less effective than the Federal regulations at 30 CFR 816.102, and we are therefore approving it.

25 Pa. Code 86.281(e) provides that on declaration of forfeiture ''additional funds from the Remining Financial Assurance Fund will be used to complete reclamation'' where the actual reclamation cost exceeds the financial guarantee amount reserved for a given permit. This appears to present, as part of a remining incentives program, a type of alternative bonding system (ABS). An ABS can be approved under 30 CFR 800.11(e) if two objectives are met: (1) The ABS must assure that the regulatory authority will have available sufficient money to complete the reclamation plan for any areas which may be in default at any time, and (2) the ABS must provide a substantial economic incentive for the permittee to comply with all reclamation provisions. With regard to participation in the Remining Financial Assurance Fund as envisioned under 25 Pa. Code 86.281, Pennsylvania's regulations fail the second objective because the program does not provide any economic incentives for permittees to comply with all reclamation provisions. While the statute and regulations provide numerous qualifying criteria for operators to enter the program, once approved for the program there are no criteria for removal from the program nor any other incentive to ensure that operators comply with all reclamation provisions. As a result, this portion of 25 Pa. Code 86.281(e) is less effective than the Federal regulations regarding an ABS and we are not approving the last sentence which states, ''If the actual cost of reclamation by the Department exceeds the amount reserved, additional funds from the Remining Financial Assurance Fund will be used to complete reclamation.''

With removal of the last sentence of 25 Pa. Code 86.281(e), the remainder of the regulation provides that on declaration of forfeiture, reserved funds will be used by PADEP to complete reclamation of the remining area in accordance with the procedures and criteria in 25 Pa. Code 86.187–86.190. The regulations at 25 Pa. Code 86.187–86.190 provide procedures to be followed in the case of bond forfeiture and require, among other things, that moneys received from the forfeiture will be used only for reclamation and water supply restoration affected by the bonded operation. Thus, without the last sentence, 25 Pa. Code 86.281(e) presents the Remining Financial Assurance Fund as a conventional bond. Our disapproval of the last sentence of 25 Pa. Code 86.281(e) renders the remainder of the regulation no less effective than the Federal regulations regarding bonding and therefore, we are approving it.

25 Pa. Code 86.291–86.295. These regulations contain the procedures for the use of an account in the Remining Financial Assurance Fund to financially assure bond obligations of an operator who has voluntarily completed a reclamation project approved by PADEP under the bond credit program. The regulations govern financial assurance for bond credit-general (86.291), bond credit application procedures and requirements, and operator qualifications (86.292), bond credit issuance (86.293), bond credit uses and limitations (86.294), and forfeiture (86.295). A ''bond credit'' will be issued to a qualified operator from the bond credit special account in the Remining Financial Assurance Fund. The credit amount reserved will be the lesser of the operator's or PADEP's cost of reclamation of the abandoned mine lands to be reclaimed under the agreement. The operator may apply the bond credit to an original or additional bond for a permit for surface or underground coal mining operations. Bond credits or parts thereof may be used on single or multiple permits, and may be used two times. However, the second use of the credit may not commence until the credit is released from its first use. Bond credits may not be used to bond water loss or long-term water treatment. Bond credits will be released prior to any other bond release on a permit area. Credits not used within 5 years of issuance will expire. Forfeited bond credit reserved amounts will be used to complete reclamation of the mine site. For a more detailed discussion of the ''bond credit'' concept, please see the finding for Section 4.13 of PASMCRA. As we noted with our finding on the statute, there are no Federal counterparts to these regulations and we find that the allowance of financially guaranteed bond credits within a conventional bonding system does not render the Pennsylvania program less stringent than Section 509 of SMCRA, so long as all applicable bonding requirements contained in the State counterparts to Section 509 and the implementing Federal regulations at 30 CFR part 800 are met. Therefore, we are approving these regulations.

25 Pa. Code 86.351–86.359 (formerly 87.12–87.21). These regulations were revised by Pennsylvania to require all coal mine operators to obtain a mine operator's license. In its program amendment submittal, Pennsylvania indicated that because of revisions to PASMCRA that require anyone mining coal to secure a license (formerly, only surface coal mine operators were required to be licensed), it moved the requirements for a mine operator's license from Chapter 87 Surface Mining of Coal to Chapter 86 Surface and Underground Coal Mining: General. Pennsylvania further noted that when moving these regulations to Chapter 86, it made minor changes in wording and punctuation for clarity. Most of these minor changes were necessary to render the licensing requirements applicable to all coal mining operations. In addition, the following substantive changes were made.

25 Pa. Code 86.353 (formerly 87.14). This regulation was amended to delete the requirement that license applications provide information pertaining to ''persons owning or controlling the coal to be mined under the proposed permit under a lease, sublease or other contract, and having the right to receive the coal after mining or having authority to determine the manner in which the proposed surface mining activity is to be conducted.''

25 Pa. Code 86.355 (formerly 87.17). The regulation was amended to require PADEP to deny a license, renewal or amendment to an applicant where:

> [t]he applicant has a partner, associate, officer, parent corporation, subsidiary corporation, contractor or subcontractor which has shown a lack of ability or intention to comply with an adjudicated proceeding, cessation order, consent order and agreement or decree, or as indicated by a written notice from the Department of a declaration of forfeiture of a person's bonds.

25 Pa. Code 86.358 (formerly 87.20). This regulation was amended by deleting failure to comply with a notice of violation as a basis upon which PADEP may suspend or revoke a license, and by adding failure to maintain public liability insurance as a permissible basis for license suspension or revocation.

Finally, Section 86.359 (formerly 87.21) was amended to provide for varying licensing fee amounts, depending on the tonnage of marketable coal per year.

As part of the license application, operators must provide information on: Identification of ownership, public liability insurance, and compliance information. These regulations provide the requirements for submitting a license application and criteria for approval of mining licenses. Section 86.355 was revised to make the criteria for approval of licenses applicable to license amendments.

The Federal regulations do not require mine operators to be licensed. However, many of the reporting requirements of Pennsylvania's license application are required by the Federal regulations (*e.g.,* ownership and compliance information and liability insurance requirements). As Pennsylvania noted, OSM had previously approved these requirements when they were part of Chapter 87. By moving these requirements to Chapter 86, with only minor changes, Pennsylvania has made it clear that these requirements apply to all those who mine coal in the State. As such, the revisions do not render these regulations inconsistent with SMCRA or the implementing regulations; therefore, we are approving them.

25 Pa. Code Chapter 87.1 and 88.1 Definitions of ''*de minimis* cost increase,'' ''water supply,'' and ''water supply survey.'' Pennsylvania has added these definitions to its program. The term ''*de minimis* cost increase'' was added to define requirements of 25 Pa. Code 87.119 related to water supply replacement for water supplies affected by surface coal mining activities and to 25 Pa. Code 88.1 related to water supply replacement for water supplies affected by anthracite coal mining operations (both underground and surface). This definition is the same as the definition of ''*de minimis* cost increase'' found at 25 Pa. Code 89.5. When we considered the water supply replacement requirements for 25 Pa. Code Chapter 89 relating to water supplies affected by underground mining activities, we determined that the definition of ''*de minimis* cost increase'' was not as effective as the Federal regulation at 30 CFR 701.5 (definition of the term, ''replacement of water supply''); because the intent of the Federal regulations was to insure that the owner or user of the water supply was made whole and that no additional costs were passed on to the water supply user. For additional rationale on why we did not approve the definition of ''*de minimis* cost increase'' as it applies to underground mining, the December 27, 2001, **Federal Register** (66 FR 67010, 67029) is incorporated by reference. Because the term ''replacement of water supply'' at 30 CFR 701.5 applies to water supplies affected by both surface and underground coal mining operations, including anthracite coal mining operations, we are not approving the definition of ''*de minimis* cost increase'' at 25 Pa. Code 87.1 and 88., as it applies to operations subject to SMCRA, for the same reasons that we did not approve the definition at 25 Pa. Code 89.5.

Pennsylvania also added and defined the term, ''water supply'' in this amendment to 25 Pa. Code 87.119 related to water supply replacement for water supplies affected by surface mining activities and to 25 Pa. Code 88.1 related to water supply replacement for water supplies affected by anthracite coal mining operations. Pennsylvania defined ''water supply'' as an existing or currently designated or currently planned source of water or facility or system for the supply of water for human consumption or for agricultural, commercial, industrial or other uses. Section 717(b) of SMCRA requires an operator to replace the water supply of owners who obtain all or part of their supply of water for domestic, agricultural, industrial, or other legitimate use from an underground or surface source when the supply has been affected by surface coal mine operations. As noted above, Pennsylvania's anthracite definitions do not distinguish between surface and underground coal mining activities. For underground coal mining activities, Section 720(b) of SMCRA is more limited than 717(b) of SMCRA in that it only requires the replacement of drinking, domestic or residential water. Pennsylvania's definition of water supply is as inclusive in the types of water supplies that are protected as those in 717(b) and 720(b) of SMCRA. As a result, we are approving this definition in both sections.

Pennsylvania also defined the term, ''water supply survey.'' Water supply survey is defined as the collection of reasonably available information for a water supply to establish certain physical characteristics of the supply. Pennsylvania only uses this term in its regulations at 25 Pa. Code 87.119 and 88.107 with regard to those circumstances that operators can rebut the presumption of liability for pollution as established in Subsection (b) of those regulations. The Federal regulations do not define the term, ''water supply survey.'' Since Pennsylvania only uses the term in conjunction with an operator's ability to rebut the presumption of liability of pollution, and as we stated earlier, rebutting the presumption of liability does not relieve operators of liability for replacement or restoration of water supplies that were impacted by their mining operations, use of the term does not make Pennsylvania's program less effective than the Federal regulations and we are approving this definition.

Finally, in the amendment submission of December 18, 1998, Pennsylvania proposed to delete the definition of the term, ''dry weather flow'' from 25 Pa. Code 87.1, 88.1, 89.5, and 90.1. However, in a letter dated December 23, 2003 (Administrative Record No. PA 853.23), Pennsylvania revised the proposed amendment to retain the definition of ''dry weather flow'' at 25 Pa. Code 87.1 as well as at 25 Pa. Code Sections 88.1, 89.5 and 90.1. As a result of Pennsylvania's December 23, 2003, letter, this rulemaking does not address this definition.

25 Pa. Code 87.11. Pennsylvania deleted this section which provided definitions of the terms, ''owned or controlled or owns or controls,'' ''principal shareholder,'' and ''surface mining.'' These terms were defined in this section for use in Pennsylvania's licensing procedures. The definitions of the terms ''owned or controlled or owns or controls'' and ''principal shareholder'' are in the regulations at 25 Pa. Code 86.1. There were some differences in the definitions of ''owned or controlled or owns or controls'' between 25 Pa. Code 87.11 and 25 Pa. Code 86.1. We approved the differences to the definition in the November 3, 2000, **Federal Register** (65 FR 66170). Since these terms appear elsewhere in the Pennsylvania program and OSM does not require the licensing of operators, we are approving their removal from 25 Pa. Code 87.11.

The definition of ''surface mining'' at 25 Pa. Code 87.11 does not appear elsewhere in the Pennsylvania program. However it was defined in this section only for Pennsylvania's use in licensing procedures. Since OSM does not require licensing of operators, we are approving the removal of this definition from the program.

25 Pa. Code 87.12–87.15 and 87.17–87.21. Pennsylvania has deleted these regulations which provide the requirements for obtaining a mining license from 25 Pa. Code Chapter 87 and moved them to 25 Pa. Code Chapter 86 (please see our findings for 25 Pa. Code 86.351–86.359 above). We are approving the deletion of these regulations from Chapter 87 for the reasons noted in our findings for 25 Pa. Code 86.351–86.359 above.

25 Pa. Code 87.16. In this amendment, Pennsylvania deleted this provision which was in place as part of the

requirements for obtaining a mine operator's license. The compliance information provisions of this section are located in 25 Pa. Code 86.63. Since these provisions appear elsewhere in the Pennsylvania program and OSM does not require the licensing of operators, we are approving the deletion of 25 Pa. Code 87.16.

25 Pa. Code 87.102, 87.103, 88.92, 88.93, 88.187, 88.188, 88.292, 88.293, 89.52, 89.53, 90.102 and 90.103. In the original amendment, Pennsylvania proposed to delete these sections from the approved program. However, in a letter dated December 23, 2003 (Administrative Record No. PA 853.23), Pennsylvania revised its proposed amendment to retain these regulations. Therefore, these sections are not addressed in this rulemaking.

25 Pa. Code 87.119, 88.107. Pennsylvania substantially modified these sections which provide for the replacement of water supplies affected by surface coal mining activities or government financed reclamation. Subsection (a) provides for water supply replacement obligations and indicates that a water supply affected by the operator of any mine or a person engaged in government financed reclamation must restore or replace the affected supply with an alternate source adequate in water quantity and quality for the purpose served by the water supply. Under the Federal regulations at 30 CFR 701.5 defining the term, ''replacement of water supply,'' an operator must restore or replace an affected water supply, on both a temporary and permanent basis with one that is equivalent to premining quantity and quality. While Pennsylvania's proposed regulation under Subsection (a) does not expressly include temporary replacement of water supplies, it does not preclude Pennsylvania from requiring temporary replacement where a permanent replacement cannot be readily implemented. To the extent the proposed provision would not require temporary replacement of water supplies when needed, it is less effective than the Federal rules and is not approved. Also, the phrase ''adequate in water quantity and quality for the purpose served by the water supply'' differs from the Federal phrase ''equivalent to premining quantity and quality.'' To the extent the proposed provision would allow the replaced water supply to be of a lesser quality and/or quantity than the premining quality and quantity, it is less effective than the Federal requirements. Therefore, we are not approving Subsection (a) for water supplies affected by surface coal mining activities to the extent that it would allow the replaced water supply to be of a lesser quantity and quality than the premining water supply or would not require temporary replacement of water supplies where needed. Otherwise, it is approved.

Subsection (a)(1) requires that a restored or replaced water supply meet the criteria listed in subsections (1)(i) through (iv), which talks about reliability, cost, maintenance and control. Subsection (i) requires the restored or replaced water supply to be as reliable as the previous water supply. Subsection (ii) requires the restored or replaced water supply to be as permanent as the previous water supply and Subsection (iii) requires the supply to not require excessive maintenance. Subsection (iv) requires that the supply provide the owner and the user with as much control and accessibility as exercised over the previous water supply. This subsection also provides that the use of a public water supply as a replacement water supply provides as much control and accessibility as the previous supply. We are approving 25 Pa. Code 87.119(a)(1)(i) through (iv) and 88.107(a)(1)(i) through (iv). There are no direct corresponding Federal regulations to these sections. We find that these sections are no less effective than the requirements found in the definition of the term ''replacement of water supply'' in the Federal regulations at 30 CFR 701.5 because they help return the water supply to its premining status.

Subsection (a)(1)(v) provides that to be adequate a restored or replaced water supply must not result in more than a de minimis cost increase to operate and maintain. As noted earlier in this rulemaking (see our finding for 25 Pa. Code 87.1 and 88.1, definition of ''de minimis cost increase''), the Director has not approved a ''de minimis cost increase.'' Accordingly, we are not approving Subsection (a)(1)(v) for the reasons noted above in 25 Pa. Code 87.1 and 88.1, the definition of the term ''de minimis cost increase.'' This disapproval is only to the extent the rule applies to surface coal mining operations.

Similarly, Subsection (a)(2) provides that operators are only required to provide for the permanent payment of increased operating and maintenance costs if those costs represent more than a de minimis cost increase. We are not approving this section to the extent that it limits an operator's obligations by use of the term ''de minimis cost increase.''

Subsection (a)(3) provides that the requirement to restore or replace an affected water supply may be waived. The Federal regulations regarding restoration or replacement of water supplies at 30 CFR 701.5, the definition of the term, ''replacement of water supply,'' indicates that replacement requirements may be satisfied by demonstrating that a suitable alternative water source is available and could feasibly be developed. However this satisfaction of a water supply replacement requirement is acceptable only if the affected water supply is not needed for the land use in existence at the time it was affected by surface mining and the supply is not needed to achieve the postmining land use. Pennsylvania's regulation at 25 Pa. Code 87.119(a)(3) allows a waiver from the restoration or replacement obligations without requiring a demonstration that a suitable alternative water source is available and could feasibly be developed. Additionally, this section could allow a waiver for water supply replacement under circumstances other than those described in the Federal definition of the term, ''replacement of water supply,'' (i.e., the water supply is not needed for the land use in existence at the time it was affected by surface mining and the supply is not needed to achieve the postmining land use). Therefore, we are not approving 25 Pa. Code 87.119(a)(3) and 88.107(a)(3) to the extent they would allow a waiver from the requirements for replacing a water supply outside the requirements of 30 CFR 701.5 regarding the definition of the term, ''replacement of water supply.''

Subsections (b), (c) and (d) provide for the presumption of liability for pollution. Essentially, Subsection (b) provides that a surface mine operator or mine owner is responsible without proof of fault, negligence or causation for all pollution, except bacterial contamination, and diminution of public or private water supplies within 1000 linear feet of the boundaries of the areas bonded and affected by coal mining operations except for haul and access roads. The operator or owner must affirmatively prove these defenses by a preponderance of the evidence. Subsection (c) only allows for five defenses to the presumption: (1) The mine operator or owner was denied access to conduct a pre-mining water supply survey; (2) the water supply is not within 1,000 linear feet of the coal mining operations, support areas [excluding haul and access roads] and overburden removal/storage areas or areas affected by surface mining activities but not bonded; (3) a pre-permit water supply survey, that is documented in the permit application,

which shows that the pollution/diminutation [sic] existed prior to the surface mining activities; (4) the pollution/diminution occurred as a result of some cause other than surface mining activities; and (5) the mine operator or owner was denied access to determine the cause of the pollution/diminution. Subsection (d) requires the mine operator or owner to notify Pennsylvania of the possible defenses, providing all information including proof of service to the landowner or water supply company that denying access for a survey could rebut the presumption.

In its amendment submission, Pennsylvania indicated that with or without the rebuttable presumption of liability, a mine operator is liable for replacing or restoring a water supply contaminated or diminished by the operator's surface mining activities. The Federal regulations do not provide for a similar presumption and do not prohibit Pennsylvania from enacting a rebuttable presumption for water. These subsections are not inconsistent with the requirements of SMCRA and the Federal regulations because they do not eliminate an operator's responsibility under Section 717(b) of SMCRA. If all the pollution or diminution existed prior to the start of the coal mining operations, then the supply was not affected by the coal mining operations. If additional pollution or diminution occurred after the start of the coal mining operations, then the operator would become liable for the damage caused to the water supply by the coal mining operations. The presumptions and the defenses to rebut the presumptions, do not relieve the regulatory authority of its initial burden. If the evidence demonstrates that a water supply is affected within the presumption area, then the operator has the burden to rebut the presumption with one of the five defenses. The ultimate burden remains with the regulatory authority. Therefore, we are approving subsections (b), (c), and (d).

Subsection (e) allows Pennsylvania to use money from the Surface Mining Conservation and Reclamation Fund for the immediate replacement of a water supply used for potable or domestic purposes when that supply is required to protect public health or safety. This section is the implementing regulation for Section 4.2(f)(3) of PASMCRA that we discussed above. We are approving this provision for the same reason that we are approving Section 4.2(f)(3) of PASMCRA.

Subsection (f) provides that PADEP will recover costs associated with restoration or replacement water supplies from the operator or mine owner. There is no similar provision in the Federal regulations. We have found that this section is not inconsistent with the requirements of SMCRA and the Federal regulations because under SMCRA an operator is responsible for replacing a water supply that was affected by the mining operations; this is just another means to achieving that purpose. Thus we are approving this subsection.

Subsection (g) provides for operator cost recovery. This section provides that if an operator successfully appeals a PADEP order, the operator may recover reasonable costs incurred in the appeal. Subsection (g) is the implementing regulation for Section 4.2(f)(5) of PASMCRA. Section 4.2(f)(5) of PASMCRA was repealed by Pennsylvania in House Bill 393 (see 66 FR 57662, 57664 [November 16, 2001] for OSM's approval of Pennsylvania's repeal of this section). Because the regulations at 25 Pa. Code 87.119(g) and 88.107(g) implement the section of the statute that was repealed, there is no statutory authority for Subsection (g) of the regulation. Therefore, we are not approving the regulations at 25 Pa. Code 87.119(g) and 88.107(g).

Subsection (h) provides that nothing in this section prevents anyone who claims water pollution or diminution of a water supply from pursuing any other remedy that may be provided for in law or equity. There is no Federal counterpart to this provision. Nonetheless, landowners or water supply users have the full protection of Chapters 87 and 88 even while pursuing other avenues of redress. Since all the protections of Chapter 87 and 88 remain available, we have determined that this provision is not inconsistent with the requirements of SMCRA or the Federal regulations and we are approving it.

Subsection (i) provides that an order issued under this section which is appealed will not be used to block issuance of new permits or the release of bonds when a stage of reclamation work is completed. This subsection is the implementing regulation for Section 4.2(f)(4) of PASMCRA that we discussed above. Please see our findings regarding that section of the statute. We are approving 25 Pa. Code 87.119(i) and 88.107(i) to the extent noted in our discussion on Section 4.2(f)(4) and not approving these regulations to the extent noted in that same discussion.

Subsection (j) provides that nothing in this section limits PADEP's authority under Section 4.2(f)(1) of PASMCRA. Section 4.2(f)(1) provides for the replacement of water supplies. Subsection (j) is not inconsistent with SMCRA or the Federal regulations and we are approving it.

Subsection (k) provides that a surface mining operation conducted under a permit issued before February 16, 1993, is not subject to subsections (b)–(i) but is subject to subsections (a) and (j). Because subsections (a) and (j) require the replacement of water supplies, we have determined that Subsection (k) is no less effective than the Federal regulations and we are approving it to the extent noted in our discussions of subsections (a) and (j).

25 Pa. Code 87.147(b)(1), 88.121(b) and 88.209(b). These subsections are the implementing regulations for the amended language of Section 4(a)(2)(C) of PASCMRA that we discussed above. As with that section, these regulations are no less effective than the ground cover revegetation requirements of the Federal regulations at 30 CFR 816.116(a) and (b)(5). Therefore, we are approving these provisions.

25 Pa. Code 87.202, the definition of the term, ''best professional judgment,'' 25 Pa. Code 87.207(b), 25 Pa. Code 88.502, the definition of the term, ''baseline pollution load,'' and 25 Pa. Code 87.207(b). These were all proposed for removal. However, in its December 23, 2003 letter, Pennsylvania informed us that it wishes to retain these provisions as part of the approved program. Accordingly, they are not a part of this rulemaking.

IV. Summary and Disposition of Comments

Public Comments

We first asked for public comments on the amendment in the March 12, 1999, **Federal Register** (64 FR 12269) (Administrative Record No. PA 853.07). We reopened the comment period in the July 8, 1999, **Federal Register** (64 FR 36828) and again in the November 24, 2004 **Federal Register** (69 FR 68285). We received public comments from: Amerikohl Mining, Inc., dated March 29, 1999 (Administrative Record No. PA 853.08); the Pennsylvania Coal Association (PCA), dated April 9, 1999 (Administrative Record No. PA 853.09); Schmid & Company Inc. (Schmid), Consulting Ecologists, dated April 9, 1999 (Administrative Record No. PA 853.10); and Citizens for Pennsylvania's Future (PennFuture), dated January 18, 2005 (Administrative Record No. 853.31).

Amerikohl Mining indicated that it was writing in support of the referenced amendment and further indicated that adoption of the proposed changes is a practical attempt to encourage significant amounts of abandoned mine

reclamation and coal recovery which would otherwise not happen.

We appreciate Amerikohl's comments and believe our approval of this amendment will lead to benefits such as those described by Amerikohl.

PCA indicated that it supports the amendment and believes the legislative and regulatory changes are important to the continued efforts to enhance remining opportunities and to encourage the reclamation of abandoned mine lands by industry. Additionally, PCA indicated that the water supply protection and replacement regulations are important for clear and consistent regulatory interpretation and enforcement.

We appreciate PCA's comments with regard to enhancing remining of abandoned mine lands. We believe our approval of this portion of the amendment will lead to additional reclamation of abandoned mine lands. With regard to PCA's comments concerning water supply replacement, we have determined that portions of Pennsylvania's submission as noted previously are not consistent with SMCRA and the Federal regulations. As a result, we have not approved portions of the water supply replacement regulations for supplies affected by surface mining operations. We have determined that changes noted above for the regulations concerning water supplies affected by surface coal mining will make Pennsylvania's program consistent and will lead to PCA's goals of consistent regulatory interpretation and enforcement.

Schmid provided numerous comments on various sections of the amendment. The comments are listed by the sections of PASMCRA and the implementing regulations that were the subject of the comments.

25 Pa. Code 86.174(a). Schmid indicates that Stage 1 reclamation standards are assumed to have been met when, among other things, drainage controls have been installed. Schmid suggests that this standard should be expanded to require some period of follow up (6 months to a year) to ensure that the installed controls are working effectively.

The only change to this section proposed by Pennsylvania was to replace a roman numeral I with the Arabic 1 (regarding Stage 1) in Subsection (a) and to insert the word ''additional'' at the beginning of Subsection (d). Neither of these changes substantively modifies this section which was previously approved by OSM. Therefore, Schmid's comment is not responsive to the amendment. Moreover, since we had previously determined that this section was no less effective than the Federal regulations and since the amendment did not substantively modify this section, we do not have a reason to require Pennsylvania to make the suggested change.

25 Pa. Code 86.251. Schmid indicates that this section is a very positive and commendable addition to Pennsylvania's program.

We appreciate Schmid's comment in this regard.

25 Pa. Code 87.1 and 88.1. Schmid commented that the definition of ''reasonably available information'' in terms of its input to a water supply survey is too subjective. Schmid questions what constitutes an extraordinary effort or an excessive sum of money.

As we noted above, Pennsylvania only uses the term ''water supply survey'' in its regulations at 25 Pa. Code 87.119 and 88.107 with regard to those circumstances that operators can rebut the presumption of liability for pollution as established in Subsection (b) of those regulations. The Federal regulations do not define the term, ''water supply survey.'' Since Pennsylvania only uses the term in conjunction with an operator's ability to rebut the presumption of liability of pollution, and rebutting the presumption of liability does not relieve operators of liability for the replacement or restoration of water supplies that were impacted by their mining operations, use of the term does not make Pennsylvania's program less effective than the Federal regulations.

Also under 25 Pa. Code 87.1, 88.1, 89.5, and 90.1, Schmid noted that the definition of dry weather flow is proposed for deletion because water discharges are believed to be more appropriately regulated by State and Federal water quality laws and by EPA regulations. Schmid agrees in part but is not confident that the two-step review process will work. Additionally, Schmid is not convinced that the mining agencies are doing a competent job of applying and enforcing water quality controls. Schmid would prefer to see all of the regulatory requirements imposed by a single regulatory entity that should be willing to accept and carry out all of its responsibilities.

In its December 23, 2003, letter to us, Pennsylvania indicated that it wished to retain the definitions of both dry weather flow and best professional judgment. OSM had previously approved the inclusion of this definition in Pennsylvania's approved program. Because Pennsylvania has rescinded its desire to remove those definitions from the approved program, it is no longer a part of the amendment and Schmid's comment is no longer responsive to the amendment as revised.

25 Pa. Code 87.102, 88.92, 88.187, 89.52, 90.102. Schmid indicated that these sections are proposed to be deleted because water discharges are believed to be more appropriately regulated by State and Federal water quality laws and by EPA regulations. Schmid also referenced its previous comments regarding the definition of dry weather flow.

As we noted in the November 24, 2004, proposed rule in which we reopened the public comment period for this amendment, Pennsylvania informed us in a December 23, 2003, letter (Administrative Record No. PA 853.23) that it wished to retain 25 Pa. Code 87.102, 88.92, 88.187, 89.52, and 90.102 as part of its approved program (69 FR at 68286–7). We have accepted Pennsylvania's request and therefore, Schmid's comment is no longer responsive to the amendment as revised.

25 Pa. Code 87.119, 88.107, and 88.292. Schmid noted that the new provisions presume a mine operator is responsible for impacts to water supplies located within 1,000 feet of the areas bonded and affected by surface mining. Schmid was concerned that these areas could not be accurately delineated and indicated that if a water supply is impacted by a mining activity, even if it is outside the 1,000 foot zone, it is within an area affected by the mining.

The Federal regulations require replacement or restoration of water supplies affected by surface mining activities regardless of the distance from the water supply to the mine. Pennsylvania's regulations require the same thing. However, Pennsylvania's regulations are more stringent than the Federal regulations in that they provide for a presumption of liability for restoration or replacement if the supply falls within the 1,000 foot zone described above. The Federal regulations do not have a presumption of liability with regard to water supplies. We have determined that this provision is not inconsistent with SMCRA and the Federal regulations and we have approved it.

25 Pa. Code 87.147(b) and 88.121(b). Schmid commented on the portion of 25 Pa. Code 87.147(b) which indicates that introduced species may be used in the revegetation process when desirable and necessary to achieve the postmining land use. Schmid indicated that PADEP should not be encouraging the use of nonnative, alien or introduced species. Schmid suggests that this section should

instead indicate that native species are to be used in the revegetation process to achieve postmining land uses, except in exceptional circumstances as determined by PADEP.

The Federal regulations at 30 CFR 816.111, like Pennsylvania's regulation at 25 Pa. Code 87.147(b), provide that introduced species may be used for establishing revegetation on disturbed areas where desirable and necessary to achieve the post mining land use. We have determined that Pennsylvania's regulation is no less effective than the Federal requirement and we are approving it.

Schmid also commented on the proposal that states that plants used for revegetation should be capable of self-regeneration and plant succession. Schmid supports this provision, but noted that to determine whether the plants in the revegetated area are capable of self-regeneration and plant succession could take several years. Schmid believes that it would be appropriate to impose a monitoring requirement to ensure that the goal of a diverse, effective, and permanent vegetative cover is achieved.

The Pennsylvania program contains monitoring requirements, such as those recommended by Schmid, in its bond release requirements at 25 Pa. Code 86.151 and 86.175. The regulations at 25 Pa. Code 86.151 provide that liability under bonds posted for a surface mine continue for five years after completion of augmented seeding, fertilization, irrigation or other work necessary to achieve permanent vegetation of the site. The regulations at 25 Pa Code 86.175 provide that Stage 3 bonds cannot be released until that liability period has expired. Pennsylvania conducts periodic inspections of reclaimed sites to monitor the vegetation success and also conducts bond release inspections prior to any final bond release. Therefore, Schmid's concerns are addressed by the approved program.

Section 4(a) of PASMCRA. Schmid indicated that the amendment requires that the permit application fee not exceed the cost of reviewing, administering, and enforcing such permit. Schmid commented that the environmental review of permit applications and the enforcement of environmental permit requirements have been woefully inadequate and that PADEP typically responds to this complaint by pointing to a lack of staff and resources. Schmid suggests that the application fees be raised as they have been too small for too long.

The only change that Pennsylvania made to Section 4(a) of PASMCRA is to change the word ''minerals'' to ''coal'' in the first sentence. The sentence now requires a person who wishes to mine coal by the surface mining method to apply for a permit. While Schmid correctly notes that Section 4(a) of PASMCRA requires that permit fees not exceed the cost of reviewing, administering and enforcing a permit, this portion of PASMCRA was not the subject of the amendment and therefore, Schmid's comment is not responsive to the amendment. Schmid submitted the same comments for Subsection 4(a)(2). However, the only amendment to that subsection establishes a ground cover standard for previously mined areas proposed to be remined. Schmid's comment is not responsive to the amended portion of Subsection 4(a)(2).

Section 4(g)(1) of PASMCRA. Schmid suggested that phase 1 bond release not occur until the operator has demonstrated, through follow-up monitoring for at least six months, that pollution treatment provisions are being effective.

As we noted in our finding on Section 4(g)(1), this provision has no precise Federal counterpart. However, we found it to be consistent with Section 519(b) of SMCRA, which requires the regulatory authority to evaluate ''whether pollution of surface and subsurface water is occurring, the probability of continuance of such pollution, and the estimated cost of abating such pollution.'' Therefore, we approved the change to Section 4(g)(1).

Section 4(g)(2) of PASMCRA. Schmid indicates that this section proposes that no bond be released so long as the lands are contributing suspended solids to streamflow or runoff outside the permit area in excess of the requirements of law or until soil productivity for prime farmlands has returned. Schmid commented that for Pennsylvania to determine whether either of these conditions exists suggests that monitoring is being done, but none is mentioned. Schmid indicated that monitoring for suspended solids and soil productivity should be required as a prerequisite to bond release. Further, Schmid recommends that there not be an either/or situation (either no suspended solids in the water or the return of productive soil); the word ''or'' should be changed to ''and.'' Schmid also noted that this section proposes that a portion of a bond may be released as long as provisions for sound future maintenance by the operator or landowner have been made with PADEP. Schmid commented that the type of provisions that qualify as sound future management should be defined.

The only change that Pennsylvania made to Section 4(g)(2) of PASMCRA was to preface the requirements for bond release of this section with the phrase ''At Stage 2.'' Our review of this section found that the addition of this phrase clarified that the bond release requirements of this section only apply to Stage 2. The actual requirements for bond release were not changed. Therefore, Schmid's comments questioning the requirements for release is not responsive to this amendment.

Section 4(g)(3) of PASMCRA. Schmid noted that this section requires that the remainder of the bond be released when the operator has made provisions for the sound future treatment of pollutional discharges, if any. Schmid commented that the type of provisions that qualify as sound future treatment of pollutional discharges should be specified.

Pennsylvania noted in the amendment submission that this portion of PASMCRA allows bond release on the remaining area in a situation where there is a postmining discharge associated with the permit and the permittee provides financial assurance for long-term treatment of the discharge to include areas used for water treatment. Pennsylvania also noted that in practice this involves replacing a reclamation bond with a financial assurance instrument that guarantees continued treatment of the postmining discharge. Finally, Pennsylvania noted that replacement of all or part of a reclamation bond can take place only when the permittee meets the appropriate standards for bond release at a stage of reclamation.

In its comments submitted as part of the amendment, Pennsylvania made it clear that all bond release requirements must be met before any replacement of bonds with a financial assurance instrument can take place. Finally, Pennsylvania noted that replacement of a standard bond with a financial assurance for the cost of long term treatment is in practical terms a bond adjustment. Since all bond release standards will be met, and since one such standard is compliance with applicable water pollution requirements, Pennsylvania has effectively defined the term ''sound future treatment of pollutional discharges.'' Therefore, Pennsylvania has addressed the subject of Schmid's concerns.

Sections 4(g.1), (g.2), and (g.3) of PASMCRA. Schmid submitted several comments on these sections. However, as noted above, Pennsylvania requested that we remove these sections from this program amendment, because its definition of ''minimal impact

postmining discharges'' and the regulations for postmining discharges were not included in the proposed program amendment. Since we are granting that request, and taking no further action in this rulemaking with respect to proposed sections 4(g.1), (g.2), and (g.3), Schmid's comments on these sections likewise need not be addressed in this rulemaking.

Section 4.2(f)(2). Schmid had several concerns with the presumption of liability provisions of this section. Schmid was concerned about delineating the areas bonded and affected by mining. Schmid was also concerned because the presumption applies to areas that are not permitted and bonded. Finally, Schmid indicated that the five defenses for presumption of liability can exonerate an operator of liability for water supply replacement.

The areas bonded and affected are determined through the mining permit maps and visual observation if the operator has affected areas beyond those delineated on the permit maps. The presumption of liability extends beyond all areas affected even if they are not permitted. While the Federal regulations do not provide for presumption of liability with regard to water supply diminution or contamination, there is nothing in the regulations prohibiting a State from enacting such presumption.

The regulations for presumption of liability for water supply replacement apply only to the presumption that an operator caused the water supply problems. These regulations do not release the operator from liability to replace water supplies damaged by their mining activities. If the operator prevails on one or more of the five defenses from presumption, it simply means that PADEP must investigate the causes of the water supply problems. The operator has only rebutted the presumption that he caused the problems. If PADEP finds, through its investigation, that the operator is responsible for the water supply problems, even after a successful presumption rebuttal, the liability for restoration or replacement remains with the operator.

Section 4.2(i) and 18(a). Schmid agreed with Pennsylvania's provisions regarding authority for entering property and the incentives for remining previously affected areas. We appreciate Schmid's comments with regard to these provisions.

Section 18(a.1)(1). Schmid indicated that the title Secretary of Environmental Resources should be changed to the Secretary of Environmental Protection.

Pennsylvania is aware of the need to change the title. In this case, use of the incorrect title does not make this provision any less effective than the Federal regulations. Therefore, we did not require Pennsylvania to make the change to the statute.

In its letter of January 18, 2005, PennFuture asked that we reopen the comment period for two weeks or in the alternative consider comments attached to the letter. The comments attached to the letter were comments that PennFuture submitted to OSM on October 15, 2002, in response to an OSM advance notice of proposed rulemaking. We decided to accept the comments attached to PennFuture's January 18, 2005, letter.

PennFuture's first comment concerned the substitution of alternative financial guarantees for traditional SMCRA bonds and how their use would affect termination of jurisdiction. PennFuture was concerned that use of a financial guarantee (such as a trust fund established to treat acid mine drainage) would lead to bond release and therefore termination of the regulatory authority's jurisdiction over a minesite. PennFuture commented that the Federal regulations allow release of a bond upon its replacement with another bond that provides equivalent coverage, but this substitution does not constitute a bond release. PennFuture also notes that an existing bond could be released upon establishment of a trust fund or other adequate financial guarantee of perpetual treatment, but that the substitute guarantee must be treated as the equivalent of a performance bond under Section 509 of SMCRA. Section 509 does not permit bond release and the termination of jurisdiction over a site where mine drainage treatment operations are occurring.

The provision at 25 Pa. Code 86.152(j), which we are approving in this rulemaking, provides that no bond release relieves the operator of the ''responsibility to treat discharges of mine drainage emanating from or hydrologically connected to the site, to the standards in the permit, the act, the Clean Streams Law, the Federal Water Pollution Control Act and the rules and regulations thereunder.'' Further, there is no bond release for that portion of the permit required for water treatment operations. Therefore, water treatment operations remain surface mining activities covered by the regulatory program. Thus, jurisdiction is not terminated.

We agree with PennFuture that bonds can be released upon establishment of a trust fund or other financial guarantee if those instruments are treated as the equivalent of a performance bond under Section 509 of SMCRA. Pennsylvania regulations at 25 Pa. Code 86.158(f) provide for the use of trust funds as collateral bonds and as we noted in our discussion of that section, these provisions make Pennsylvania's regulations regarding trust funds no less effective than any other form of collateral bond.

PennFuture's next comment concerned the form or characteristics of alternative financial guarantees. PennFuture indicated that an NPDES permit alone (as allegedly suggested by some Pennsylvania regulatory officials) would not suffice as an enforcement mechanism that could lead to bond release under the Federal termination of jurisdiction rule. PennFuture further indicated that alternative financial mechanisms must be sufficient to cover treatment costs as well as related expenses.

As we noted earlier, Pennsylvania's regulations have established annuities or trust funds as collateral bonds as noted in 25 Pa. Code 86.158(f). Those regulations provide that trust funds are established to guarantee that money is available for PADEP to pay for the treatment of postmining pollutional discharges. Through these regulations, Pennsylvania has satisfied PennFuture's concerns by requiring a form of collateral bond for treatment of discharges that will guarantee sufficient funds for treatment.

PennFuture also commented that both PADEP and citizens of Pennsylvania should be named beneficiaries of the proceeds from financial assurance mechanisms.

Pennsylvania's regulation at 25 Pa. Code 86.158(f)(2), that we approved in this rulemaking, provides that collateral bonds in the form of annuities or trust funds must, among other things, provide that PADEP is irrevocably established as the beneficiary of the trust fund or of the proceeds from the annuity. Because PADEP is a government entity serving the citizens of Pennsylvania, this provision satisfies PennFuture's concerns.

PennFuture commented that alternative bonding systems could be established to ensure treatment of discharges. While new Section 4(d.2) of PASMCRA allows PADEP to ''establish alternative financial assurance mechanisms which shall achieve the objectives and purposes of the bonding program,'' the only such ''alternatives'' contained in this amendment are site-specific trust funds, and life insurance policies. Neither of these mechanisms constitutes a true ''alternative bonding system,'' but rather both are additional forms of collateral bonds that can be used in Pennsylvania's conventional

bonding system. Therefore, this comment is not responsive to the amendment.

PennFuture commented that alternative financial mechanisms for treatment of discharges will not work if there are insufficient funds in those instruments. As we noted above, the Pennsylvania regulations require that sufficient funds be placed in the alternative financial mechanisms to guarantee that sufficient funds are in place for treatment of discharges.

Federal Agency Comments

Under 30 CFR 732.17(h)(11)(i) and Section 503(b) of SMCRA, we requested comments on the amendment from various Federal agencies with an actual or potential interest in the Pennsylvania program (Administrative Record No. PA 853.02). We received a letter dated January 19, 1999, from the U.S. Department of Agriculture, Natural Resources Conservation Service (NRCS) (Administrative Record No. PA 853.04) with two comments. The first comment indicated that the proposed re-establishment of vegetative cover appears to be adequately covered. NRCS recommended that a provision be made to insure erosion and sedimentation is adequately controlled during stabilization and afterwards if such a provision is not covered elsewhere in the existing program.

In our review of Pennsylvania's program, we found that NRCS's first comment has been addressed. The comment appears to be directed to Pennsylvania's changes to its regulations at 25 Pa. Code 87.147 and 88.121. In both cases, Pennsylvania added language that allows a reduced vegetative cover for reclamation of areas that were previously mined and not reclaimed to the standards of PASMCRA and the regulations at 25 Pa. Code Chapter 87. As noted above, we have determined that Pennsylvania's revised regulation is no less effective than the requirements of the Federal regulations at 30 CFR 816.116(a) and (b)(5). The revised language requires the vegetative cover to be adequate to control erosion and achieve the approved postmining land use. In addition, Pennsylvania's regulation at 25 Pa. Code 87.106 provides for the construction of sediment control measures to prevent runoff outside the affected area and to minimize erosion to the extent possible. Therefore, these provisions respond to NRCS's concerns that erosion and sedimentation are adequately controlled.

In its second comment, NRCS requested that the definition of the term ''water supply'' include agricultural use if it is not already covered. We have determined that Pennsylvania's program for the replacement of water supplies affected by surface mines includes those water supplies used for agricultural purposes. Our review of Pennsylvania's regulations found that the term ''water supply,'' as defined at 25 Pa. Code 87.1 and 88.1, includes an existing or currently designated or currently planned source of water or facility or system for the supply of water for agricultural uses, among others.

We received letters from the U.S. Department of Labor, Mine Safety and Health Administration's (MSHA) New Stanton Office dated January 20, 1999 (Administrative Record No. PA 853.05), and its Wilkes-Barre Office dated January 26, 1999 (Administrative Record No. PA 853.06). Both offices indicated that they did not identify any conflicts with existing MSHA regulations.

In response to the request for comments we made in the November 24, 2004, **Federal Register** Notice, MSHA's Arlington, Virginia, Office wrote us a letter dated December 20, 2004 (Administrative Record No. PA 853.28) which indicated that if the amendment were adopted, it would have no impact on the activities of the agency. We also received a letter from MSHA's Wilkes-Barre, Pennsylvania, Office dated January 7, 2005 (Administrative Record No. PA 853.30), in which MSHA indicated that it did not have any comments or concerns with the amendment.

Environmental Protection Agency (EPA) Concurrence and Comments

Pursuant to 30 CFR 732.17(h)(11)(i) and (ii), OSM is required to solicit comments and obtain the written concurrence of the EPA with respect to those provisions of the proposed program amendment that relate to air or water quality standards promulgated under the authority of the Clean Water Act (33 U.S.C. 1251 *et seq.*) or the Clean Air Act (42 U.S.C. 7401 *et seq.*).

On December 22, 1998, we asked for concurrence on the amendment (Administrative Record No. PA 853.02). EPA responded in a letter dated May 25, 2000 (Administrative Record No. PA 853.19), by indicating that it determined that the proposed amendment complies with the Clean Water Act with one exception; deletion of 25 Pa. Code sections 87.102, 88.92, 88.292, 89.52, and 90.102 that require compliance with 40 CFR part 424, Federal effluent standards for the coal mining industry. EPA noted that while comments in the amendment made it clear that Pennsylvania intends to continue to require compliance with Federal standards, a statement to that effect must be included in the text of the amendment itself. EPA provided its concurrence under the condition that either the sections requiring compliance with 40 CFR part 434 effluent standards not be deleted, or the 40 CFR part 434 effluent standards be included in the text of the amendment by reference.

As we noted in the November 24, 2004, proposed rule in which we reopened the public comment period for this amendment, Pennsylvania informed us in a December 23, 2003, letter (Administrative Record No. PA 853.23), that it wished to retain as part of its approved program the above referenced regulations which provide effluent limits. We have accepted Pennsylvania's request and therefore, the conditions of EPA's concurrence have been met.

EPA had two other comments regarding the amendment. The first comment involved the deletion of remining standards for treatment of preexisting discharges. EPA noted that the amendment deletes the requirement for applying best professional judgment (BPJ) treatment to preexisting discharges from abandoned mines during remining. EPA indicated that although Pennsylvania requires compliance with BPJ requirements under Section 301(p) of the Clean Water Act, it recommends that Pennsylvania retain the BPJ requirements in its mining regulations in order to provide guidance to remining applicants.

In its letter to us dated December 23, 2003, Pennsylvania revised the proposed amendment to retain, as part of its approved program, the regulations dealing with BPJ. Therefore, EPA's concerns in this regard have been addressed.

EPA's second comment involved Stage 3 bond release criteria. EPA noted that the proposed revisions in Sections 4(g.1) and (g.2) of PASMCRA specify the conditions for allowing Stage 3 bond release for reclaimed mines that have minimal-impact post mining discharges. EPA indicated that although the terms ''minimal impact post mining discharges'' and ''substantially improved water quality'' are somewhat vague, it does not object to the proposed revisions for Stage 3 release as long as the discharges comply with applicable National Pollutant Discharge Elimination System (NPDES) regulations and water quality standards for the receiving stream. EPA further noted that prior to final bond release, groundwater discharges from underground mines and surface water discharges from surface or underground mines are required to meet 40 CFR part

434 limit. Discharges for ground water seeps from surface mines may be addressed by BPJ rather than 40 CFR part 434 requirements in accordance with the January 28, 1992, guidance memorandum from EPA's NPDES Program Branch. EPA concluded by noting that determination of BPJ limits must be based on criteria established in 40 CFR 125.3(d) and more stringent limits may be necessary to comply with water quality standards. After reclamation and final bond release, recurrence of pollutants to waters of the U.S. through seeps or surface runoff may considered as point sources, subject to NPDES permitting and compliance with BPJ limits and water quality standards.

As we noted above, in its letter of December 23, 2003, Pennsylvania removed Sections 4(g.1)–(g.3) from its amendment because its definition of ''minimal impact postmining discharges'' and the regulations for postmining discharges were not included in the proposed program amendment. Since Pennsylvania has removed these provisions from the amendment, there is no further action required on our part. Pennsylvania's removal of these sections addresses EPA's concerns.

In response to our request for comments in the November 24, 2004, **Federal Register** Notice, EPA wrote us a letter dated December 27, 2004 (Administrative Record No. PA 853.27) indicating that it was pleased that Pennsylvania had decided to retain the language regarding effluent limits for discharges from areas disturbed by coal mining activities that originally was proposed to be removed from the Pennsylvania program. EPA further indicated that it did not have any other comments.

We appreciate EPA's review of the amendment.

State Historic Preservation Officer (SHPO) and the Advisory Council on Historic Preservation (ACHP)

Under 30 CFR 732.17(h)(4), we are required to request comments from the SHPO and the ACHP on amendments that may have an effect on historic properties. On December 22, 1998, we requested comments on Pennsylvania's amendment (Administrative Record No. PA 853.02). The Pennsylvania Historical and Museum Commission (PHMC) responded on January 14, 1999 (Administrative Record No. PA 853.03). PHMC indicated that it is primarily concerned with surface mining and reclamation projects that might impact cultural resources. PHMC noted that most reclamation projects impact areas already disturbed by mining activities and thus, this amendment to Pennsylvania's program will generally have little impact on important cultural resources. However, PHMC noted that there is potential for historic mining or industrial structures (*e.g.,* coke ovens, etc.) to be impacted by such work.

PHMC further indicated that the definition of the term ''remining area'' at 25 Pa. Code 86.252 includes a statement that additional undisturbed land may be within a remining area if the permittee demonstrates that a larger area is needed to accomplished backfilling and grading of the unreclaimed area or is needed for support activities for the remining activity. PHMC is concerned that the ability of a reclamation project to include previously undisturbed land suggests that there could be impacts to cultural resources not identified during the original mining operation. PHMC suggests that an addition be made to 25 Pa. Code 86.252 to indicate that cultural resources on previously mined and on undisturbed property within the project area must be identified and evaluated as part of the reclamation plan.

We have determined that PHMC's concerns have been addressed through areas of the approved Pennsylvania program. The Pennsylvania program provides that permittees must identify archaeological, cultural and historic resources in their permit applications. For surface mines, this requirement is found at 25 Pa. Code 87.42(2), for anthracite mines at 25 Pa. Code 88.22(2), for underground mines at 25 Pa. Code 89.38(a), and for coal refuse disposal at 25 Pa. Code 90.11(a)(3). The areas discussed under Pennsylvania's definition of ''remining area'' must be permitted and therefore, must be evaluated for the presence of archaeological, cultural and historic resources as noted in the above noted sections of the approved program. As a result, we have determined that there is no need for Pennsylvania to revise its definition of ''remining area.''

V. OSM's Decision

Based on the above findings we approve, with certain exceptions, the amendment Pennsylvania sent us on December 22, 1998, and as revised on December 23, 2003, and April 13, 2004. We are not approving the following sections to the extent noted:

4.2(f)(4) of PASMCRA. We are not approving Subsection (4) to the extent that it would allow Phase 3 bond release.

4.12(b) of PASMCRA. We are not approving Subsection (b) to the extent that it creates an alternative bonding system.

In 25 Pa. Code Chapter 86.281(e), the last sentence which states, ''If the actual cost of reclamation by PADEP exceeds the amount reserved, additional funds from the Remining Financial Assurance Fund will be used to complete reclamation'' is not approved.

25 Pa. Code Chapter 87.1 and 88.1. Definition of ''de minimis cost increase.'' The definition is not approved as it applies to coal mining activities.

25 Pa. Code 87.119, 88.107. We are not approving Subsection (a) to the extent that it would allow the replaced water supply to be of a lesser quantity and quality than the premining water supply or not provide for temporary replacement of water supplies. We are not approving Subsection (a)(1)(v) to the extent it would pass on operating and maintenance costs of a replacement water supply in excess of the operating and maintenance costs of the premining water supply to the landowner or water supply user. We are not approving Section (a)(2) to the extent that an operator is not required to provide for all increased operating and maintenance costs of a restored or replaced water supply. Finally, we are not approving Subsection (a)(3) to the extent it would allow a waiver from the requirements for replacing a water supply outside the requirements of 30 CFR 701.5 regarding the definition of the term, ''replacement of water supply.'' We are approving 87.119 (a), (a)(1)(v), (a)(2) and (a)(3) and 88.107(a), (a)(1)(v), (a)(2) and (a)(3) to the extent it applies to government financed reclamation.

25 Pa. Code 87.119(g) and 88.107(g). These sections are not approved.

25 Pa. Code 87.119(i) and 88.107(i). We are not approving Subsection (i) to the extent that it would allow Phase 3 bond release.

To implement this decision, we are amending the Federal regulations at 30 CFR 938.12, 938.15 and 938.16 which codify decisions concerning the Pennsylvania program. We find that good cause exists under 5 U.S.C. 553(d)(3) to make this final rule effective immediately. Section 503(a) of SMCRA requires that the State's program demonstrate that the State has the capability of carrying out the provisions of the Act and meeting its purposes. Making this regulation effective immediately will expedite that process. SMCRA requires consistency of State and Federal standards.

VI. Effect of Director's Decision

Section 503 of SMCRA provides that a State may not exercise jurisdiction under SMCRA unless the State program is approved by the Secretary. Similarly,

30 CFR 732.17(a) requires that any change of an approved State program must be submitted to OSM for review as a program amendment. The Federal regulations at 30 CFR 732.17(g) prohibit any changes to approved State programs that are not approved by OSM. In the oversight of the Pennsylvania program, we will recognize only the statutes, regulations, and other materials we have approved, together with any consistent implementing policies, directives, and other materials. We will require Pennsylvania to enforce only approved provisions.

VII. Procedural Determinations

Executive Order 12630—Takings

The provisions in the rule based on counterpart Federal regulations do not have takings implications. This determination is based on the analysis performed for the counterpart Federal regulations. The revisions made at the initiative of the State that do not have Federal counterparts have also been reviewed and a determination made that they do not have takings implications. This determination is based on the fact that the provisions are administrative and procedural in nature and are not expected to have a substantive effect on the regulated industry.

Executive Order 12866—Regulatory Planning and Review

This rule is exempted from review by the Office of Management and Budget under Executive Order 12866.

Executive Order 12988—Civil Justice Reform

The Department of the Interior has conducted the reviews required by Section 3 of Executive Order 12988 and has determined that this rule meets the applicable standards of Subsections (a) and (b) of that section. However, these standards are not applicable to the actual language of State regulatory programs and program amendments because each program is drafted and promulgated by a specific State, not by OSM. Under Sections 503 and 505 of SMCRA (30 U.S.C. 1253 and 1255) and the Federal regulations at 30 CFR 730.11, 732.15, and 732.17(h)(10), decisions on proposed State regulatory programs and program amendments submitted by the States must be based solely on a determination of whether the submittal is consistent with SMCRA and its implementing Federal regulations and whether the other requirements of 30 CFR Parts 730, 731, and 732 have been met.

Executive Order 13132—Federalism

This rule does not have Federalism implications. SMCRA delineates the roles of the Federal and State governments with regard to the regulation of surface coal mining and reclamation operations. One of the purposes of SMCRA is to ''establish a nationwide program to protect society and the environment from the adverse effects of surface coal mining operations.'' Section 503(a)(1) of SMCRA requires that State laws regulating surface coal mining and reclamation operations be ''in accordance with'' the requirements of SMCRA, and Section 503(a)(7) requires that State programs contain rules and regulations ''consistent with'' regulations issued by the Secretary pursuant to SMCRA.

Executive Order 13175—Consultation and Coordination With Indian Tribal Governments

In accordance with Executive Order 13175, we have evaluated the potential effects of this rule on Federally-recognized Indian tribes and have determined that the rule does not have substantial direct effects 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. Pennsylvania does not regulate any Native Tribal lands.

Executive Order 13211—Regulations That Significantly Affect the Supply, Distribution, or Use of Energy

On May 18, 2001, the President issued Executive Order 13211 which requires agencies to prepare a Statement of Energy Effects for a rule that is (1) considered significant under Executive Order 12866, and (2) likely to have a significant adverse effect on the supply, distribution, or use of energy. Because this rule is exempt from review under Executive Order 12866 and is not expected to have a significant adverse effect on the supply, distribution, or use of energy, a Statement of Energy Effects is not required.

National Environmental Policy Act

This rule does not require an environmental impact statement because Section 702(d) of SMCRA (30 U.S.C. 1292(d)) provides that agency decisions on proposed State regulatory program provisions do not constitute major Federal actions within the meaning of Section 102(2)(C) of the National Environmental Policy Act (42 U.S.C. 4332(2)(C)).

Paperwork Reduction Act

This rule does not contain information collection requirements that require approval by OMB under the Paperwork Reduction Act (44 U.S.C. 3507 *et seq.*).

Regulatory Flexibility Act

The Department of the Interior certifies that a portion of the provisions in 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 they are based upon counterpart Federal regulations for which an economic analysis was prepared and certification made that such regulations would not have a significant economic effect upon a substantial number of small entities. In making the determination as to whether this rule would have a significant economic impact, the Department relied upon the data and assumptions for the counterpart Federal regulations. The Department of the Interior also certifies that the provisions in this rule that are not based upon counterpart Federal regulations 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.*). This determination is based on the fact that the provisions are administrative and procedural in nature and are not expected to have a substantive effect on the regulated industry.

Small Business Regulatory Enforcement Fairness Act

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; (b) will not cause a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions; and (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. This determination is based upon the fact that a portion of the State provisions are based upon counterpart Federal regulations for which an analysis was prepared and a determination made that the Federal regulation was not considered a major rule. For the portion of the State provisions that is not based upon counterpart Federal regulations, this determination is based upon the fact that the State provisions are

administrative and procedural in nature and are not expected to have a substantive effect on the regulated industry.

Unfunded Mandates

This rule will not impose an unfunded mandate on State, local, or tribal governments or the private sector of $100 million or more in any given year. This determination is based upon the fact that a portion of the State submittal, which is the subject of this rule, is based upon counterpart Federal regulations for which an analysis was prepared and a determination made that the Federal regulation did not impose an unfunded mandate. For the portion of the State provisions that is not based upon counterpart Federal regulations, this determination is based upon the fact that the State provisions are administrative and procedural in nature and are not expected to have a substantive effect on the regulated industry.

List of Subjects in 30 CFR Part 938

Intergovernmental relations, Surface mining, Underground mining.

Dated: March 14, 2005.

Brent Wahlquist,

Regional Director, Appalachian Region.

■ For the reasons set out in the preamble, 30 CFR part 938 is amended as set forth below:

PART 938—PENNSYLVANIA

■ 1. The authority citation for part 938 continues to read as follows:

Authority: 30 U.S.C. 1201 *et seq.*

■ 2. Amend Section 938.12 to add paragraph (c) to read as follows:

§ 938.12 State statutory, regulatory, and proposed program amendment provisions not approved.

* * * * *

(c) We are not approving the following portions of provisions of the proposed program amendment that Pennsylvania submitted on December 18, 1998:

(1) 4.2(f)(4) of PASMCRA. We are not approving Subsection (4) to the extent that it would allow Phase 3 bond release.

(2) 4.12(b) of PASMCRA. We are not approving Subsection (b) to the extent that it creates an alternative bonding system.

(3) 25 Pa. Code 86.281(e). The last sentence which states, ''If the actual cost of reclamation by the Department exceeds the amount reserved, additional funds from the Remining Financial Assurance Fund will be used to complete reclamation'' is not approved.

(4) 25 Pa. Code 87.1 and 88.1, Definition of ''de minimis cost increase.'' The definition is not approved as it applies to coal mining activities.

(5) 25 Pa. Code 87.119 and 88.107. With regard to coal mining activities, we are not approving Subsection (a) to the extent that it would allow the replaced water supply to be of a lesser quantity and quality than the premining water supply or does not provide for temporary replacement of water supplies. We are not approving Subsection (a)(1)(v) to the extent it would pass on operating and maintenance costs of a replacement water supply in excess of the operating and maintenance costs of the premining water supply to the landowner or water supply user. We are not approving Section (a)(2) to the extent that an operator is not required to provide for all increased operating and maintenance costs of a restored or replaced water supply. Finally, we are not approving Subsection (a)(3) to the extent it would allow a waiver from the requirements for replacing a water supply outside the requirements of 30 CFR 701.5 regarding the definition of the term, ''replacement of water supply.''

(6) 25 Pa. Code 87.119(g) and 88.107(g). These sections are not approved.

(7) 25 Pa. Code 87.119(i) and 88.107(i). We are not approving Subsection (i) to the extent that it would allow Phase 3 bond release.

■ 3. Section 938.15 is amended in the table by adding a new entry in chronological order by ''Date of final publication'' to read as follows:

§ 938.15 Approval of Pennsylvania regulatory program amendments.

* * * * *

Original amendment submission date	Date of final publication	Citation/description
* *	* *	* * *
December 18, 1998	May 13, 2005	In PASMCRA, Section 3 Definition of ''Total Project Costs;'' Sections 3.1; 4(a), (d), (d.2), (g), and (h); 4.2(f) (partial approval); 4.2(i); 4.6(i) and (j); 4.7; 4.10; 4.11; 4.12 (partial approval); 4.13; 18(a), (a.1), (a.2), and (a.3); 18(f), (g)(4) and (5); 18.7; 18.9; 18.10. 25 Pa. Code 86.142 Definitions of ''Annuity,'' ''Trustee,'' and ''Trust Fund;'' 25 Pa. Code 86.151(b), (c), and (j); 86.152(a) and (b); 86.156(b); 86.157(3), (4), (5), (6), (7), and (8); 86.158(c)(6), (e), (f), and (g); 86.161(3); 86.168; 86.171(a), (b)(6) and (7), (f)(4), (g), and (h); 86.174(a) and (d); 86.175(a) and (b)(3); 86.182(a)(3) and (4), (d), (e), (f), (g); 86.195(b), 86.251–253; 86.261–86.270; 86.281(a)–(d); 86.281(e) (partial approval); 86.282–284; 86.291–295; 86.351–359. 25 Pa. Code 87.1 Definitions of ''Water Supply,'' ''Water Supply Survey''; deletion of 87.11–21; 87.119 (partial approval); 87.147(b). 25 Pa. Code 88.1 Definitions of ''Water Supply,'' ''Water Supply Survey''; 88.107 (partial approval); 88.121(b); 88.209(b).

[FR Doc. 05–9570 Filed 5–12–05; 8:45 am]

BILLING CODE 4310–05–P

DEPARTMENT OF DEFENSE

Department of the Navy

32 CFR Part 701

[Secretary of the Navy Instruction 5211.5]

Privacy Act; Implementation

AGENCY: Department of the Navy, DoD.

ACTION: Final rule.

SUMMARY: The Department of the Navy is exempting the records contained in the Privacy Act system of records notice N12410–2, entitled—NCIS Training Academy Records. The exemption is intended to preserve the objectivity and/or fairness of the Naval Criminal Investigative Service (NCIS) test or examination process.

EFFECTIVE DATE: April 27, 2005.

FOR FURTHER INFORMATION CONTACT: Mrs. Doris Lama at (202) 685–6545 or DSN 325–6545.

SUPPLEMENTARY INFORMATION: The proposed rule was published on February 25, 2005, at 70 FR 9262. No comments were received; therefore, the Department of the Navy is adopting the rule as published below. Executive Order 12866, ''Regulatory Planning and Review''. The Director of Administration and Management, Office of the Secretary of Defense, hereby determines that Privacy Act rules for the Department of Defense are not significant rules. The rules do not (1) Have an annual effect on the economy of $100 million or more or adversely affect in a material way the economy; a sector of the economy; productivity; competition; jobs; the environment; public health or safety; or State, local, or tribal governments or communities; (2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another Agency; (3) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs, or the rights and obligations of recipients thereof; or (4) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in this Executive order.

Public Law 96–354, ''Regulatory Flexibility Act'' (5 U.S.C. Chapter 6)

The Director of Administration and Management, Office of the Secretary of Defense, hereby certifies that Privacy Act rules for the Department of Defense do not have significant economic impact on a substantial number of small entities because they are concerned only with the administration of Privacy Act systems of records within the Department of Defense.

Public Law 96–511, ''Paperwork Reduction Act'' (44 U.S.C. Chapter 35)

The Director of Administration and Management, Office of the Secretary of Defense, hereby certifies that Privacy Act rules for the Department of Defense impose no information requirements beyond the Department of Defense and that the information collected within the Department of Defense is necessary and consistent with 5 U.S.C. 552a, known as the Privacy Act of 1974.

Section 202, Public Law 104–4, ''Unfunded Mandates Reform Act''

The Director of Administration and Management, Office of the Secretary of Defense, hereby certifies that the Privacy Act rulemaking for the Department of Defense does not involve a Federal mandate that may result in the expenditure by State, local and tribal governments, in the aggregate, or by the private sector, of $100 million or more and that such rulemaking will not significantly or uniquely affect small governments.

Executive Order 13132, ''Federalism''

The Director of Administration and Management, Office of the Secretary of Defense, hereby certifies that the Privacy Act rules for the Department of Defense do not have federalism implications. The rules do 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.

List of Subjects in 32 CFR Part 701

Privacy.

PART 701—[AMENDED]

■ 1. The authority citation for 32 CFR part 701, Subpart G continues to read as follows:

Authority: Pub. L. 93–579, 88 Stat. 1896 (5 U.S.C. 552a).

■ 2. Section 701.118, is amended by adding paragraph (h) to read as follows:

§ 701.118 Exemptions for specific Navy record systems.

* * * * *

(h) *System identifier and name:* N12410–2, NCIS Training Academy Records.

(1) *Exemption:* (i) Testing or examination material used solely to determine individual qualifications for appointment or promotion in the federal or military service, if the disclosure would compromise the objectivity or fairness of the test or examination process may be exempt pursuant to 5 U.S.C. 552a(k)(6), if the disclosure would compromise the objectivity or fairness of the test or examination process. Therefore, information within this system of records may be exempt pursuant to 5 U.S.C. 552a, subsection (d).

(ii) *Portions of this system of records are exempt from the following subsection of the Privacy Act:* (d).

(2) *Authority:* 5 U.S.C. 552a(k)(6).

(3) *Reason:* From subsection (d) because this system relates to testing or examination materials used solely to determine individual qualifications for appointment or promotion in the Federal service. Access to or amendment of this information by the data subject would compromise the objectivity and fairness of the NCIS test and evaluation system.

* * * * *

Dated: May 5, 2005.

Jeannette Owings-Ballard,

OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 05–9418 Filed 5–12–05; 8:45 am]

BILLING CODE 5001–01–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 229

[Docket No. 030221039–5125–21; I.D. 050605A]

Taking of Marine Mammals Incidental to Commercial Fishing Operations; Atlantic Large Whale Take Reduction Plan (ALWTRP)

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

ACTION: Temporary rule.

SUMMARY: The Assistant Administrator for Fisheries (AA), NOAA, announces temporary restrictions consistent with the requirements of the ALWTRP's implementing regulations. These regulations apply to lobster trap/pot and anchored gillnet fishermen in an area totaling approximately 1,235 nm^2 (4,236 km^2), southeast of Chatham, MA for 15 days. The purpose of this action is to provide protection to an aggregation of northern right whales (right whales).

DATES: Effective beginning at 0001 hours May 15, 2005, through 2400 hours May 29, 2005.

ADDRESSES: Copies of the proposed and final Dynamic Area Management (DAM) rules, Environmental Assessments

(EAs), Atlantic Large Whale Take Reduction Team (ALWTRT) meeting summaries, and progress reports on implementation of the ALWTRP may also be obtained by writing Diane Borggaard, NMFS/Northeast Region, One Blackburn Drive, Gloucester, MA 01930.

FOR FURTHER INFORMATION CONTACT: Diane Borggaard, NMFS/Northeast Region, 978–281–9300 x6503; or Kristy Long, NMFS, Office of Protected Resources, 301–713–1401.

SUPPLEMENTARY INFORMATION:

Electronic Access

Several of the background documents for the ALWTRP and the take reduction planning process can be downloaded from the ALWTRP web site at *http://www.nero.noaa.gov/whaletrp/*.

Background

The ALWTRP was developed pursuant to section 118 of the Marine Mammal Protection Act (MMPA) to reduce the incidental mortality and serious injury of three endangered species of whales (right, fin, and humpback) due to incidental interaction with commercial fishing activities. In addition, the measures identified in the ALWTRP would provide conservation benefits to a fourth species (minke), which are neither listed as endangered nor threatened under the Endangered Species Act (ESA). The ALWTRP, implemented through regulations codified at 50 CFR 229.32, relies on a combination of fishing gear modifications and time/area closures to reduce the risk of whales becoming entangled in commercial fishing gear (and potentially suffering serious injury or mortality as a result).

On January 9, 2002, NMFS published the final rule to implement the ALWTRP's DAM program (67 FR 1133). On August 26, 2003, NMFS amended the regulations by publishing a final rule, which specifically identified gear modifications that may be allowed in a DAM zone (68 FR 51195). The DAM program provides specific authority for NMFS to restrict temporarily on an expedited basis the use of lobster trap/pot and anchored gillnet fishing gear in areas north of 40° N. lat. to protect right whales. Under the DAM program, NMFS may: (1) require the removal of all lobster trap/pot and anchored gillnet fishing gear for a 15–day period; (2) allow lobster trap/pot and anchored gillnet fishing within a DAM zone with gear modifications determined by NMFS to sufficiently reduce the risk of entanglement; and/or (3) issue an alert to fishermen requesting the voluntary removal of all lobster trap/pot and anchored gillnet gear for a 15–day period and asking fishermen not to set any additional gear in the DAM zone during the 15–day period.

A DAM zone is triggered when NMFS receives a reliable report from a qualified individual of three or more right whales sighted within an area (75 nm^2 (139 km^2)) such that right whale density is equal to or greater than 0.04 right whales per nm^2 (1.85 km^2). A qualified individual is an individual ascertained by NMFS to be reasonably able, through training or experience, to identify a right whale. Such individuals include, but are not limited to, NMFS staff, U.S. Coast Guard and Navy personnel trained in whale identification, scientific research survey personnel, whale watch operators and naturalists, and mariners trained in whale species identification through disentanglement training or some other training program deemed adequate by NMFS. A reliable report would be a credible right whale sighting.

On May 4, 2005, an aerial survey reported a sighting of five right whales in the proximity 41° 12.4′ N. lat. and 69° 24.4′ W. long. This position lies southeast of Chatham, MA. After conducting an investigation, NMFS ascertained that the report came from a qualified individual and determined that the report was reliable. Thus, NMFS has received a reliable report from a qualified individual of the requisite right whale density to trigger the DAM provisions of the ALWTRP.

Once a DAM zone is triggered, NMFS determines whether to impose restrictions on fishing and/or fishing gear in the zone. This determination is based on the following factors, including but not limited to: the location of the DAM zone with respect to other fishery closure areas, weather conditions as they relate to the safety of human life at sea, the type and amount of gear already present in the area, and a review of recent right whale entanglement and mortality data.

NMFS has reviewed the factors and management options noted above relative to the DAM under consideration. As a result of this review, NMFS prohibits lobster trap/pot and anchored gillnet gear in this area during the 15–day restricted period unless it is modified in the manner described in this temporary rule.

In May, the DAM Zone overlaps SAM East and the Great South Channel Critical Habitat, and because the May 4 right whale sightings occurred within the area of a previously identified DAM zone triggered by the April 5, 2005, aerial-based sighting of 9 right whales (70 FR 20484, April 20, 2005), the coordinates for this DAM zone will encompass the same area, which is bound by the following coordinates:

41°52.8′ N., 69°57.5′ W. (NW Corner)
41°52.8′ N., 69°24′ W.
41°48.9′ N., 69°2′′ W.
41°40′ N., 69°45′ W.
41°09′ N., 69°14.4′ W.
41°09′ N., 70°07′ W.
41°14.4′ N., 70°07′ W. and follow the Nantucket coastline eastward, northward and then southward to
41°18′ N., 70°07′ W.
41°39.6′ N., 70°07′ W. and follow the Cape Cod coastline eastward and then northward back to NW Corner

In addition to those gear modifications currently implemented under the ALWTRP at 50 CFR 229.32, the following gear modifications are required in the DAM zone. If the requirements and exceptions for gear modifications in the DAM zone, as described below, differ from other ALWTRP requirements for any overlapping areas and times, then the more restrictive requirements will apply in the DAM zone. Special note for gillnet fisherman: During May, a portion of this DAM zone overlaps the Northeast multispecies seasonal Georges Bank Closure Area found at 50 CFR 648.80(g). Due to this closure, sink gillnet gear is prohibited from this portion of the DAM zone during the month of May.

Lobster Trap/Pot Gear

Fishermen utilizing lobster trap/pot gear within the portion of the Northern Nearshore Lobster Waters and Northern Inshore State Lobster Waters that overlap with the DAM zone are required to utilize all of the following gear modifications while the DAM zone is in effect:

1. Groundlines must be made of either sinking or neutrally buoyant line. Floating groundlines are prohibited.

2. All buoy lines must be made of either sinking or neutrally buoyant line, except the bottom portion of the line, which may be a section of floating line not to exceed one-third the overall length of the buoy line.

3. Fishermen are allowed to use two buoy lines per trawl.

4. A weak link with a maximum breaking strength of 600 lb (272.4 kg) must be placed at all buoys.

Fishermen utilizing lobster trap/pot gear within the portion of the Offshore Lobster Waters Area that overlap with the DAM zone are required to utilize all of the following gear modifications while the DAM zone is in effect:

1. Groundlines must be made of either sinking or neutrally buoyant line. Floating groundlines are prohibited.

2. All buoy lines must be made of either sinking or neutrally buoyant line, except the bottom portion of the line, which may be a section of floating line not to exceed one-third the overall length of the buoy line.

3. Fishermen are allowed to use two buoy lines per trawl.

4. A weak link with a maximum breaking strength of 1,500 lb (680.4 kg) must be placed at all buoys.

Anchored Gillnet Gear

Fishermen utilizing anchored gillnet gear within the portion of the Other Northeast Gillnet Waters that overlap with the DAM zone are required to utilize all the following gear modifications while the DAM zone is in effect:

1. Groundlines must be made of either sinking or neutrally buoyant line. Floating groundlines are prohibited.

2. All buoy lines must be made of either sinking or neutrally buoyant line, except the bottom portion of the line, which may be a section of floating line not to exceed one-third the overall length of the buoy line.

3. Fishermen are allowed to use two buoy lines per string.

4. Each net panel must have a total of five weak links with a maximum breaking strength of 1,100 lb (498.8 kg). Net panels are typically 50 fathoms (91.4 m) in length, but the weak link requirements would apply to all variations in panel size. These weak links must include three floatline weak links. The placement of the weak links on the floatline must be: one at the center of the net panel and one each as close as possible to each of the bridle ends of the net panel. The remaining two weak links must be placed in the center of each of the up and down lines at the panel ends.

5. All anchored gillnets, regardless of the number of net panels, must be securely anchored with the holding power of at least a 22–lb (10.0–kg) Danforth-style anchor at each end of the net string.

The restrictions will be in effect beginning at 0001 hours May 15, 2005, through 2400 hours May 29, 2005, unless terminated sooner or extended by NMFS through another notification in the **Federal Register**.

The restrictions will be announced to state officials, fishermen, ALWTRT members, and other interested parties through e-mail, phone contact, NOAA website, and other appropriate media immediately upon filing with the **Federal Register**.

Classification

In accordance with section 118(f)(9) of the MMPA, the Assistant Administrator (AA) for Fisheries has determined that this action is necessary to implement a take reduction plan to protect North Atlantic right whales.

Environmental Assessments for the DAM program were prepared on December 28, 2001 and August 6, 2003. This action falls within the scope of the analyses of these EAs, which are available from the agency upon request.

NMFS provided prior notice and an opportunity for public comment on the regulations establishing the criteria and procedures for implementing a DAM zone. Providing prior notice and opportunity for comment on this action, pursuant to those regulations, would be impracticable because it would prevent NMFS from executing its functions to protect and reduce serious injury and mortality of endangered right whales. The regulations establishing the DAM program are designed to enable the agency to help protect unexpected concentrations of right whales. In order to meet the goals of the DAM program, the agency needs to be able to create a DAM zone and implement restrictions on fishing gear as soon as possible once the criteria are triggered and NMFS determines that a DAM restricted zone is appropriate. If NMFS were to provide prior notice and an opportunity for public comment upon the creation of a DAM restricted zone, the aggregated right whales would be vulnerable to entanglement which could result in serious injury and mortality. Additionally, the right whales would most likely move on to another location before NMFS could implement the restrictions designed to protect them, thereby rendering the action obsolete. Therefore, pursuant to 5 U.S.C. 553(b)(B), the AA finds that good cause exists to waive prior notice and an opportunity to comment on this action to implement a DAM restricted zone to reduce the risk of entanglement of endangered right whales in commercial lobster trap/pot and anchored gillnet gear as such procedures would be impracticable.

For the same reasons, the AA finds that, under 5 U.S.C. 553(d)(3), good cause exists to waive the 30–day delay in effective date. If NMFS were to delay for 30 days the effective date of this action, the aggregated right whales would be vulnerable to entanglement, which could cause serious injury and mortality. Additionally, right whales would likely move to another location between the time NMFS approved the action creating the DAM restricted zone and the time it went into effect, thereby rendering the action obsolete and ineffective. Nevertheless, NMFS recognizes the need for fishermen to have time to either modify or remove (if not in compliance with the required restrictions) their gear from a DAM zone once one is approved. Thus, NMFS makes this action effective 2 days after the date of publication of this document in the **Federal Register**. NMFS will also endeavor to provide notice of this action to fishermen through other means as soon as the AA approves it, thereby providing approximately 3 additional days of notice while the Office of the Federal Register processes the document for publication.

NMFS determined that the regulations establishing the DAM program and actions such as this one taken pursuant to those regulations are consistent to the maximum extent practicable with the enforceable policies of the approved coastal management program of the U.S. Atlantic coastal states. This determination was submitted for review by the responsible state agencies under section 307 of the Coastal Zone Management Act. Following state review of the regulations creating the DAM program, no state disagreed with NMFS' conclusion that the DAM program is consistent to the maximum extent practicable with the enforceable policies of the approved coastal management program for that state.

The DAM program under which NMFS is taking this action contains policies with federalism implications warranting preparation of a federalism assessment under Executive Order 13132. Accordingly, in October 2001 and March 2003, the Assistant Secretary for Intergovernmental and Legislative Affairs, Department of Commerce, provided notice of the DAM program and its amendments to the appropriate elected officials in states to be affected by actions taken pursuant to the DAM program. Federalism issues raised by state officials were addressed in the final rules implementing the DAM program. A copy of the federalism Summary Impact Statement for the final rules is available upon request (**ADDRESSES**).

The rule implementing the DAM program has been determined to be not significant under Executive Order 12866.

Authority: 16 U.S.C. 1361 *et seq.* and 50 CFR 229.32(g)(3)

Dated: May 9, 2005.

John Oliver,

Deputy Assistant Administrator for Operations, National Marine Fisheries Service.

[FR Doc. 05–9602 Filed 5–12–05; 2:34 pm]

BILLING CODE 3510–22–S

Proposed Rules

Federal Register
Vol. 70, No. 92
Friday, May 13, 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 HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Part 101

[Docket No. 2004P–0294]

Food Labeling; Health Claims; Dietary Noncariogenic Carbohydrate Sweeteners and Dental Caries

AGENCY: Food and Drug Administration, HHS.

ACTION: Proposed rule.

SUMMARY: The Food and Drug Administration (FDA) is proposing to amend the regulation authorizing a health claim on noncariogenic carbohydrate sweeteners and dental caries, i.e., tooth decay, to include sucralose, a nonnutritive sweetener. Similar to the sweeteners currently authorized to make a health claim, sucralose is used as a sugar substitute that is minimally fermented, relative to sugar, by oral microorganisms and thus does not contribute to production of organic acids by plaque bacteria as do the fermentable sugars for which it is a substitute. FDA is taking this action in response to a health claim petition filed by McNeil Nutritionals. The agency previously concluded that there was significant scientific agreement for the relationship between slowly fermented carbohydrate sugar substitutes, specifically certain sugar alcohols, and the nonpromotion of dental caries. Based on the totality of publicly available scientific evidence, FDA now has determined that the nonnutritive sweetener sucralose, like the sugar alcohols, is not fermented by oral bacteria to an extent sufficient to lower dental plaque pH to levels that would contribute to the erosion of dental enamel. Therefore, FDA has concluded that sucralose does not promote dental caries, and it is proposing to amend the regulation authorizing a health claim relating certain noncariogenic sweeteners and nonpromotion of dental caries to include sucralose as a substance eligible for the claim.

DATES: Submit written or electronic comments by July 27, 2005. See section XII of this document for the proposed effective date of a final rule based on this document.

ADDRESSES: You may submit comments, identified by the Docket Number 2004P–0294, by any of the following methods:

- Federal eRulemaking Portal: *http://www.regulations.gov*. Follow the instructions for submitting comments.
- Agency Web site: *http://www.fda.gov/dockets/ecomments*. Follow the instructions for submitting comments on the agency Web site.
- E-mail: *fdadockets@oc.fda.gov*. Include Docket No. 2004P–0294 and/or RIN number ___ in the subject line of your e-mail message.
- FAX: 301–827–6870
- Mail/Hand delivery/Courier [for paper, disk, or CD-ROM submissions]: Division of Dockets Management (HFA–305), 5630 Fishers Lane, rm. 1061, Rockville, MD 20852.

Instructions: All submissions received must include the agency name and Docket Number or Regulatory Information Number (RIN) for this rulemaking. All comments received will be posted without change to *http://www.fda.gov/ohrms/dockets/default.htm*, including any personal information provided. For detailed instructions on submitting comments and additional information on the rulemaking process, see the ''Comments'' 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.fda.gov/ohrms/dockets/default.htm* and insert the docket number, found in brackets in the heading of this document, into the ''Search'' box and follow prompts and/or go to the Division of Dockets Management, 5630 Fishers Lane, room 1061, Rockville, MD 20852.

FOR FURTHER INFORMATION CONTACT: James E. Hoadley, Center for Food Safety and Applied Nutrition (HFS–830), Food and Drug Administration, 5100 Paint Branch Pkwy., College Park, MD 20740–3835, 301–436–1450.

SUPPLEMENTARY INFORMATION:

I. Background

The Nutrition Labeling and Education Act of 1990 (the 1990 amendments) (Public Law 101–535) amended the Federal Food, Drug, and Cosmetic Act (the act) in a number of important respects. One aspect of the 1990 amendments was that they clarified FDA's authority to regulate health claims on food labels and in food labeling.

FDA issued several new regulations in 1993 that implemented the health claim provisions of the 1990 amendments. Among these were § 101.14 *Health claims: general requirements* (21 CFR 101.14) (58 FR 2478, January 6, 1993) and § 101.70 *Petitions for health claims* (21 CFR 101.70) (58 FR 2478), which established a process for petitioning the agency to authorize health claims about substance-disease relationships and set out the types of information that a health claim petition must include. These regulations became effective on May 8, 1993.

The final rule that established § 101.80 (21 CFR 101.80) (61 FR 43433, August 23, 1996), relating sugar alcohols to the nonpromotion of dental caries (the dental caries health claim), completed the first rulemaking that we conducted in response to a health claim petition (Docket No. 1995P–0003).[1] Section 101.80(a) describes the role of fermentable carbohydrates, i.e., dietary sugars and starches, in the development of dental caries. The fermentation of these carbohydrates by microorganisms produces organic acids on the surface of teeth, which contribute to the development of dental caries through erosion of tooth enamel. Section 101.80(b) explains that noncariogenic carbohydrate sweeteners are fermented by oral microorganisms more slowly than fermentable carbohydrates. Consequently, the rate of acid production is lower than that from fermentable carbohydrates. Noncariogenic carbohydrate sweeteners, when used in place of fermentable sugars, are therefore useful in that they do not promote dental caries as do the sugars they replace. Section 101.80(c) describes the specific requirements of the dental caries health claim, including

[1]Section 101.80 was subsequently amended, to expand the substances which are the subject of the claim, to include noncariogenic carbohydrate sweeteners other than sugar alcohols (67 FR 71461, December 2, 2002).

the requirement that the food bearing the claim be ''sugar free'' (§ 101.80(c)(2)(iii)(A)). This section also specifies 10 noncariogenic carbohydrate sweeteners (xylitol, sorbitol, mannitol, maltitol, isomalt, lactitol, hydrogenated starch hydrolysates, hydrogenated glucose syrups, erythritol, and D-tagatose) that are eligible for the claim (§ 101.80(c)(2)(ii)). Section 101.80(c)(2)(iii)(C) further states that:

When carbohydrates other than those listed in paragraph (c)(2)(ii) of this section are present in the food, the food shall not lower plaque pH below 5.7 by bacterial fermentation either during consumption, or up to 30 minutes after consumption, as measured by the indwelling plaque pH test found in ''Identification of Low Caries Risk Dietary Components * * *.''

In the dental caries health claim final rule, the agency stated that for other noncariogenic carbohydrate sweeteners to be included in the list of sweeteners eligible for the health claim, a petitioner must show how the substance conforms to the requirements of §§ 101.14(b) and 101.80 and must provide evidence that the new noncariogenic carbohydrate sweetener will not lower dental plaque pH below 5.7 (61 FR 43433 at 43442).

In 1997, the agency amended the dental caries health claim to include erythritol as an additional noncariogenic carbohydrate sweetener eligible for the claim (62 FR 63653, December 2, 1997). The health claim petition to add erythritol to § 101.80 (Docket No. 1997P–0206) presented scientific data from a rodent cariogenicity study and from a clinical indwelling plaque pH test of erythritol. The agency was satisfied that the results of these two studies were consistent with the results of the studies that investigated the cariogenic potential of the substances previously listed in § 101.80(c)(2)(ii)(A) and that erythritol met the requirements of § 101.14(b). Therefore, erythritol was added to the list of sugar alcohols eligible as a noncariogenic carbohydrate sweetener. In 2002, the agency again amended § 101.80 (67 FR 71461) to add D-tagatose, a non-fermentable sugar, to the list of substances eligible for the health claim. This action was based upon clinical evidence that ingestion of D-tagatose would not lower plaque pH below 5.7 as measured by the indwelling plaque pH method. Because the sweetener added to the health claim in the 2002 amendment was not a sugar alcohol, the 2002 amendment also changed the substance in the title of the regulation from ''sugar alcohols'' to ''noncariogenic carbohydrate sweeteners.''

II. Petition and Grounds

A. The Petition

On April 2, 2004, McNeil Nutritionals, of New Brunswick, NJ (petitioner) submitted a petition under section 403(r)(4) of the act (21 U.S.C. 343(r)(4)) (Ref. 1). The petition requested that we amend § 101.80 to include the nonnutritive sweetener sucralose as one of the substances eligible to bear the dental caries health claim. On July 9, 2004, we notified the petitioner that we had completed our initial review of the petition and that the petition had been filed for further action in accordance with section 403(r)(4) of the act. If the agency does not act, by either denying the petition or issuing a proposed regulation to authorize the health claim, within 90 days of the date of filing for further action, the petition is deemed to be denied unless an extension is mutually agreed upon by the agency and the petitioner (section 403(r)(4)(A)(i) of the act and § 101.70(j)(3)(iii)). On April 5, 2005, FDA and the petitioner mutually agreed to extend the deadline to publish a proposed regulation until October 7, 2005.

B. Nature of the Substance

The petition has identified the substance, which is the subject of the petitioned health claim, to be sucralose (CAS Reg. No. 56038–13–2), a substituted carbohydrate in which there is a selective replacement of three hydroxyl groups on a sucrose molecule with chlorine atoms. The food additive use of sucralose is as a general purpose sweetener in both conventional foods and dietary supplements (§ 172.831 (21 CFR 172.831)). Sucralose, used as a general purpose sweetening food additive, is a specific component of food. The term ''substance'' within the meaning of a health claim includes ''* * * a specific food or component of food * * *'' (§ 101.14(a)(2)). As such, FDA concludes that sucralose is a ''substance'' as defined in § 101.14(a)(2) for the purpose of a food label statement which characterizes the relationship of any substance to a disease or health-related condition.

C. Review of Preliminary Requirements for a Health Claim

1. The Substance Is Associated With a Disease for Which the U.S. Population Is at Risk

The petition noted that the scientific literature establishing the relationship between dental caries and fermentable carbohydrates is described and referenced in the final rule for the dental caries health claim (61 FR 43433). When authorizing the health claim relating noncariogenic carbohydrate sweeteners and dental caries, the agency recognized that, although the prevalence of dental caries among children in the United States had been declining since the early 1970s, the overall prevalence of dental caries remained widespread throughout the U.S. population (§ 101.80(a)(3)). Currently, the Department of Health and Human Services' Healthy People 2010 Objectives recognizes dental caries as the single most common chronic disease of childhood, and states that 30 percent of adults have untreated dental decay (Ref. 2). Based on these facts, FDA concludes that, as required in § 101.14(b)(1), dental caries is a disease for which the general U.S. population is at risk.

2. The Substance is a Food

When a health claim involves consumption of a substance at other than decreased dietary levels, the substance that is the subject of the health claim must contribute taste, aroma, or nutritive value, or any other technical effect listed in § 170.3(o) (21 CFR 170.3(o)) to the food, and must retain that attribute when consumed at the levels that are necessary to justify a claim (§ 101.14(b)(3)(i)). As noted by the petition, the use of sucralose as a nonnutritive sweetener in conventional foods and dietary supplements is prescribed by the food additive regulation under § 172.831. The sweetness intensity of sucralose is approximately 600 times that of sucrose (Ref. 3), as such the amount of sucralose used as a sugar substitute is in milligrams per serving and the caloric contribution of sucralose to a food is insignificant. The food additive use of sucralose is as a ''non-nutritive sweetener,'' one of the technical effects listed in § 170.3(o) for which human food ingredients may be added to foods. Because sucralose contributes to food taste, one of the technical effects listed in § 170.3(o), the agency concludes that the preliminary requirement of § 101.14(b)(3)(i) is satisfied.

3. The Substance is Safe and Lawful

The petition notes that FDA has evaluated the use of sucralose in the food supply and has issued a food additive regulation setting out the conditions of its safe use in foods. The safe use of sucralose as a general purpose sweetener in foods in accordance with current good manufacturing practice in an amount not to exceed that reasonably required to accomplish the intended effect is

prescribed by the food additive regulation under § 172.831. This food additive regulation establishes the food use of sucralose under conditions prescribed by the regulation to be safe and lawful under section 409 of the act (21 U.S.C. 348). Therefore, FDA concludes that the petitioner has satisfied the requirement of § 101.14(b)(3)(ii) to demonstrate, to FDA's satisfaction, that the use of sucralose as a sweetener is safe and lawful under the provisions of the act.

III. Review of Scientific Evidence of the Substance-Disease Relationship

A. Basis for Evaluating the Relationship Between Sucralose and Dental Caries

In the preamble to the 1996 dental caries health claim final rule, the agency concluded that there was significant scientific agreement among qualified experts to support the relationship between certain sugar alcohols and the nonpromotion of dental caries (61 FR 43433 at 43443). The agency noted that it would take action to add additional sugar alcohols to this regulation when presented with evidence that the additional sugar alcohols would not lower plaque pH (i.e., raise plaque acidity) below 5.7, and that the substance conformed to the requirements of § 101.14(b) (61 FR 43433 at 43442).

The substance that is the subject of the current petition, sucralose, is a chlorine-substituted sugar rather than a sugar alcohol. However, like the sugar alcohols, the intended food ingredient use of sucralose is as a sugar substitute. Also, as is the case with the sugar alcohols, the potential dental health benefit from sucralose derives from its lower fermentability relative to traditional sugars. Consequently, the criteria that were used to evaluate the sugar alcohols in the existing dental caries health claim can be applied to assess whether sucralose also qualifies for such a claim.

B. Review of Scientific Evidence

1. Evidence Considered in Reaching the Decision

In the initial proposal to authorize a health claim relating noncariogenic carbohydrate sweeteners and nonpromotion of dental caries (60 FR 37507, July 20, 1995), FDA considered evidence from long-term controlled human caries studies, in vivo and in vitro plaque acidity studies, tooth decalcification and remineralization studies, and experimental rat caries studies for the noncariogenic potential of several specific sugar alcohols. FDA's review focused on the scientific evidence from studies evaluating changes in human dental plaque pH, plaque acid production, decalcification or remineralization of tooth enamel, and the incidence of dental caries. FDA limited its review to these types of studies because previous reviews by the Federal Government and other authorities had focused on these areas, and the majority of research efforts have also focused on these areas (60 FR 37507 at 37523). The well established role of sucrose in the etiology of dental caries is related to the ability of sucrose to be metabolized by oral bacteria into extracellular polymers that adhere firmly to the tooth surfaces (i.e., plaque), and at the same time to form acids that can demineralize tooth enamel. FDA had previously concluded that human studies show sugar alcohols are associated with reduced rate of acid production in dental plaque and, in some studies, a reduced incidence of dental caries, in comparison to sucrose (60 FR 37507 at 37523).

In consideration of the amendment requested in the current petition, FDA compared scientific evidence regarding the cariogenic potential of sucralose from three human studies which investigated the rate of acid production in dental plaque resulting from exposure to sucralose-containing solutions. This is the same type of clinical evidence that the agency previously reviewed regarding the cariogenic potential of certain sugar alcohols and of D-tagatose. As discussed in section II.C of this document, FDA has concluded that sucralose satisfies the requirements of § 101.14(b).

Sucralose is used as a nonnutritive food additive in processed foods. Sucralose is also marketed directly to consumers in several formulations for use in sweetening foods and beverages (Splenda Packet, Splenda Sugar Blend for Baking, and Splenda Granular). Splenda Packet is a formulation of sucralose dispersed in a dextrose/maltodextrin blend containing greater than 0.5 gram (g) dextrose sugar per labeled serving, and packaged in single serving packets for consumer use as a ''table top'' sweetener. Splenda Sugar Blend for Baking is a formulation of sucralose dispersed in sucrose, containing 2 g sugar per labeled serving, and packaged for consumer use as a sugar replacement in cooking and baking. The dental caries health claim regulation requires that a food bearing the claim be ''sugar-free'' as defined in the regulations, except that the food may contain D-tagatose (see § 101.80(c)(2)(iii)(A) and § 101.60(c)(1)(i) (21 CFR 101.60(c)(1)(i)). Neither Splenda Packet nor Splenda Sugar Blend for Baking meet the definition of ''sugar-free'' as set out in § 101.60(c)(1)(i). Therefore, neither of these two sucralose formulations are eligible for use of the health claim, and the dental plaque pH data provided in the petition for Splenda Packet has not been considered as evidence for amending the health claim regulation. The petition did not include dental plaque pH data for Splenda Sugar Blend for Baking.

There are three primary methods used for measuring the impact of foods on plaque acidity in humans: Plaque sampling, micro-touch, and indwelling electrode methods (Ref. 4). The plaque sampling method involves the scraping of plaque from tooth surfaces, dispersing the collected plaque in distilled water, and in vitro pH measurement of the plaque suspension. The micro-touch method involves measurements of plaque pH in situ, at the plaque surface, by touching a small pH electrode against tooth surfaces. The indwelling electrode method involves mounting a small pH electrode in a removable partial denture such that it is positioned adjacent to a natural tooth crown, allowing in situ pH measurements under the plaque layer that accumulates on the electrode. Since these three methods measure pH at different locations and at different depths in the plaque, they yield somewhat different pH values. Both the micro-touch and indwelling electrode methods have been reported to satisfactorily identify relative differences in acidogenic foods compared to a positive control (Refs. 4 and 5). However, in studies which directly compare the absolute pH values obtained from the different plaque pH measurement methods, the indwelling electrode method consistently yields lower minimum pH values than do either the plaque sampling or micro-touch methods (Refs. 4 to 6).

When initially authorizing the dental caries health claim, FDA noted that it would take action to add other sweeteners to the list of substances eligible for this health claim when presented with a petition that included, in part, evidence that the substance would not lower plaque pH below 5.7 (61 FR 43433 at 43442). FDA did not specify a specific method to be used in measuring plaque pH for considering the addition of other sweeteners to the list of eligible substances for this health claim. On the other hand, in order for foods that contain both noncariogenic sweeteners and fermentable carbohydrates to qualify for this health claim, § 101.80(c)(2)(iii)(C) specifies that

the indwelling electrode method is the procedure that the agency will use.

2. Review of Sucralose Studies

The petition included published reports from three separate randomized, double-blind studies of the effect of sucralose on dental plaque pH in humans (Refs. 7 to 9). Each study was conducted with essentially the same experimental protocol, and in each study interdental plaque pH was measured with a hand-held miniature pH electrode (the micro-touch method). Exposure to sucralose was accomplished by a 1 minute rinsing of the mouth with the test sweetener substances dissolved in water (Ref. 7), hot coffee (Ref. 8), or iced tea (Ref. 9).

Each study recruited subjects older than 18 years of age and with high caries susceptibility as demonstrated by: (1) Greater than seven decayed, missing, or filled teeth, and (2) a plaque pH measurement below 5.7 when challenged with a 4.7 percent sucrose rinse. Subjects refrained from oral hygiene procedures for 48 hours prior to each test and refrained from smoking and all food and drink, except for water, for at least 4 hours prior to each test to allow for the development of an undisturbed resting plaque layer. At each test session, pre-rinse baseline pH was measured at the mesiobuccal surface of six teeth, after which subjects rinsed with a test sweetener solution for 1 minute, and then pH measurements at the same six sites were repeated at timed intervals over 60 minutes.

Each study included test solutions of: (1) Sucralose alone, (2) sucralose with maltodextrin (Splenda Granular), (3) sucralose with a dextrose-maltodextrin blend (Splenda Packet), and (4) sucrose alone. The sucrose rinse served as a positive control. The sweetness of the sucralose solutions (0.007 percent by weight) and sucrose solution (4.7 percent by weight) were equivalent to 2 teaspoons of sucrose in 6 fluid ounces. A fifth test solution (unsweetened coffee or iced tea) was included in two of the reported studies (Refs. 8 and 9). Test sessions were conducted at 1-week intervals, and at approximately the same time of day for each individual. One sweetener solution was tested per test session and each individual tested all test solutions for the study they were enrolled in.

The reported mean minimum plaque pH values following a sucralose rinse were 6.56 ± 0.23 (water), 6.04 ± 0.44 (coffee), and 6.73 ± 0.34 (iced tea). The reported mean minimum plaque pH values following a Splenda Granular rinse were 6.15 ± 0.36 (water), 5.59 ± 0.35 (coffee), and 6.20 ± 0.31 (iced tea). The reported mean minimum plaque pH values following a Splenda Packet rinse were 5.84 ± 0.47 (water), 5.34 ± 0.29 (coffee), and 6.02 ± 0.42 (iced tea). The reported mean minimum pH values following a sucrose rinse were 5.29 ± 0.30 (water), 5.35 ± 0.37 (coffee), and 5.46 ± 0.33 (iced tea). The reported mean minimum pH values following a rinse with unsweetened beverage were 5.92 ± 0.41 (coffee), and 6.79 ± 0.31 (iced tea). These results show that exposure to sucralose alone by an oral rinse did not result in a increase in plaque acidity as measured by the micro-touch pH method. As such, these data are evidence that sucralose will not lower plaque pH below 5.7. However, exposure by an oral rinse to Splenda Granular and Splenda Packet did, in some instances, lower plaque pH below 5.7. For instance, when the oral rinse medium was coffee, mean plaque pH was reduced below pH 5.7 for both Splenda Granular and Splenda Packet.

The human in situ plaque pH evidence for non-fermentability of sucralose is supported by pre-clinical study evidence submitted with the petition. The petitioner submitted reports from in vitro studies of sucralose metabolism by oral bacteria. These data indicate that sucralose does not support the growth of *Streptococcus mutans* nor of other strains of acidogenic plaque bacteria, nor do the bacteria produce acid from sucralose (Refs. 10 and 11). Studies with experimental rat models for caries development indicate that sucralose is noncariogenic in rats (Refs. 12 and 13). The preclinical data taken in total support a conclusion that sucralose is not a substrate for cariogenic bacteria and is not a contributor to caries development.

IV. Decision to Authorize a Health Claim Relating Sucralose to the Nonpromotion of Dental Caries

FDA previously concluded that there is significant scientific agreement among qualified experts to support the relationship between certain noncariogenic carbohydrate sweeteners (e.g., some sugar alcohols and D-tagatose) and the nonpromotion of dental caries. The principal evidence, which substantiates this relationship, is in situ human plaque pH data showing that the metabolism of sugar alcohols and D-tagatose by oral bacteria is significantly less than the metabolism of sucrose and other fermentable carbohydrates, and therefore does not contribute to the loss of minerals from tooth enamel (§ 101.80(b)). The current petition evaluated the cariogenic potential of sucralose based on three studies which measured the acidogenic potential of sucralose with in situ plaque pH tests. As discussed previously, these plaque pH tests demonstrate that rinsing of the mouth with sucralose did not result in decreases in plaque pH below pH 5.7 and, therefore, does not promote demineralization of dental enamel. The results of these studies are consistent with the results of the studies that investigated the cariogenic potential of the sugar alcohols originally listed in § 101.80(c)(2)(ii), and are consistent with the evidence relied upon by the agency when adding erythritol (62 FR 63653) and D-tagatose (67 FR 71461) to this list. Therefore, based on the totality of publicly available evidence pertaining to the cariogenicity of sucralose and to the relationship between dental plaque pH and dental caries, we conclude that there is significant scientific agreement that sucralose does not promote dental caries. Accordingly, we are proposing to amend § 101.80 to authorize extending the dental caries health claim to include sucralose.

Section 101.80(c)(2)(iii) contains requirements for the nature of the food bearing the dental caries health claim. Section 101.80(c)(2)(iii)(A) states ''The food shall meet the requirement in § 101.60(c)(1)(i) with respect to sugars content, except that the food may contain D-tagatose.'' That is, one criterion of the health claim is that the food be ''sugar free,'' i.e., the food contains less than 0.5 grams of sugar per reference amount customarily consumed and per labeled serving. The agency notes that ''Splenda Packet'' contains in excess of 0.5 g of dextrose per serving and as such does not meet the ''sugar free'' requirement of § 101.80 and thus is ineligible to bear the dental caries health claim. The petition does not request amendments to the ''sugar-free'' requirement in § 101.80(c)(2)(iii) in order to accommodate use of the dental caries health claim by Splenda Packet, nor has the agency considered amending this paragraph.

The predominant ingredient, by weight, of Splenda Granular is maltodextrin, a fermentable carbohydrate. The data provided by the petitioner indicates that rinsing with one serving of Splenda Granular (sweetness equivalent to 2 teaspoons of sucrose) resulted in plaque acidity between pH 5.6 and 6.2, depending on the beverage in which it was suspended, as measured by the micro-touch plaque pH measurement method. As mentioned in section III.B.1 of this document, plaque pH values measured by the indwelling electrode pH measurement method are consistently lower than are

the pH values obtained by the micro-touch method.

A provision of the § 101.80 health claim regulation requires that when carbohydrates other than those eligible for the claim are present in a food bearing the dental caries health claim, bacterial fermentation of the food must not lower plaque pH below 5.7, either during consumption or up to 30 minutes after consumption, as measured by an indwelling electrode pH method (see § 101.80(c)(2)(iii)(C)). The petitioner's micro-touch pH measurement method data do not satisfy the pH evidence requirement of § 101.80(c)(2)(iii)(C) for Splenda Granular (i.e., plaque pH remains above pH 5.7 as measured by the indwelling electrode method). Therefore, FDA concludes that the use of the dental caries health claim on the label of Splenda Granular would not be appropriate.

V. Description of Modifications to § 101.80

A. Requirements

Specific requirements for use of the dental caries health claim are provided in § 101.80(c)(2). The noncariogenic carbohydrate sweeteners now eligible for the health claim are listed within the nature of the substance paragraph (§ 101.80(c)(2)(ii)). FDA is proposing to amend § 101.80(c)(2)(ii) to include sucralose as an additional eligible noncariogenic carbohydrate sweetener.

B. Model Health Claims

Section 101.80(e) provides examples of statements that meet the requirements to make a health claim about nonpromotion of dental caries. FDA emphasizes that these ''model health claims'' are only illustrative. These model claims illustrate both the elements of the health claim statement required under § 101.80(c)(2)(i) and some of the optional elements permitted under § 101.80(d). Because the agency is proposing to amend § 101.80 to add sucralose as an additional noncariogenic carbohydrate sweetener eligible for the health claim, and is not approving specific claim wording, manufacturers will be free to design their own claim so long as it is consistent with agency regulations.

Current § 101.80(e)(1) consists of examples of the full claim, and § 101.80(e)(2) consists of examples of the shortened claim for use on packages with less than 15 square inches of surface area available for labeling. The petition recommends amending § 101.80(e) to include examples of both the full claim and the shortened claim specific for sucralose. One of the requirements of the dental caries health claim is that the claim statement specify the substance as ''sugar alcohol,'' ''sugar alcohols,'' or by the name of the substance, e.g., sorbitol or tagatose (§ 101.80(c)(2)(i)(C)). The health claim regulation provides that packages with less that 15 square inches of surface area available for labeling are exempt from the § 101.80(c)(2)(i)(C) requirement of specifying the substance in the claim statement (§ 101.80(c)(2)(i)(G)). As such, the shortened claim provided for by § 101.80(c)(2)(i)(G) need not specify the substance and therefore FDA is not proposing to amend § 101.80(e)(2) to add examples of the shortened claim specific for sucralose. FDA notes that the lack of a model shortened claim specifying ''sucralose'' in § 101.80(e)(2) does not preclude a manufacturer from using, on packages with less that 15 square inches of surface area available for labeling, a shortened claim that mentions sucralose specifically, as was proposed by the petition. We are proposing to amend § 101.80(e)(1) to add the model claim for sucralose proposed by the petition. The added example of the full claim will state: ''Frequent eating of foods high in sugars and starches as between-meal snacks can promote tooth decay. Sucralose, the sweetening ingredient used to sweeten this food, unlike sugars, does not promote tooth decay.'' (proposed § 101.80(e)(1)(v)).

VII. Analysis of Impacts

A. Regulatory Impact Analysis

FDA has examined the economic implications of this proposed rule as required by Executive Order 12866. 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). Executive Order 12866 classifies a rule as significant if it meets any one of a number of specified conditions, including: Having an annual effect on the economy of $100 million, adversely affecting a sector of the economy in a material way, adversely affecting competition, or adversely affecting jobs. A regulation is also considered a significant regulatory action if it raises novel legal or policy issues. FDA has determined that this proposed rule is not a significant regulatory action as defined by Executive Order 12866.

FDA has identified three options regarding this petition: (1) Deny the petition; (2) add sucralose to the dental caries health claim using the standards previously applied for making that claim; or (3) add sucralose to the dental caries health claim using different standards from those standards previously applied for making that claim, so that the claim could be applied to products such as Splenda Granular and Splenda Packet. This rule will affect three sets of stakeholders: Consumers, producers using sucralose, and producers not using sucralose. The agency will evaluate each of the three options with respect to their effect on each of these three sets of stakeholders.

Option one: FDA's denial of the petition would mean no change in the dental caries health claim. This option generates no new costs and benefits and is the point of comparison for all other options. Producers using sucralose would not change labels to provide more information on sucralose and dental caries. Producers not using sucralose would not be affected by changes in the information given to consumers about sucralose and dental caries or changes in the relative prices of sweeteners or products using sweeteners. Consumers would continue to experience dental caries unaffected by information on sucralose and dental caries.

If we deny the petition, then the state of treatment of dental caries would not be affected. Dental caries is the most common chronic childhood disease and 94 percent of adults have either untreated decay or fillings in the crowns of their teeth, with an average of 22 affected surfaces, according to the National Oral Health Survey, part of the National Health and Nutrition Examination Survey (Ref. 14). The cost of dental caries includes the costs of dental treatment as well as the value of lost productivity and pain and suffering associated with dental caries. There are several risk factors for developing dental caries: Genetic factors, eating behaviors, and types and characteristics of foods eaten (Ref. 15). Specifically, consumption of dietary sugars and starches have been linked to development of dental caries.

Option two: The option chosen by the agency under certain conditions permits producers who use sucralose to place the dental caries health claim in their labeling. If these producers decide to do so they will have to pay to redesign and replace their labels. If they voluntarily make this choice, then their choice reveals that they value the ability to place the health claim on their products more highly than they value the cost they must bear to make the labeling change. Producers who use sucralose

are better off under option two than under option one because under option two they have additional ways to market their products to consumers.

This option under certain conditions permits producers who use sucralose to give consumers more information about sucralose and dental carries. Some consumers may find this information valuable to them while choosing products. As stated previously, FDA has determined that this information has sufficient scientific support, and when provided in labeling under certain conditions is truthful and not misleading to consumers. Consumption of products containing sucralose, such as gum and soft drinks, can potentially reduce the risk of dental caries. This would lead to benefits in reduced expenditures and other health costs related to dental caries. It is possible that the health claim could draw some consumers to choose foods that are more expensive. If they voluntarily make this choice, they reveal that they value the more expensive products more highly than the they value the additional expenditure. It is also possible that the prices of products containing sucralose may rise and cause some consumers to seek other, less expensive products with less protection against dental caries. If they voluntarily make this choice, they reveal that they value the less expensive products more highly than the increased probability of bearing the consequences of dental caries. Regardless of their choices, consumers are better off under option two than under option one because they can have more information related to their health and can make the choices that seem best to them.

If the agency under certain conditions permits producers who use sucralose to place the dental caries health claim in their labeling, products that do not contain sucralose may be affected. Some producers may be hurt if consumers choose to stop consuming their products and instead consume products containing sucralose. Some producers may be helped if changes in the prices of products using sucralose make their products look less expensive to consumers. Producers not using sucralose will be affected differently depending on the type of product that they produce, and it is impossible to tell beforehand how the approval of this health claim will affect different producers.

Some producers not currently using sucralose may decide to reformulate their products to contain sucralose. Substitution of sucralose for sugars in some foods, such as gum and soft drinks can potentially reduce the risk of dental caries. This reformulation would lead to benefits to consumers in reduced costs associated with dental caries. If some producers voluntarily choose to reformulate their products, they reveal that they value the ability to place the health claim on their products more highly than they value the cost of reformulating their products. Whatever the effects of this option on producers not using sucralose, they will be the results of the product choices made by consumers who respond to the new information and make the choices that seem best to them.

Option three: This option would relax some of the restrictions imposed by the agency in option two so that the claim could be applied to products such as Splenda Granular and Splenda Packet. Option three would use different standards for approving this claim than previously applied to other products.

Option three would give producers using sucralose more opportunities to make the health claim than under option two. If, when given this option, producers decide to make the claims, they would have to pay to redesign and replace their labels, and they could decide to change more labels than under option two. However, if they voluntarily make this choice, they reveal that they value the ability to place the health claim on their product more highly than they value the cost of the label change regardless of how many labels they would change. Therefore, producers who use sucralose are better off under option three than under option two because they have additional opportunities for marketing their products to consumers using the health claim.

Option three makes producers using sucralose better off while making consumers worse off. As stated above, the intended use of Splenda Granular is in the preparation of foods likely to lower plaque pH below 5.7 when measured by the indwelling electrode method. It also is designed to be used in the cooking and baking of many foods containing starch. Since foods containing starch are associated with increased plaque acidity and thus increased risk of dental caries, consumers would not benefit from seeing the health claim on products such as Splenda Granular. Also, as stated previously, Splenda Packet contains dextrose, and therefore is not ''sugar free'' and may promote tooth decay. Therefore, consumers would be made worse off under option three than under option two. Having the health claim on these additional types of products may mislead consumers and undo some of the benefit (reduced dental caries) of allowing the claim on products containing sucralose that meet the conditions set forth by the agency.

For producers not using sucralose, the effect of option three is generally the same as for option two, though allowing the claim to appear on more products would likely make for larger effects.

We can conclude that the option chosen by the agency (option two) is better for society than option one because the impact on consumers and on producers using sucralose is positive and the impact on producers not using sucralose is indeterminate and depends only on choices made by better informed consumers. We can also conclude that the option chosen by the agency (option two) is better for society than option three because under option three any advantage to producers using sucralose comes at the disadvantage of consumers.

The petition also raises the issue of the effect the increased use of sucralose could have on weight loss in the U.S. population. We have not addressed that issue here because the products involved and the amounts consumed are so small that a health claim relating sucralose to reduced dental caries would not have an impact big enough to cause a noticeable change in weight.

B. Regulatory Flexibility Analysis

FDA has examined the economic implications of this proposed rule as required by the Regulatory Flexibility Act (5 U.S.C. 601–612). If a rule has a significant impact on a substantial number of small entities, the Regulatory Flexibility Act requires the agency to analyze regulatory options that would minimize the economic impact of the rule on small entities.

As previously explained, this proposed rule will not generate any compliance costs for any small entities, because it does not require small entities to undertake any new activity. No small business will choose to use the dental caries health claim authorized by this rule unless it believes that doing so will increase private benefits by more than it increases private costs. Accordingly, we certify that this proposed rule will not have a significant impact on a substantial number of small entities. Under the Regulatory Flexibility Act, no further analysis is required.

C. Unfunded Mandates

Title II of the Unfunded Mandates Reform Act of 1995 (Public Law 104–4) requires cost-benefit and other analyses before any rulemaking if the rule would include a ''Federal Mandate that may result in the expenditure by State, local, and tribal governments, in the aggregate,

or by the private sector, of $100,000,000 or more (adjusted annually for inflation) in any 1 year.'' FDA has determined that this proposed rule does not constitute a significant regulatory action under the Unfunded Mandates Reform Act.

VIII. Environmental Impact

FDA has determined under 21 CFR 25.32(p) 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.

IX. Paperwork Reduction Act

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

X. Federalism

FDA has analyzed this proposed rule in accordance with the principles set forth in Executive Order 13132. We have determined that the rule does not contain policies that have substantial direct effects on the States or on the relationship between the National Government and the States, or on the distribution of power and responsibility among the various levels of government. Accordingly, FDA has concluded that the proposed rule does not contain policies that have federalism implications as defined in the Executive order and, consequently, a federalism summary impact statement is not required.

XI. Comments

Interested persons may submit to the Division of Dockets Management (see **ADDRESSES**) written or electronic comments in response to FDA's proposed rule. Submit a single copy of electronic comments or two paper copies of any mailed comments, except that individuals may submit one paper copy. Identify comments 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.

XII. Proposed Effective Date

FDA proposes that any final regulation that may issue based on this proposal become effective 30 days after its date of publication in the **Federal Register**.

XIII. References

The following references have been placed on display in the Division of Dockets Management (see **ADDRESSES**) and may be seen by interested persons between 9 a.m. and 4 p.m., Monday through Friday.

1. McNeil Nutritionals, ''Petition to Amend 21 CFR 101.80 to Authorize a Noncariogenicity Dental Health Claim for Sucralose,'' CP–1, Docket No. 2004P–0294, April 2, 2004.

2. U.S. Department of Health and Human Services, ''Oral Health,'' chapter 21, *Healthy People 2010*, volume II, part B, 2d ed., Washington, DC: U.S. Government Printing Office (*www.health.gov/healthypeople/Document/HTML/Volume2/21Oral.htm*, visited 03/17/2005), November 2000.

3. G.A. Miller, ''Sucralose,'' *Alternative Sweeteners, 2d ed.* L.O. Nabors and R.C. Gelardi, eds. Marcel Dekker, Atlanta, pp. 173–175, 1991.

4. P. Lingström, T. Imfeld, and D. Birkhed, ''Comparison of Three Different Methods for Measurement of Plaque-pH in Humans After Consumption of Soft Bread and Potato Chips,'' *Journal of Dental Research*, 72:865–870, 1993.

5. D.S. Harper, R. Gray, J.W. Lenke, et al., ''Measurement of Human Plaque Acidity: Comparison of Interdental Touch and Indwelling Electrodes,'' *Caries Research*, 19:536–546, 1985.

6. M.E. Jensen and C.F. Schachtele, ''Plaque pH Measurements by Different Methods on the Buccal and Approximal Surfaces of Human Teeth After Sucrose Rinse,'' *Journal of Dental Research*, 62:1058–1061, 1983.

7. L.M. Steinberg, F. Odusola, J. Yip, et al., ''Effect of Aqueous Solutions of Sucralose on Plaque pH,'' *American Journal of Dentistry*, 8:209–211, 1995.

8. L.M. Steinberg, F. Odusola, J. Yip, et al., ''Effect of Sucralose in Coffee on Plaque pH in Human Subjects,'' *Caries Research*, 30:138–142, 1996.

9. C. Meyerowitz, E.P. Syrrakov, and R.F. Raubertas, ''Effect of Sucralose—Alone or Bulked With Maltodextrin and/or Dextrose—on Plaque pH in Humans,'' *Caries Research*, 30:439–444, 1996.

10. D.A. Young and W.H. Bowen, ''The Influence of Sucralose on Bacterial Metabolism,'' *Journal of Dental Research*, 69:1480–1484, 1990.

11. D.B. Drucker and J. Verron, ''Comparative Effects of the Substance Sweeteners Glucose, Sorbitol, Sucrose, Xylitol, and Trichlorosucrose on Lowering of pH by Two Oral *Streptococcus Mutans* Strains In Vitro,'' *Archives of Oral Biology*, 24:965–970, 1980.

12. W.H. Bowen, D.A. Young, and S.K. Pearson, ''The Effects of Sucralose on Coronal and Root-Surface Caries,'' *Journal of Dental Research*, 69:1485–1487, 1990.

13. W.H. Bowen, S.K. Pearson, and J.L. Falany, ''Influence of Sweetening Agents in Solution on Dental Caries in Desalivated Rats,'' *Archives of Oral Biology*, 35:839–844, 1990.

14. Department of Health and Human Services, Results of National Oral Health Survey Results Released (press release) (*http://www.hhs.gov/news/press/1996pres/960311.html*, visited on 03/17/2005), March 11, 1996.

15. U.S. Department of Health and Human Services, *Oral Health in America: A Report of the Surgeon General*—Executive Summary, Rockville, MD, U.S. Department of Health and Human Services, National Institute of Dental and Craniofacial Research, National Institutes of Health, (*http://www2.nidcr.nih.gov/sgr/execsumm.htm*, visited on 03/17/2005), 2000.

List of Subjects in 21 CFR Part 101

Food labeling, Nutrition, Reporting and recordkeeping requirements.

Therefore, under the Federal Food, Drug, and Cosmetic Act and under authority delegated to the Commissioner of Food and Drugs, 21 CFR part 101 is proposed to be amended as follows:

PART 101—FOOD LABELING

1. The authority citation for 21 CFR part 101 continues to read as follows:

Authority: 15 U.S.C. 1453, 1454, 1455; 21 U.S.C. 321, 331, 342, 343, 348, 371; 42 U.S.C. 243, 264, 271.

2. Section 101.80 is amended by adding (c)(2)(ii)(C) and (e)(1)(v) to read as follows:

§ 101.80 Health claims: dietary noncariogenic carbohydrate sweeteners and dental caries.

* * * * *

(c) * * *

(2) * * *

(ii) * * *

(C) Sucralose.

* * * * *

(e) * * *

(1) * * *

(v) Frequent eating of foods high in sugars and starches as between-meal snacks can promote tooth decay. Sucralose, the sweetening ingredient used to sweeten this food, unlike sugars, does not promote tooth decay.

Dated: May 4, 2005..

Jeffrey Shuren,

Assistant Commissioner for Policy.

[FR Doc. 05–9608 Filed 5–12–05; 8:45 am]

BILLING CODE 4160–01–S

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

21 CFR Part 1308

[Docket No. DEA–267P]

Schedules of Controlled Substances: Placement of Pregabalin into Schedule V

AGENCY: Drug Enforcement Administration, Department of Justice.

ACTION: Notice of proposed rulemaking.

SUMMARY: This proposed rule is issued by the Deputy Administrator of the Drug Enforcement Administration (DEA) to place the substance pregabalin [(S)-3-(aminomethyl)-5-methylhexanoic acid], including its salts, and all products containing pregabalin into Schedule V of the Controlled Substances Act (CSA). This proposed action is based on a recommendation from the Acting Assistant Secretary for Health of the Department of Health and Human Services (DHHS) and on an evaluation of the relevant data by DEA. If finalized, this action will impose the regulatory controls and criminal sanctions applicable to Schedule V non-narcotics on those who handle pregabalin and products containing pregabalin.

DATES: Written comments must be postmarked, and electronic comments must be sent, on or before June 13, 2005.

ADDRESSES: To ensure proper handling of comments, please reference ''Docket No. DEA–267P'' on all written and electronic correspondence. Written comments being sent via regular mail should be sent to the Deputy Administrator, Drug Enforcement Administration, Washington, DC 20537, Attention: DEA Federal Register Representative/ODL. Written comments sent via express mail should be sent to the Deputy Administrator, Drug Enforcement Administration, Attention: DEA Federal Register Representative/ODL, 2401 Jefferson-Davis Highway, Alexandria, VA 22301. Comments may be directly sent to DEA electronically by sending an electronic message to *dea.diversion.policy@usdoj.gov.* Comments may also be sent electronically through *http://www.regulations.gov* using the electronic comment form provided on that site. An electronic copy of this document is also available at the *http://www.regulations.gov* Web site. DEA will accept electronic comments containing MS Word, WordPerfect, Adobe PDF, or Excel file formats only. DEA will not accept any file format other than those specifically listed here.

FOR FURTHER INFORMATION CONTACT: Christine Sannerud, Ph.D., Chief, Drug and Chemical Evaluation Section, Drug Enforcement Administration, Washington, DC 20537, (202) 307–7183.

SUPPLEMENTARY INFORMATION:

Note Regarding This Scheduling Action

In accordance with the provisions of the Controlled Substances Act (21 U.S.C. 811(a)), this action is a formal rulemaking ''on the record after opportunity for a hearing.'' Such proceedings are conducted pursuant to the provisions of the Administrative Procedure Act (5 U.S.C. 556 and 557). Interested persons are invited to submit their comments, objections or requests for a hearing with regard to this proposal. Requests for a hearing should be made in accordance with 21 CFR 1308.44 and should state, with particularity, the issues concerning which the person desires to be heard. All correspondence regarding this matter should be submitted to the Drug Enforcement Administration using the address information provided above.

Background

On December 31, 2004, the Food and Drug Administration (FDA) approved pregabalin [(S)-3-(aminomethyl)-5-methylhexanoic acid] for marketing under the trade name Lyrica™. Lyrica™ will be marketed in the United States as a prescription drug product for the management of neuropathic pain associated with diabetic peripheral neuropathy (DPN) and postherpetic neuralgia (PHN). Pregabalin has recently been placed on the market in some European countries for the treatment of epilepsy and neuropathic pain.

Unlike morphine-type analgesics, pregabalin does not produce analgesia through binding at opioid receptors. While pregabalin is an analog of gamma-aminobutyric acid (GABA), a major inhibitory neurotransmitter in the brain, it does not bind at GABA or benzodiazepine receptors nor alter GABA concentrations in the brain. Pregabalin does bind with high affinity to the alpha 2-delta receptor site (a subunit of voltage-gated calcium channels) in the central nervous system. The binding of pregabalin at this site is thought to be responsible for its therapeutic effect on neuropathic pain.

Pregabalin has been shown to produce effects that are similar to other controlled substances. In a study with recreational users of sedative/hypnotic drugs, a 450 mg dose of pregabalin resulted in subjective ratings of ''good drug effect,'' ''high,'' and ''liking'' similar to 30 mg of diazepam. In clinical studies, pregabalin showed an adverse event profile similar to other central nervous system depressants. Some of these effects included dizziness, somnolence, ataxia, and confusion. Following abrupt or rapid discontinuation of pregabalin, some patients reported symptoms suggestive of physical dependence. The FDA determined that the dependence profile of pregabalin, as measured by a patient physical withdrawal checklist, was quantitatively less than benzodiazepines in schedule IV of the CSA.

On April 4, 2005, the Acting Assistant Secretary for Health of the DHHS sent the Administrator of the DEA a scientific and medical evaluation and a letter recommending that pregabalin be placed into Schedule V of the CSA. Enclosed with the April 4, 2005, letter was a document prepared by the FDA entitled, ''Basis for the Recommendation for Control of Pregabalin in Schedule V of the Controlled Substances Act (CSA).'' The document contained a review of the factors which the CSA requires the Secretary to consider (21 U.S.C. 811(b)).

The factors considered by the Acting Assistant Secretary of Health and DEA with respect to pregabalin were:

(1) Its actual or relative potential for abuse;

(2) Scientific evidence of its pharmacological effects;

(3) The state of current scientific knowledge regarding the drug;

(4) Its history and current pattern of abuse;

(5) The scope, duration, and significance of abuse;

(6) What, if any, risk there is to the public health;

(7) Its psychic or physiological dependence liability; and

(8) Whether the substance is an immediate precursor of a substance already controlled under this subchapter. (21 U.S.C. 811(c))

Based on the recommendation of the Acting Assistant Secretary for Health, received in accordance with section 201(b) of the Act (21 U.S.C. 811(b)), and the independent review of the available data by the DEA, the Deputy Administrator of the DEA, pursuant to sections 201(a) and 201(b) of the Act (21 U.S.C. 811(a) and 811(b)), finds that:

(1) Based on information now available, pregabalin has a low potential for abuse relative to the drugs or other substances in Schedule IV;

(2) Pregabalin has a currently accepted medical use in treatment in the United States; and

(3) Abuse of pregabalin may lead to limited physical dependence or psychological dependence relative to the drugs or other substances in Schedule IV. (21 U.S.C. 812(b)(5))

Based on these findings, the Deputy Administrator of the DEA concludes that pregabalin, including its salts, and all products containing pregabalin, warrant control in Schedule V of the CSA.

Interested persons are invited to submit their comments, objections or requests for a hearing with regard to this proposal. Requests for a hearing should state, with particularity, the issues concerning which the person desires to

be heard. All correspondence regarding this matter should be submitted to the Drug Enforcement Administration using the address information provided above. In the event that comments, objections, or requests for a hearing raise one or more issues which the Deputy Administrator finds warrant a hearing, the Deputy Administrator shall order a public hearing by notice in the **Federal Register**, summarizing the issues to be heard and setting the time for the hearing.

Requirements for Handling Pregabalin

If this rule is finalized as proposed, pregabalin and all products containing pregabalin would be subject to the Controlled Substances Act and the Controlled Substances Import and Export Act regulatory controls and administrative, civil and criminal sanctions applicable to the manufacture, distribution, dispensing, importing and exporting of a Schedule V controlled substance, including the following:

Registration. Any person who manufactures, distributes, dispenses, imports, exports, engages in research or conducts instructional activities with pregabalin, or who desires to manufacture, distribute, dispense, import, export, engage in instructional activities or conduct research with pregabalin, would need to be registered to conduct such activities in accordance with Part 1301 of Title 21 of the Code of Federal Regulations.

Security. Pregabalin would be subject to Schedule III–V security requirements and must be manufactured, distributed and stored in accordance with §§ 1301.71, 1301.72(b), (c), and (d), 1301.73, 1301.74, 1301.75(b) and (c), 1301.76, and 1301.77 of Title 21 of the Code of Federal Regulations.

Labeling and Packaging. All labels and labeling for commercial containers of pregabalin which are distributed on or after finalization of this rule would need to comply with requirements of §§ 1302.03–1302.07 of Title 21 of the Code of Federal Regulations.

Inventory. Every registrant required to keep records and who possesses any quantity of pregabalin would be required to keep an inventory of all stocks of pregabalin on hand pursuant to §§ 1304.03, 1304.04 and 1304.11 of Title 21 of the Code of Federal Regulations. Every registrant who desires registration in Schedule V for pregabalin would be required to conduct an inventory of all stocks of the substance on hand at the time of registration.

Records. All registrants would be required to keep records pursuant to §§ 1304.03, 1304.04, 1304.21, 1304.22, and 1304.23 of Title 21 of the Code of Federal Regulations.

Prescriptions. All prescriptions for pregabalin or prescriptions for products containing pregabalin would be required to be issued pursuant to 21 CFR 1306.03–1306.06 and 1306.21, 1306.23–1306.27.

Importation and Exportation. All importation and exportation of pregabalin would need to be in compliance with part 1312 of Title 21 of the Code of Federal Regulations.

Criminal Liability. Any activity with pregabalin not authorized by, or in violation of, the Controlled Substances Act or the Controlled Substances Import and Export Act occurring on or after finalization of this proposed rule would be unlawful.

Regulatory Certifications

Executive Order 12866

In accordance with the provisions of the CSA (21 U.S.C. 811(a)), this action is a formal rulemaking ''on the record after opportunity for a hearing.'' Such proceedings are conducted pursuant to the provisions of 5 U.S.C. 556 and 557 and, as such, are exempt from review by the Office of Management and Budget pursuant to Executive Order 12866, section 3(d)(1).

Regulatory Flexibility Act

The Deputy Administrator, in accordance with the Regulatory Flexibility Act (5 U.S.C. 605(b)), has reviewed this proposed rule and by approving it certifies that it will not have a significant economic impact on a substantial number of small entities. Pregabalin products will be prescription drugs used for the treatment of neuropathic pain. Handlers of pregabalin often handle other controlled substances used to treat pain which are already subject to the regulatory requirements of the CSA.

Executive Order 12988

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

Executive Order 13132

This rulemaking does not preempt or modify any provision of state law; nor does it impose enforcement responsibilities on any state; nor does it diminish the power of any state to enforce its own laws. Accordingly, this rulemaking does not have federalism implications warranting the application of Executive Order 13132.

Unfunded Mandates Reform Act of 1995

This rule will not result in the expenditure by State, local and tribal governments, in the aggregate, or by the private sector, of $115,000,000 or more in any one year, and will not significantly or uniquely affect small governments. Therefore, no actions were deemed necessary under 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 § 804 of the Small Business Regulatory Enforcement Fairness Act of 1996. This rule will not result in an annual effect on the economy of $100,000,000 or more; a major increase in costs or prices: or significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based companies to compete with foreign based companies in domestic and export markets.

List of Subjects in 21 CFR Part 1308

Administrative practice and procedure, Drug traffic control, Narcotics, Prescription drugs.

Under the authority vested in the Attorney General by section 201(a) of the CSA (21 U.S.C. 811(a)), and delegated to the Administrator of DEA by Department of Justice regulations (28 CFR 0.100), and redelegated to the Deputy Administrator pursuant to 28 CFR 0.104, the Deputy Administrator hereby proposes that 21 CFR part 1308 be amended as follows:

PART 1308—SCHEDULES OF CONTROLLED SUBSTANCES [AMENDED]

1. The authority citation for 21 CFR part 1308 continues to read as follows:

Authority: 21 U.S.C. 811, 812, 871(b) unless otherwise noted.

2. Section 1308.15 is proposed to be amended by adding a new paragraph (e) to read as follows:

§ 1308.15 Schedule V.

* * * * *

(e) *Depressants.* Unless specifically exempted or excluded or unless listed in another schedule, any material, compound, mixture, or preparation which contains any quantity of the following substances having a depressant effect on the central nervous system, including its salts:

(1) Pregabalin [(S)-3-(aminomethyl)-5-methylhexanoic acid]—2782

(2) [Reserved]

Dated: May 6, 2005.

Michele M. Leonhart,

Deputy Administrator.

[FR Doc. 05–9634 Filed 5–12–05; 8:45 am]

BILLING CODE 4410–09–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 165

[CGD01–05–041]

RIN 1625–AA00

Safety Zone; Beverly Homecoming Fireworks, Beverly, MA

AGENCY: Coast Guard, DHS.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Coast Guard proposes to establish a temporary safety zone for the Beverly Homecoming Fireworks in Beverly, Massachusetts. This safety zone is necessary to protect the life and property of the maritime public from potential hazards associated with a fireworks display. The safety zone would temporarily prohibit entry into or movement within this portion of Beverly Harbor during the closure period.

DATES: Comments and related material must reach the Coast Guard on or before June 13, 2005.

ADDRESSES: You may mail comments and related material to Coast Guard Sector Boston, 427 Commercial Street, Boston, MA 02109. Sector Boston maintains the public docket for this rulemaking. Comments and material received from the public, as well as documents indicated in this preamble as being available in the docket are part of docket CGD01–05–041 and are available for inspection or copying at Sector Boston, 427 Commercial Street, Boston, MA, between 8 a.m. and 3 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: Chief Petty Officer Paul English, Sector Boston, Waterways Safety and Response Division, at (617) 223–3010.

SUPPLEMENTARY INFORMATION:

Request for Comments

We encourage you to participate in this rulemaking by submitting comments and related material. If you do so, please include your name and address, identify the docket number for this rulemaking (CGD01–05–041), indicate the specific section of this document to which each comment applies, and give the reason for each comment. Please submit all comments and related material in an unbound format, no larger than 8½ by 11 inches, suitable for copying. If you would like to know that your submission reached us, please enclose a stamped, self-addressed postcard or envelope. We will consider all comments and material received during the comment period. We may change this proposed rule in view of them.

Public Meeting

We do not now plan to hold a public meeting. But you may submit a request for a meeting by writing to Sector Boston at the address under **ADDRESSES** explaining why one would be beneficial. If we determine that one would aid this rulemaking, we will hold one at a time and place announced by a later notice in the **Federal Register**.

Background and Purpose

This rule proposes to establish a safety zone in Beverly Harbor within a 400-yard radius of the fireworks barge located at approximate position 42°32′35″ N, 070°52′00″ W. The safety zone would be in effect from 8 p.m. until 10:30 p.m. EDT on August 7, 2005.

The safety zone would temporarily restrict movement within the effected portion of Beverly Harbor and is needed to protect the maritime public from the dangers posed by a fireworks display. Marine traffic may transit safely outside of the safety zone during the effective period. The Captain of the Port does not anticipate any negative impact on vessel traffic due to this event. Public notifications will be made prior to the effective period of this proposed rule via safety marine information broadcasts and Local Notice to Mariners.

Discussion of Proposed Rule

The Coast Guard is establishing a temporary safety zone in Beverly Harbor, Beverly, Massachusetts. The safety zone would be in effect from 8 p.m. until 10:30 p.m. EDT on August 7, 2005. Marine traffic may transit safely outside of the safety zone in the majority of Beverly Harbor during the event. This safety zone will control vessel traffic during the fireworks display to protect the safety of the maritime public.

Due to the limited timeframe of the fireworks display and because the zone leaves the majority of Beverly Harbor open for navigation, the Captain of the Port anticipates minimal negative impact on vessel traffic due to this event. Public notifications will be made prior to the effective period via Local Notice to Mariners and marine information broadcasts.

Regulatory Evaluation

This proposed rule is not a ''significant regulatory action'' under section 3(f) of Executive Order 12866, Regulatory Planning and Review, and does not require an assessment of potential costs and benefits under section 6(a)(3) of that Order. The Office of Management and Budget has not reviewed it under that Order. It is not ''significant'' under the regulatory policies and procedures of the Department of Homeland Security (DHS).

The Coast Guard expects the economic impact of this proposed rule to be so minimal that a full Regulatory Evaluation under the regulatory policies and procedures of DHS is unnecessary.

Although this rule will prevent traffic from transiting a portion of Beverly Harbor during the effective period, the effects of this rule will not be significant for several reasons: vessels will only be excluded from the proscribed area for two and one half hours, vessels will be able to operate in the majority of Beverly Harbor during this time, and advance notifications will be made to the local maritime community by marine information broadcasts and Local Notice to Mariners.

Small Entities

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

The Coast Guard certifies under 5 U.S.C. 605(b) that this proposed rule would not have a significant economic impact on a substantial number of small entities.

This proposed rule would affect the following entities, some of which may be small entities: the owners or operators of vessels intending to transit or anchor in effected portion of Beverly Harbor from 8 p.m. until 10:30 p.m. EDT on August 7, 2005.

This safety zone would not have a significant economic impact on a substantial number of small entities for the following reasons: this proposed rule would be in effect for only two and one half hours, vessel traffic can safely pass around the safety zone during the effected period, and advance notifications will be made to the local maritime community by marine

information broadcasts and Local Notice to Mariners.

If you think that your business, organization, or governmental jurisdiction qualifies as a small entity and that this rule would have a significant economic impact on it, please submit a comment (see **ADDRESSES**) explaining why you think it qualifies and how and to what degree this rule would economically affect it.

Assistance for Small Entities

Under section 213(a) of the Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104–121), we want to assist small entities in understanding this proposed rule so that they can better evaluate its effects on them and participate in the rulemaking. If the rule would affect your small business, organization, or governmental jurisdiction and you have questions concerning its provisions or options for compliance, please contact Chief Petty Officer Paul English at the address listed under **ADDRESSES.** The Coast Guard will not retaliate against small entities that question or complain about this rule or any policy or action of the Coast Guard.

Collection of Information

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

Federalism

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

Unfunded Mandates Reform Act

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

Taking of Private Property

This proposed rule will not effect a taking of private property or otherwise have taking implications under Executive Order 12630, Governmental Actions and Interference with Constitutionally Protected Property Rights.

Civil Justice Reform

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

Protection of Children

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

Indian Tribal Governments

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

Energy Effects

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

Technical Standards

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

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

Environment

We have analyzed this rule under Commandant Instruction M16475.lD, which guides the Coast Guard in complying with the National Environmental Policy Act of 1969 (NEPA)(42 U.S.C. 4321–4370f), and have concluded that there are no factors in this case that would limit the use of a categorical exclusion under section 2.B.2 of the Instruction. Therefore, we believe that this rule is categorically excluded, under figure 2–1, paragraph (34)(g) of the Instruction, from further environmental documentation. A preliminary ''Environmental Analysis Check List'' is available in the docket where indicated under **ADDRESSES.** This rule fits the category selected from paragraph (34)(g), as it would establish a safety zone. Comments on this section will be considered before we make the final decision on whether to categorically exclude this rule from further environmental review.

List of Subjects in 33 CFR Part 165

Harbors, Marine Safety, Navigation (water), Reporting and recordkeeping requirements, Security measures, Waterways.

For the reasons discussed in the preamble, the Coast Guard proposes to amend 33 CFR part 165 as follows:

PART 165—REGULATED NAVIGATION AREAS AND LIMITED ACCESS AREAS

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

Authority: 33 U.S.C. 1226, 1231; 46 U.S.C. Chapter 701; 50 U.S.C. 191, 195; 33 CFR 1.05–1(g), 6.04–1, 6.04–6, and 160.5; Pub. L. 107–295, 116 Stat. 2064; Department of Homeland Security Delegation No. 0170.1.

2. From 8 p.m. until 10:30 p.m. on August 7, 2005, add temporary § 165.T01–041 to read as follows:

§ 165.T01–041 Safety Zone; Beverly Homecoming Fireworks, Beverly, Massachusetts.

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

All waters of Beverly Harbor in a 400-yard radius of the fireworks barge located at approximate position 42°032′035″ N, 070°052′000″ W.

(b) *Effective date.* This section is effective from 8 p.m. until 10:30 p.m. EDT on August 7, 2005.

(c) *Regulations.*

(1) In accordance with the general regulations in section 165.23 of this part, entry into or movement within this zone will be prohibited unless authorized by the Captain of the Port Boston.

(2) All vessel operators shall comply with the instructions of the COTP or the designated on-scene U.S. Coast Guard patrol personnel. On-scene Coast Guard patrol personnel include commissioned, warrant, and petty officers of the Coast Guard on board Coast Guard, Coast Guard Auxiliary, local, state, and federal law enforcement vessels.

Dated: May 3, 2005.

James L. McDonald,

Captain, U.S. Coast Guard, Captain of the Port, Boston, Massachusetts.

[FR Doc. 05–9532 Filed 5–12–05; 8:45 am]

BILLING CODE 4910–15–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 165

[CGD1–05–039]

RIN 1625–AA00

Safety Zone; Town of Marblehead Fourth of July Fireworks Display, Marblehead Harbor, MA

AGENCY: Coast Guard, DHS.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Coast Guard proposes establishing a temporary safety zone for the Town of Marblehead Fourth of July Fireworks. This safety zone is necessary to protect the life and property of the maritime public from the potential hazards associated with a fireworks display. The safety zone would temporarily prohibit entry into or movement within this portion of Marblehead Harbor during the closure period.

DATES: Comments and related material must reach the Coast Guard on or before June 13, 2005.

ADDRESSES: You may mail comments and related material to Sector Boston 427 Commercial Street, Boston, MA. Sector Boston maintains the public docket for this rulemaking. Comments and material received from the public, as well as documents indicated in this preamble as being available in the docket are part of docket CGD01–05–039 and are available for inspection or copying at Sector Boston, 427 Commercial Street, Boston, MA between the hours of 8 a.m. and 3 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: Chief Petty Officer Paul English, Sector Boston, Waterways Management Division, at (617) 223–3010.

SUPPLEMENTARY INFORMATION:

Request for Comments

We encourage you to participate in this rulemaking by submitting comments and related material. If you do so, please include your name and address, identify the docket number for the rulemaking (CGD01–05–039), indicate the specific section of this document to which each comment applies, and give the reason for each comment. Please submit all comments and related materials in an unbound format, no larger than 8.5 by 11 inches, suitable for copying. If you would like to know that your submission reached us, please enclose a stamped, self-addressed postcard or envelope. We may change this proposed rule in view of them.

Public Meeting

We do not plan to hold a public meeting. But you may submit a request for a meeting by writing to Sector Boston at the address under **ADDRESSES** explaining why one would be beneficial. If we determine that one would aid this rulemaking, we will hold one at a time and place announced by a later notice in the **Federal Register**.

Background and Purpose

This rule proposes to establish a safety zone on the waters of Marblehead Harbor within a 400-yard radius of the fireworks barge located at approximate position 42°30′.548″ N, 070°50′.098″ W. The safety zone would be in effect from 8:30 p.m. until 10 p.m. on July 4, 2005. The rain date for the fireworks event is from 8:30 p.m. until 10 p.m. EDT on July 5, 2005.

The safety zone would temporarily restrict movement within this effected portion of Marblehead Harbor and is needed to protect the maritime public from the dangers posed by a fireworks display. Marine traffic may transit safely outside the safety zone during the effective period. The Captain of the port does not anticipate any negative impact on vessel traffic due to this event. Public notifications will be made prior to the effective period of this proposed rule via safety marine information broadcasts and Local Notice to Mariners.

Discussion of Proposed Rule

The Coast Guard is establishing a temporary safety zone in Marblehead Harbor, Marblehead, Massachusetts. The safety zone would be in effect from 8:30 p.m. until 10 p.m. on July 4, 2005, with a Rain date of 8:30 p.m. until 10 p.m. EDT on July 5, 2005. Marine traffic may transit safely outside of the safety zone in the majority of Marblehead Harbor during the event. This safety zone will control vessel traffic during the fireworks display to protect the safety of the maritime public.

Due to the limited time frame of the firework display, the Captain of the Port anticipates minimal negative impact on vessel traffic due to this event. Public notifications will be made prior to the effective period via local media, local notice to mariners and marine information broadcasts.

Regulatory Evaluation

This proposed rule is not a ''significant regulatory action'' under section 3(f) of Executive Order 12866, Regulatory Planning and Review, and does not require an assessment of potential costs and benefits under section 6(a)(3) of that Order. The Office of Management and Budget has not reviewed it under that Order. It is not ''significant'' under the regulatory policies and procedures of the Department of Homeland Security (DHS).

The Coast Guard expects the economic impact of this proposed rule to be so minimal that a full Regulatory Evaluation under the regulatory policies and procedures of DHS is unnecessary.

Although this rule will prevent traffic from transiting a portion of Marblehead Harbor during the effective period, the effects of this rule will not be significant for several reasons: Vessels will be excluded from the proscribed area for only one and one half hours, and advance notifications will be made to the local maritime community by marine information broadcasts and Local Notice to Mariners.

Small Entities

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

The Coast Guard certifies under 5 U.S.C. 605(b) that this proposed rule

would not have a significant economic impact on a substantial number of small entities.

This proposed rule would affect the following entities, some of which may be small entities: the owners or operators of vessels intending to transit or anchor in the affected portion of Marblehead Harbor from 8:30 p.m. EDT July 4, 2005 to 10 p.m. EDT on July 4, 2005 or during the same hours on July 5.

This safety zone would not have a significant economic impact on a substantial number of small entities for the following reasons: This proposed rule would be in effect for only one and one half hours, vessel traffic can safely pass around the safety zone during the affected period, and advance notification via safely marine informational broadcast and Local Notice to Mariners.

Assistance for Small Entities

Under section 213(a) of the Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104–121), we want to assist small entities in understanding this proposed rule so that they can better evaluate its effects on them and participate in the rulemaking. If the rule would affect your small business, organization, and government jurisdiction and you have questions concerning its provisions or options for compliance, please contact Chief Petty Officer at the address listed under **ADDRESSES.** The Coast Guard will not retaliate against small entities that question or complain about this rule or any policy or action of the Coast Guard.

Collection of Information

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

Federalism

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

Unfunded Mandates Reform Act

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

Taking of Private Property

This proposed rule will not effect a taking of private property or otherwise have taking implications under Executive Order 12630, Governmental Actions and Interference with Constitutionally Protected Property Rights.

Civil Justice Reform

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

Protection of Children

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

Indian Tribal Governments

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

Energy Effects

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

Technical Standards

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

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

Environment

We have analyzed this rule under Commandant Coast Guard Instruction M16475.1D, which guides the Coast Guard in complying with the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321–4370f), and have concluded that there are no factors in this case that would limit the use of a categorical exclusion under 2.B.2 of the Instruction. Therefore, we believe that this rule is categorically excluded, under figure 2–1, paragraph (34)(g) of the Instruction, from further environmental documentation. A preliminary ''Environmental Analysis Check List'' is available in the docket where indicated under **ADDRESSES.** This rule fits the category selected from paragraph (34)(g), as it would establish a safety zone. Comments on this section will be considered before we make the final decision on whether to categorically exclude this rule from further environmental review.

List of Subjects in 33 CFR Part 165

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

For the reasons discussed in the preamble, the Coast Guard proposes to amend 33 CFR 165 as follows:

PART 165—REGULATED NAVIGATION AREAS AND LIMITED ACCESS AREAS

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

Authority: 33 U.S.C. 1226, 1231; 46 U.S.C. Chapter 701; 50 U.S.C. 191, 195; 33 CFR 1.05–1(g), 6.04–1, 6.04–6, and 160.5; Public Law 107–295, 116 Stat. 2064; Department of Homeland Security Delegation No. 0170.1.

2. From 8:30 p.m. until 10 p.m. on July 4, 2005, add temporary § 165.T01–039 to read as follows:

§ 165.T01–039 Safety Zone; Town of Marblehead Fourth of July Fireworks Display, Marblehead, Massachusetts

(a) *Location.* The following area is a safety zone: All waters of Marblehead Harbor within a 400-yard radius of the fireworks barge located at approximate position 42°30′548″ N, 070°50′098″ W.

(b) *Effective date.* This section is effective from 8:30 p.m. until 10 p.m. EDT on July 4, 2005, with a rain date of 8:30 p.m. until 10 p.m. EDT on July 5, 2005.

(c) *Regulations.*

(1) In accordance with the general regulations in section 165.23 of this part, entry into or movement within this zone is prohibited unless authorized by the Captain of the Port Boston.

(2) All vessel operators shall comply with the instructions of the COTP or the designated on-scene U.S. Coast Guard patrol personnel. On-scene Coast Guard patrol personnel include commissioned, warrant, and petty officers of the Coast Guard on board Coast Guard, Coast Guard Auxiliary, local, State, and Federal law enforcement vessels.

Dated: May 3, 2005.

James L. McDonald,

Captain, U.S. Coast Guard, Captain of the Port, Boston, Massachusetts.

[FR Doc. 05–9533 Filed 5–12–05; 8:45 am]

BILLING CODE 4910–15–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 165

[CGD1–05–037]

RIN 1625–AA00

Safety Zone; City of Lynn Fourth of July Celebration, Lynn, MA

AGENCY: Coast Guard, DHS.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Coast Guard proposes to establish a temporary safety zone for the City of Lynn Fourth of July Celebration. The safety zone is necessary to protect the life and property of the maritime public from the potential hazards posed by a fireworks display. The safety zone will prohibit entry into or movement within this portion of Nahant Bay during its effective period.

DATES: Comments and related material must reach the Coast Guard on or before June 13, 2005.

ADDRESSES: You may mail comments and related material to Sector Boston, 427 Commercial Street, Boston, MA. Sector Boston maintains the public docket for this rulemaking. Comments and material received from the public, as well as documents indicated in this preamble as being available in the docket are part of docket CGD01–05–037 and are available for inspection or copying at Sector Boston, 427 Commercial Street, Boston, MA between the hours of 8 a.m. and 3 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: Chief Petty Officer Paul English, Sector Boston, Waterways Management Division, at (617) 223–3010.

SUPPLEMENTARY INFORMATION:

Request for Comments

We encourage you to participate in this rulemaking by submitting comments and related material. If you do so, please include your name and address, identify the docket number for the rulemaking (CGD01–05–037), indicate the specific section of this document to which each comment applies, and give the reason for each comment. Please submit all comments and related materials in an unbound format, no larger than 8.5 by 11 inches, suitable for copying. If you would like to know that your submission reached us, please enclose a stamped, self-addressed postcard or envelope. We may change this proposed rule in view of them.

Public Meeting

We do not plan to hold a public meeting. But you may submit a request for a meeting by writing to Sector Boston at the address under **ADDRESSES** explaining why one would be beneficial. If we determine that one would aid this rulemaking, we will hold one at a time and place announced by a later notice in the **Federal Register**.

Background and Purpose

This proposed rule establishes a safety zone on the waters of Nahant Bay within a four hundred yard radius around the fireworks barge located at approximate position 42°27.686′ N, 070°55.101′ W. The safety zone would be in effect from 8:30 p.m. until 10:30 p.m. on July 3, 2005.

This safety zone is necessary to protect the life and property of the maritime public from the dangers posed by this event. It would protect the public by temporarily prohibiting entry into or movement within this portion of Nahant Bay.

Discussion of Proposed Rule

The Coast Guard proposes establishing a temporary safety zone in a portion of Nahant Bay. The temporary safety zone would be in effect from 8:30 p.m. EDT until 10:30 p.m. EDT on July 3, 2005. Marine traffic may transit safely outside of the safety zone during the event, thereby allowing navigation of Nahant Bay except for the portion delineated by this rule. This safety zone would control vessel traffic during the fireworks event to protect the safety of the maritime public.

Given the limited time frame of the fireworks display and because the zone leaves the majority of Nahant Bay open for navigation, the Captain of the Port anticipates minimal negative impact on vessel traffic due to this event. Public notifications will be made prior to the effective period via local media, local notice to mariners and marine information broadcasts.

Regulatory Evaluation

This proposed rule is not a ''significant regulatory action'' under section 3(f) of Executive Order 12866, Regulatory Planning and Review, and does not require an assessment of potential costs and benefits under section 6(a)(3) of that Order. The Office of Management and Budget has not reviewed it under that Order. It is not ''significant'' under the regulatory policies and procedures of the Department of Homeland Security (DHS).

The Coast Guard expects the economic impact of this proposed rule to be so minimal that a full Regulatory Evaluation under paragraph 10e of the regulatory policies and procedures of DHS is unnecessary.

Although this regulation prevents vessel traffic from transiting into a portion of Nahant Bay during this event, the effect of this regulation will not be significant for several reasons: vessels will be excluded from the area of the safety zone for only two hours, vessels will be able to operate in the majority of Nahant Bay during this time period; and advance notifications will be made to the local maritime community by marine information broadcasts and Local Notice to Mariners.

Small Entities

Under the Regulatory Flexibility Act (5 U.S.C. 601–612), the Coast Guard considered whether this proposed rule would have a significant economic impact on a substantial number of small entities. The term ''small entities'' comprises small businesses, not-for-profit organizations that are

independently owned and operated and are not dominant in their fields, and governmental jurisdictions with populations of less than 50,000.

The Coast Guard certifies under 5 U.S.C. 605(b) that this rule will not have a significant economic impact on a substantial number of small entities. This proposed rule would affect the following entities, some of which may be small entities: the owners or operators of vessels intending to transit or anchor in the effected portion of Nahant Bay from 8:30 p.m. until 10:30 p.m. EDT July 3, 2005.

This safety zone would not have a significant economic impact on a substantial number of small entities for the reasons: Vessels traffic can safety pass outside of the safety zone during the effective period, the period is limited in duration, and advance notification via safety marine informational broadcast and local notice to mariners.

Assistance for Small Entities

Under section 213(a) of the Small Business Regulatory Enforcement Fairness Act of 1996 (Public Law 104–121), we want to assist small entities in understanding this proposed rule so that they can better evaluate its effects on them and participate in the rulemaking. If the rule would effect your small business, organization, and government jurisdiction and you have questions concerning its provisions or options for compliance, please contact Chief Petty Officer at the address listed under **ADDRESSES.** The Coast Guard will not retaliate against small entities that question or complain about this rule or any policy or action of the Coast Guard.

Collection of Information

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

Federalism

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

Unfunded Mandates Reform Act

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

Taking of Private Property

This rule would not effect a taking of private property or otherwise have taking implications under Executive Order 12630, Governmental Actions and Interference with Constitutionally Protected Property Rights.

Civil Justice Reform

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

Protection of Children

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

Indian Tribal Governments

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

Energy Effects

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

Technical Standards

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

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

Environment

We have analyzed this rule under Commandant Coast Guard Instruction M16475.1D, which guides the Coast Guard in complying with the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321–4370f), and have concluded that there are no factors in this case that would limit the use of a categorical exclusion under 2.B.2 of the Instruction. Therefore, we believe that this rule is categorically excluded, under figure 2–1, paragraph (34)(g) of the Instruction, from further environmental documentation. A preliminary ''Environmental Analysis Check List'' is available in the docket where indicated under **ADDRESSES.** This rule fits the category selected from paragraph (34)(g), as it would establish a safety zone. Comments on this section will be considered before we make the final decision on whether to categorically exclude this rule from further environmental review.

List of Subjects in 33 CFR Part 165

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

For the reasons discussed in the preamble, the Coast Guard proposes to amend 33 CFR 165 as follows:

PART 165—REGULATED NAVIGATION AREAS AND LIMITED ACCESS AREAS

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

Authority: 33 U.S.C. 1226, 1231; 46 U.S.C. Chapter 701; 50 U.S.C. 191, 195; 33 CFR 1.05–1(g), 6.04–1, 6.04–6, and 160.5; Pub. L. 107–295, 116 Stat. 2064; Department of Homeland Security Delegation No. 0170.1.

2. From 8:30 p.m. until 10:30 p.m. on July 3, 2005, add temporary § 165.T01–037 to read as follows:

§ 165.T01–037 Safety Zone; City of Lynn Fourth of July Celebration, Lynn, Massachusetts

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

All waters of Nahant Bay within a 400 yard radius of the fireworks barge site, at approximate position 42°27.686′ N, 070°55.101′ W.

(b) *Effective date*. This section is effective from 8:30 p.m. until 10:30 p.m. EDT on July 3, 2005.

(c) *Regulations*. (1) In accordance with the general regulations in section 165.23 of this part, entry into or movement within this zone is prohibited unless authorized by the Captain of the Port Boston.

(2) All vessel operators shall comply with the instructions of the COTP or the designated on-scene U.S. Coast Guard patrol personnel. On-scene Coast Guard patrol personnel include commissioned, warrant, and petty officers of the Coast Guard on board Coast Guard, Coast Guard Auxiliary, local, State, and Federal law enforcement vessels.

Dated: May 3, 2005.

James L. McDonald,

Captain, U.S. Coast Guard, Captain of the Port Boston, Massachusetts.

[FR Doc. 05–9531 Filed 5–12–05; 8:45 am]

BILLING CODE 4910–15–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 165

[CCGD11–05–006]

RIN 1625–AA11

Regulated Navigation Area; Humboldt Bay Bar Channel and Humboldt Bay Entrance Channel, Humboldt Bay, CA

AGENCY: Coast Guard, DHS.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Coast Guard proposes designating the Humboldt Bay Bar Channel and the Humboldt Bay Entrance Channel as a Regulated Navigation Area (RNA) for certain commercial vessels transporting oil or hazardous material as cargo. This action is necessary to reduce significant hazards to subject vessels, the port and the public that are present during periods of poor weather conditions. This RNA includes criteria for when the bar would close, notice requirements, and procedures for waiver requests for vessels transporting oil or certain dangerous cargoes in bulk within Humboldt Bay.

DATES: Comments and related material must reach the Coast Guard on or before July 12, 2005.

ADDRESSES: You may mail comments and related material to the Waterways Management Branch, U.S. Coast Guard Marine Safety Office San Francisco Bay, Coast Guard Island, Alameda, California 94501. The Waterways Management Branch maintains the public docket for this rulemaking. Comments and material received from the public, as well as documents indicated in this preamble as being available in the docket, will become part of this docket and will be available for inspection or copying at the Waterways Management Branch between 9 a.m. and 4 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: Lieutenant Doug Ebbers, Waterways Management Branch, U.S. Coast Guard Marine Safety Office San Francisco Bay, (510) 437–2770.

SUPPLEMENTARY INFORMATION:

Request for Comments

We encourage you to participate in this rulemaking by submitting comments and related material. If you do so, please include your name and address, identify the docket number for this rulemaking (CCGD11–05–006), indicate the specific section of this document to which each comment applies, and give the reason for each comment. Please submit all comments and related material in an unbound format, no larger than 8½ by 11 inches, suitable for copying. If you would like to know that your submission reached us, please enclose a stamped, self-addressed postcard or envelope. We will consider all comments and material received during the comment period. We may change this proposed rule in view of them.

Public Meeting

We do not now plan to hold a public meeting. But you may submit a request for a meeting by writing to the Waterways Management Branch at the address under **ADDRESSES** explaining why one would be beneficial. If we determine that one would aid this rulemaking, we will hold one at a time and place announced by a separate notice in the **Federal Register**.

Background and Purpose

Because Humboldt Bay has a breaking bar, a narrow entrance channel, and no general anchorages within the bay, transits of this area present significant hazards to vessels carrying oil or hazardous material as cargo. The potential hazards to the subject vessels and the consequences of casualties involving commercial vessels carrying oil or hazardous material as cargo warrant special procedures to reduce the potential for a collision or grounding and any subsequent release of a cargo covered by this regulation.

Prior to the issuance of this proposed rule, the COTP issued several advisories addressing safe entry procedures for vessels transporting cargoes of oil or other hazardous material in the Humboldt Bay area. The most recent was a COTP Advisory put into effect in June of 1998 (COTP Advisory 01–98). This advisory included policies for when the bar would be closed to specified vessel traffic, notice requirements, vessel escort policies, and addressed parameters and procedures for waiver requests. In August of 2004, representatives from the Coast Guard Marine Safety Office San Francisco Bay met with Humboldt Bay stakeholders to review COTP Advisory 01–98. In attendance at this meeting were representatives from the California State Department of Fish and Game's Office of Oil Spill Prevention and Response, Humboldt Bay Coast Guard units, and local oil tank vessel operators. The COTP determined that although the policies contained within the COTP Advisory were appropriate, a rulemaking was needed to clearly establish the Coast Guard's authority to enforce them. In addition, it was decided that because Coast Guard Group Humboldt Bay is located near the Humboldt Bay Bar, the Group Commander would be better equipped to make timely judgments on bar conditions and to enforce this RNA. Therefore, the authority to enforce this RNA is being delegated to the Commanding Officer of Group Humboldt Bay.

In this rulemaking, the Coast Guard proposes to designate an area around the Humboldt Bay Bar as an RNA for the following purposes: (1) To establish the Coast Guard's authority to prohibit vessels carrying oil or hazardous material as cargo from crossing the bar during unsafe conditions, (2) to establish waiver, notice, and vessel escort policies, and (3) to delegate the authority for enforcing these regulations to the Humboldt Bay Group Commander.

Discussion of Proposed Rule

This proposed rule would designate the Humboldt Bay Bar Channel and the

Humboldt Bay Entrance Channel as an RNA for the purpose of regulating vessels transporting cargoes of oil or hazardous material. The potential hazards associated with these products are serious enough to justify special procedures to reduce the possibility of a collision or grounding during periods of poor weather, which could lead to a release of the materials covered by this proposed regulation. The proposed regulation would help to ensure the safety of mariners, the public, the port, and the environment by establishing requirements and procedures regarding: (1) Notice of intent to cross the bar, (2) when the bar would be closed to certain vessels due to weather conditions, (3) waivers, and (4) vessel escorts.

If the owner, master, agent, or person in charge of a vessel to which the proposed regulation would apply wants to obtain a waiver to cross the bar when it is closed, the proposed regulation states that a waiver can be requested up to four hours in advance of crossing the bar and would be considered for approval by the Group Commander, or his designated representative, on a case-by-case basis. As a general rule waivers would only be granted when the following conditions exist: (1) Proper permission to cross has been received, (2) sea conditions at the bar are less than 6 feet, (3) winds at the bar are less than 30 knots, (4) the transit will take place during daylight hours, (5) the vessel has only a single tow or no tow, and (6) the visibility at the bar is greater than 1,000 yards.

Deviations from the procedures and requirements of this proposed rule would be prohibited unless specifically authorized by the Group Commander. Vessels or persons violating this section may be subject to the penalties set forth in 33 U.S.C. 1232. Pursuant to 33 U.S.C. 1232, any violation of the regulations described herein, is punishable by civil penalties (not to exceed $32,500 per violation, where each day of a continuing violation is a separate violation), criminal penalties (imprisonment from 5 to 10 years and a maximum fine of $250,000) and in rem liability against the offending vessel. Any person who violates this section using a dangerous weapon, or who engages in conduct that causes bodily injury or fear of imminent bodily injury to any officer authorized to enforce this regulation also faces imprisonment from 10 to 25 years.

The Group Commander would enforce this regulation and would have the authority to take steps necessary to ensure the safe transit of vessels in Humboldt Bay. The Group Commander can enlist the aid and cooperation of any Federal, State, county, and municipal agency to assist in the enforcement of the regulation.

In addition to this Notice of Proposed Rulemaking (NPRM), a Temporary Final Rule (TFR) was published on March 9, 2005, in the **Federal Register** (70 FR 11546), temporarily establishing regulations to address the issues detailed in this NPRM. The TFR will allow the Coast Guard to regulate vessels carrying oil or certain dangerous cargoes across the Humboldt Bay bar as specified in this NPRM while the public comment period established by this NPRM is in place. Once the comment period is over, the COTP intends to draft a final rule.

Regulatory Evaluation

This proposed rule is not a ''significant regulatory action'' under section 3(f) of Executive Order 12866, Regulatory Planning and Review, and does not require an assessment of potential costs and benefits under section 6(a)(3) of that Order. The Office of Management and Budget has not reviewed it under that Order. It is not ''significant'' under the regulatory policies and procedures of the Department of Homeland Security (DHS).

We expect the economic impact of this proposed rule to be so minimal that a full Regulatory Evaluation under the regulatory policies and procedures of DHS is unnecessary. The effect of this regulation would not be significant for the following reasons: (1) Very few vessels carrying oil or certain dangerous cargoes transit the Humboldt Bay area, and (2) those vessels carrying oil or hazardous material as cargo have been complying with the COTP advisories that established the same procedures that are being proposed in this regulation. Therefore, this proposed rule would be a continuation of the already established policy of monitoring the entrance and departure of the above-mentioned vessels. In addition, vessels will continue to be allowed to enter on a case-by-case basis with prior permission of the Group Commander, or his designated representative.

Small Entities

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

The Coast Guard certifies under 5 U.S.C. 605(b) that this proposed rule is not expected to have a significant economic impact on a substantial number of small entities. The effect of this rule on small entities would not be significant for the following reasons: (1) Very few vessels carrying oil or hazardous material as cargo transit the Humboldt Bay area, and (2) those vessels carrying oil or hazardous material as cargo have been complying with the COTP advisories that established the same procedures that are being established by this regulation. In addition, the proposed regulations would still allow the regulated vessels to complete transits of the bar under favorable weather conditions, and the Group Commander would continue to grant entrance waivers on a case-by-case basis.

If you think that your business, organization, or governmental jurisdiction qualifies as a small entity and that this rule would have a significant economic impact on it, please submit a comment (see ADDRESSES) explaining why you think it qualifies and how and to what degree this rule would economically affect it.

Assistance for Small Entities

Under section 213(a) of the Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104–121), we want to assist small entities in understanding this proposed rule so that they can better evaluate its effects on them and participate in the rulemaking. If the proposed rule would affect your small business, organization, or governmental jurisdiction and you have questions concerning its provisions or options for compliance, please contact Lieutenant Doug Ebbers, Waterways Management Branch, U.S. Coast Guard Marine Safety Office San Francisco Bay, at (510) 437–2770. The Coast Guard will not retaliate against small entities that question or complain about this rule or any policy or action of the Coast Guard.

Collection of Information

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

Federalism

A rule has implications for federalism under Executive Order 13132, Federalism, if it has a substantial direct effect on State or local governments and would either preempt State law or impose a substantial direct cost of compliance on them. We have analyzed

this proposed rule under that Order and have determined that it does not have implications for federalism.

Unfunded Mandates Reform Act

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

Taking of Private Property

This proposed rule would not effect a taking of private property or otherwise have taking implications under Executive Order 12630, Governmental Actions and Interference with Constitutionally Protected Property Rights.

Civil Justice Reform

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

Protection of Children

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

Indian Tribal Governments

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

Energy Effects

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

Technical Standards

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

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

Environment

We have analyzed this proposed rule under Commandant Instruction M16475.lD, which guides the Coast Guard in complying with the National Environmental Policy Act of 1969 (NEPA)(42 U.S.C. 4321–4370f), and have concluded that there are no factors in this case that would limit the use of a categorical exclusion under section 2.B.2 of the Instruction. Therefore, this rule is categorically excluded, under figure 2–1, paragraph (34)(g), of the Instruction, from further environmental documentation because it would establish an RNA.

A draft ''Environmental Analysis Check List'' and a draft ''Categorical Exclusion Determination'' (CED) are available in the docket where indicated under **ADDRESSES.** Comments on this section will be considered before we make the final decision on whether the rule should be categorically excluded from further environmental review.

List of Subjects in 33 CFR Part 165

Harbors, Marine safety, Navigation (water), Reporting and record-keeping requirements, Security measures, Waterways.

For the reasons discussed in the preamble, the Coast Guard proposes to amend 33 CFR part 165 as follows:

PART 165—REGULATED NAVIGATION AREAS AND LIMITED ACCESS AREAS

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

Authority: 33 U.S.C. 1226, 1231; 46 U.S.C. Chapter 701; 50 U.S.C. 191, 195; 33 CFR 1.05–1(g), 6.04–1, 6.04–6, and 160.5; Pub. L. 107–295, 116 Stat. 2064; Department of Homeland Security Delegation No. 0170.1.

2. Add § 165.1195 to read as follows:

§ 165.1195 Regulated Navigation Area; Humboldt Bay Bar Channel and Humboldt Bay Entrance Channel, Humboldt Bay, California.

(a) *Location.* The Regulated Navigation Area (RNA) includes all navigable waters of the Humboldt Bay Bar Channel and the Humboldt Bay Entrance Channel, Humboldt Bay, California.

(b) *Definitions.* As used in this section—

COTP means the Captain of the Port as defined in 33 CFR 1.01–30 and 3.55–20.

Group means Coast Guard Group Humboldt Bay.

Group Commander means the Commanding Officer of Coast Guard Group Humboldt Bay.

Hazardous material means any of the materials or substances listed in 46 CFR 153.40.

Humboldt Bay Area means the area described in the location section of this regulation.

Oil means oil of any kind or in any form, including but not limited to, petroleum, fuel oil, sludge, oil refuse, and oil mixed with wastes other than dredged spoil.

Station means Coast Guard Station Humboldt Bay.

Tank vessel means any vessel that is constructed or adapted to carry, or that carries, oil or hazardous material in bulk as cargo or cargo residue.

(c) *Applicability.* This section applies to the owners and operators of tank vessels transporting oil or hazardous material as cargo within the Humboldt Bay Area.

(d) *Regulations.*

(1) In addition to the arrival and departure notification requirements listed in 33 CFR Part 160, Ports and Waterways Safety—General, Subpart C—Notifications of ''Arrivals, Departures, Hazardous Conditions, and Certain Dangerous Cargoes'', the owner, master, agent or person in charge of a vessel to which this notice applies shall obtain permission to cross within four hours of crossing the Humboldt Bay Bar. Between 6:30 a.m. and 10 p.m. Notifications and requests for permission can be made to Station

Humboldt Bay on VHF–FM Channel 16, or at (707) 443–2213. If between 10 p.m. and 6:30 a.m., or if unable to reach the Station, notifications and requests for permission can be made directly to Group Humboldt Bay on VHF–FM Channel 16 or at (707) 839–6113.

(2) Permission for a bar crossing by vessels or towing vessels and their tows to which this section applies is dependant on environmental and safety factors, including but not limited to: sea state, winds, visibility, size and type of vessel or tow, wave period, time of day or night, and tidal currents. The final decision to close the bar rests with Humboldt Bay Group Commander or his designated representative. Humboldt Bay Bar Channel crossings by vessels subject to this section will generally not be permitted unless all of the following conditions exist: proper permission to cross has been received, sea conditions at the bar are less than 6 feet, winds at the bar are less than 30 knots, the transit will take place during daylight hours, the vessel has only a single tow or no tow, the visibility at the bar is greater than 1,000 yards, and the vessel and tow are in proper operating condition.

(3) If the bar is closed to vessels to which this section applies, waiver requests will be accepted within four hours of crossing the entrance channel. If the waiver request is made between 6:30 a.m. and 10 p.m., the request should be made to Station Humboldt Bay on VHF–FM Channel 16, or at (707) 443–2213. If between 10 p.m. and 6:30 a.m., or if unable to reach the Station, the request can be made directly to Group Humboldt Bay on VHF-FM Channel 16 or at (707) 839–6113. Waiver requests must be made by the vessel master and must provide the following: a description of the proposed operation, the conditions for which the waiver is requested, the reasons for requesting the waiver, the reasons that the requester believes the proposed operation can be accomplished safely, and a callback phone number. The Station or Group Watchstander receiving the request will brief the Officer in Charge of the Station who will then brief the Group Commander. The authority to grant waivers rests with the Group Commander or his designated representative.

(4) In addition to the requirements in paragraphs (d)(1)–(3) of this section, vessels transporting liquefied hazardous gasses or compressed hazardous gasses in bulk as cargo into or out of Humboldt Bay are required to be aided by two assist tugs. If the vessel carrying the gasses is towed, the assist tug requirement is in addition to the towing tug. The assist tugs shall escort the vessel through its transit and must be stationed so as to provide immediate assistance in response to the loss of power or steering of the cargo vessel, its towing tug, or loss of control over the tow.

(5) Vessels to which this section applies may be required by the Group Commander or his designated representative to be escorted by a Coast Guard vessel during their transit. In addition, if a vessel master, agent, or pilot has concerns about the safety of a vessel's transit through the Humboldt Bay Entrance Channel, a Coast Guard escort may be requested. Requests for an escort should be directed to Station on VHF–FM channel 16 or at (707) 443–2213 between 6:30 a.m. and 10 p.m., or to Group on VHF–FM channel 16 or at (707) 839–6113 if between 10 p.m. and 6:30 a.m.

(e) *Enforcement.* Acting as a representative of the Captain of the Port, the Humboldt Bay Group Commander will enforce this regulation and has the authority to take steps necessary to ensure the safe transit of vessels in Humboldt Bay. The Group Commander can enlist the aid and cooperation of any Federal, State, county, and municipal agency to assist in the enforcement of the regulation. All persons and vessels shall comply with the instructions of the Group Commander or the designated on-scene patrol personnel. Patrol personnel comprise commissioned, warrant, and petty officers of the Coast Guard onboard Coast Guard, Coast Guard Auxiliary, local, state, and federal law enforcement vessels. Upon being hailed by U.S. Coast Guard patrol personnel by siren, radio, flashing light, or other means, the operator of a vessel shall proceed as directed.

Dated: April 25, 2005.

Kevin J. Eldridge,

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

[FR Doc. 05–9530 Filed 5–12–05; 8:45 am]

BILLING CODE 4910–15–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 165

[CGD09–05–014]

RIN 1625–AA87

Security Zone; Duluth Harbor, Duluth, MN

AGENCY: Coast Guard, DHS.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Coast Guard proposes to establish a temporary security zone in Duluth's inner harbor for the Commissioning ceremony of the Coast Guard Cutter ALDER. The security zone is necessary to ensure the security of dignitaries attending this ceremony on June 10, 2005. The security zone is intended to restrict vessels from a portion of Duluth Harbor in Duluth, Minnesota.

DATES: Comments and related material must reach the Coast Guard on or before June 2, 2005.

ADDRESSES: You may mail comments and related material to U.S. Coast Guard Marine Safety Office Duluth, 600 South Lake Ave, Canal Park, Duluth, Minnesota 55802. U.S. Coast Guard Marine Safety Office (MSO) Duluth maintains the public docket for this rulemaking. You may also submit comments electronically to *djustis@msoduluth.uscg.mil.* Comments and material received from the public, as well as documents indicated in this preamble as being available in the docket, will become part of this docket and will be available for inspection or copying at the U.S. Coast Guard Marine Safety Office Duluth, 600 South Lake Ave, Canal Park, Duluth, Minnesota 55802, between the hours of 7:30 a.m. and 3:30 p.m., Monday through Friday, except Federal Holidays.

FOR FURTHER INFORMATION CONTACT: LT Greg Schultz, U.S. Coast Guard Marine Safety Office Duluth, at (218) 720–5285.

SUPPLEMENTARY INFORMATION:

Request for Comments

We encourage you to participate in this rulemaking by submitting comments and related material. If you do so, please include your name and address, identify the docket number for this rulemaking (CGD09–05–014), indicate the specific section of this document to which each comment applies, and give the reason for each comment. Please submit all comments and related material in an unbound format, no larger than 8½ by 11 inches, suitable for copying. You may also submit comments electronically to *djustis@msoduluth.uscg.mil.* If you would like to know that they reached us, please enclose a stamped, self-addressed postcard or envelope. We will consider all comments and material received during the comment period. We may change this proposed rule in view of them.

Public Meeting

We do not now plan to hold a public meeting. But you may submit a request for a meeting by writing to MSO Duluth at the address under **ADDRESSES** explaining why one would be beneficial. If we determine that one would aid this rulemaking, we will hold one at a time and place announced by a later notice in the **Federal Register**.

Background and Purpose

An event such as a military vessel commissioning is a high interest event and will be attended by large numbers of spectators from both shore and on the water. In addition, it is expected at the time of publication of this proposed rule that certain dignitaries will be in attendance, however specific knowledge of the attendees is not yet known.

A security zone is necessary to keep boaters from the specified area to provide for the security of the Coast Guard Cutter Alder and the dignitaries in attendance.

Discussion of Proposed Rule

The Coast Guard is proposing a security zone in Duluth Harbor, Duluth, Minnesota. The Coast Guard will notify the public in advance by way of the Ninth Coast Guard District Local Notice to Mariners, the Broadcast Notice to Mariners, and, for those who request it, from MSO Duluth, by facsimile (fax).

Regulatory Evaluation

This rule is not a ''significant regulatory action'' under section 3(f) of Executive Order 12866, Regulatory Planning and Review, and does not require an assessment of potential costs and benefits under section 6(a)(3) of that Order. The Office of Management and Budget has not reviewed it under that Order. It is not ''significant'' under the regulatory policies and procedures of the Department of Homeland Security (DHS).

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

The security zone will only be in effect for 5 hours on the day of the event and the zone is in such a location as to allow vessels to transit into Duluth Harbor.

Small Entities

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

The Coast Guard certifies under 5 U.S.C. 605(b) that this rule will not have a significant economic impact on a substantial number of small entities.

This rule will affect the following entities: the owners or operators of vessels intending to transit or anchor in this portion of Duluth Harbor from 10 a.m. (local) to 3 p.m. (local) June 10, 2005. This regulation will not have a significant economic impact for the following reasons. The regulation is only in effect for one day of the event. The designated area is being established to allow for maximum use of the waterway for commercial and recreational vessels. The Coast Guard will inform the public that the regulation is in effect via Marine Information Broadcasts.

If you think your business, organization, or governmental jurisdiction qualifies as a small entity and that this rule would have a significant economic impact on it, please submit a comment (see **ADDRESSES**) explaining why you think it qualifies and how and to what degree this rule would economically affect it.

Assistance for Small Entities

Under Section 213(a) of the Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104–121), we offer to assist small entities in understanding the rule so that they can better evaluate its effects on them and participate in the rulemaking. If the rule would affect your small business, organization or governmental jurisdiction and you have questions concerning its provisions or options for compliance, please contact MSO Duluth (see **ADDRESSES**).The Coast Guard will not retaliate against small entities that question or complain about this rule or any policy or action of the Coast Guard.

Collection of Information

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

Federalism

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

Unfunded Mandates Reform Act

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

Taking of Private Property

This proposed rule will not effect a taking of private property or otherwise have taking implications under Executive Order 12630, Governmental Actions and Interference with Constitutionally Protected Property Rights.

Civil Justice Reform

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

Protection of Children

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

Indian Tribal Governments

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

Energy Effects

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

on the supply, distribution, or use of energy. It has not been designated by the Administrator of the Office of Information and Regulatory Affairs as a significant energy action. Therefore, it does not require a Statement of Energy Effects under Executive Order 13211.

Technical Standards

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

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

Environment

We have analyzed this proposed rule under Commandant Instruction M16475.lD, which guides the Coast Guard in complying with the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321–4370f), and have made a preliminary determination that there are no factors in this case that would limit the use of a categorical exclusion under section 2.B.2 of the Instruction. Therefore, we believe that this rule should be categorically excluded, under figure 2–1, paragraph (34)(g), of the Instruction, from further environmental documentation.

A preliminary ''Environmental Analysis Check List'' is available in the docket where indicated under **ADDRESSES.** Comments on this section will be considered before we make the final decision on whether to categorically exclude this rule from further environmental review.

List of Subjects in 33 CFR Part 165

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

For the reasons set out in the preamble, the Coast Guard amends 33 CFR Part 165 as follows:

PART 165—REGULATED NAVIGATION AREAS AND LIMITED ACCESS AREAS

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

Authority: 33 U.S.C. 1226, 1231; 46 U.S.C. Chapter 701; 50 U.S.C. 191, 195; 33 CFR 1.05–1(g), 6.04–1, 6.04–6, and 160.5; Pub. L. 107–295, 116 Stat. 2064; Department of Homeland Security Delegation No. 0170.1

2. A new temporary § 165.T09–014 is added to read as follows:

165.T09–014 Security Zone; Duluth Harbor, Duluth, Minnesota.

(a) *Location.* The following area is designated as a security zone: The waters of Duluth Harbor within a 500 foot radius from a fixed point located at 46°46′17″ N, 92°05′26″ W. These coordinates are based upon North American Datum (NAD 1983).

(b) *Effective time and date.* This regulation is effective from 10 a.m. (local) on June 10, 2005, through 3 p.m. (local), on June 10, 2005.

(c) *Regulations.* Entry into, transit through, or anchoring within the security zone is prohibited unless authorized by the Captain of the Port Duluth or the Coast Guard Patrol Commander.

Dated: May 4, 2005.

H.M. Nguyen,

Commander, U.S. Coast Guard, Captain of the Port Duluth.

[FR Doc. 05–9631 Filed 5–12–05; 8:45 am]

BILLING CODE 4910–15–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[R06–OAR–2005–OK–0001; FRL–7912–2]

Approval and Promulgation of Air Quality Implementation Plans; Oklahoma; Attainment Demonstration for the Central Oklahoma Early Action Compact Area; Ozone

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: The EPA is proposing to approve a revision to the Oklahoma State Implementation Plan (SIP) submitted by the Secretary of the Environment on December 22, 2004 for Central Oklahoma. This revision will incorporate a Memorandum of Agreement (MOA) between the Oklahoma Department of Environmental Quality (ODEQ) and the Association of Central Oklahoma Governments (ACOG) into the Oklahoma SIP and includes a demonstration of attainment for the 8-hour National Ambient Air Quality Standard (NAAQS) for ozone. The MOA outlines pollution control measures for the Central Oklahoma Early Action Compact (EAC) area. The EAC is designed to achieve and maintain the 8-hour ozone standard more expeditiously than the EPA's 8-hour implementation rulemaking. EPA is proposing approval of the photochemical modeling in support of the attainment demonstration of the 8-hour ozone standard within the Central Oklahoma EAC and is proposing approval of the associated control measures. We are proposing to approve this revision as a strengthening of the SIP in accordance with the requirements of sections 110 and 116 the Federal Clean Air Act (the Act), which will result in emission reductions needed to help ensure attainment of the 8-hour NAAQS for ozone.

DATES: Comments must be received on or before June 13, 2005.

ADDRESSES: Submit your comments, identified by Regional Material in EDocket (RME) ID No. R06–OAR–2005–OK–0001, by one of the following methods:

Federal eRulemaking Portal: *http://www.regulations.gov.* Follow the on-line instructions for submitting comments.

Agency Web site: *http://docket.epa.gov/rmepub/* Regional Material in EDocket (RME), EPA's electronic public docket and comment system, is EPA's preferred method for receiving comments. Once in the system, select ''quick search,'' then key in the appropriate RME Docket identification number. Follow the on-line instructions for submitting comments.

U.S. EPA Region 6 ''Contact Us'' Web site: *http://epa.gov/region6/r6coment.htm.* Please click on ''6PD'' (Multimedia) and select ''Air'' before submitting comments.

E-mail: Mr. Thomas Diggs at *diggs.thomas@epa.gov.* Please also cc the person listed in the **FOR FURTHER INFORMATION CONTACT** section below.

Fax: Mr. Thomas Diggs, Chief, Air Planning Section (6PD–L), at fax number 214–665–7263.

Mail: Mr. Thomas Diggs, Chief, Air Planning Section (6PD–L), Environmental Protection Agency, 1445 Ross Avenue, Suite 1200, Dallas, Texas 75202–2733.

Hand or Courier Delivery: Mr. Thomas Diggs, Chief, Air Planning Section (6PD–L), Environmental Protection Agency, 1445 Ross Avenue, Suite 1200, Dallas, Texas 75202–2733. Such deliveries are accepted only between the hours of 8 am and 4 pm

weekdays except for legal holidays. Special arrangements should be made for deliveries of boxed information.

Instructions: Direct your comments to Regional Material in EDocket (RME) ID No. R06–OAR–2005–OK–0001. The EPA's policy is that all comments received will be included in the public file without change, change and may be made available online at *http://docket.epa.gov/rmepub/,* including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information the disclosure of which is restricted by statute. Do not submit information through Regional Material in EDocket (RME), regulations.gov, or e-mail if you believe that it is CBI or otherwise protected from disclosure. The EPA RME Web site and the federal regulations.gov are ''anonymous access'' systems, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through RME or regulations.gov, your e-mail address will be automatically captured and included as part of the comment that is placed in the public file and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD–ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses.

Docket: All documents in the electronic docket are listed in the Regional Material in EDocket (RME) index at *http://docket.epa.gov/rmepub/*. 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 RME or in the official file which is available at the Air Planning Section (6PD–L), Environmental Protection Agency, 1445 Ross Avenue, Suite 700, Dallas, Texas 75202–2733. The file will be made available by appointment for public inspection in the Region 6 FOIA Review Room between the hours of 8:30 am and 4:30 pm weekdays except for legal holidays. Contact the person listed in the **FOR FURTHER INFORMATION CONTACT** paragraph below or Mr. Bill Deese at (214) 665–7253 to make an appointment. If possible, please make the appointment at least two working days in advance of your visit. There will be a 15 cents per page fee for making photocopies of documents. On the day of the visit, please check in at the EPA Region 6 reception area at 1445 Ross Avenue, Suite 700, Dallas, Texas.

The State submittal is also available for public inspection at the State Air Agency listed below during official business hours by appointment:

Oklahoma Department of Environmental Quality, Air Quality Division, 707 North Robinson, Oklahoma City, OK 73101–1677.

FOR FURTHER INFORMATION CONTACT: Mr. Kenneth Boyce, Air Planning Section (6PD–L), EPA Region 6, 1445 Ross Avenue, Dallas, Texas 75202–2733, telephone (214) 665–7259, *boyce.kenneth@epa.gov* or Carrie Paige, Air Planning Section (6PD–L), EPA Region 6, 1445 Ross Avenue, Dallas, Texas 75202–2733, telephone (214) 665–6521, *paige.carrie@epa.gov.*

SUPPLEMENTARY INFORMATION: Throughout this document ''we,'' ''us,'' and ''our'' refer to EPA.

Outline

I. What action are we proposing?
II. What is an EAC?
III. What is a SIP?
IV. What is the content of the Central Oklahoma EAC attainment demonstration?
V. Why are we proposing to approve this EAC SIP submittal?
VI. What measures are included in this EAC SIP submittal?
VII. What happens if the area does not meet the EAC commitments or milestones?
VIII. Proposed Action
IX. Statutory and Executive Order Reviews

I. What Action Are We Proposing?

Today we are proposing to approve a revision to the Oklahoma SIP under sections 110 and 116 of the Act. The revision was submitted to EPA by the State of Oklahoma on December 22, 2004. This revision demonstrates attainment of the 8-hour ozone standard within the Central Oklahoma EAC area, which is coextensive with the Oklahoma City Metropolitan Statistical Area. The Central Oklahoma EAC is a voluntary agreement between the ODEQ, the City of Oklahoma City, the Greater Oklahoma City Chamber of Commerce, the Oklahoma Department of Transportation, the ACOG and the EPA. The intent of this agreement is to reduce ozone pollution earlier than the Act requires and thereby maintain the 8-hour ozone standard. The Central Oklahoma EAC sets forth a schedule to develop technical information about local ozone pollution, and adopt and implement emission control measures to ensure that this area achieves compliance with the 8-hour ozone standard by December 31, 2007. Section VI of this rulemaking describes the control measures that will be implemented within the Central Oklahoma EAC area.

II. What Is an EAC?

The Early Action Compact program was developed to allow communities an opportunity to reduce emissions of ground level ozone pollution sooner than the Act requires. The EAC program was designed for areas that approach or monitor exceedances of the 8-hour ozone standard, but are in attainment for the 1-hour ozone standard. The compact is a voluntary agreement between local communities, States and tribal air quality officials, and EPA which allows States and local entities to make decisions that will accelerate meeting the new 8-hour ozone standard using locally tailored pollution controls instead of Federally mandated control measures. Early planning and early implementation of control measures that improve air quality will likely accelerate protection of public health. The EPA believes the EAC program provides an incentive for early planning, early implementation, and early reductions of air emissions in the affected areas, thus leading to an expeditious attainment and maintenance of the 8-hour ozone standard.

Communities with EACs will have plans in place to reduce air pollution at least two years earlier than required by the Act. In December 2002, a number of States submitted compact agreements pledging to reduce emissions earlier than required for compliance with the 8-hour ozone standard. These States and local communities had to meet specific criteria, and agreed to meet certain milestones for development and implementation of the compact. States with communities participating in the EAC program had to submit implementation plans by December 31, 2004 for meeting the 8-hour ozone standard, rather than June 15, 2007, the deadline for all other areas not meeting the 8-hour standard. The EAC program required communities to develop and implement air pollution control strategies, account for emissions growth, and demonstrate their attainment and maintenance of the 8-hour ozone standard. For more information on the EAC program see section V of our December 16, 2003 (68 FR 70108),

publication entitled ''Deferral of Effective Date of Nonattainment Designations for 8-hour Ozone National Ambient Air Quality Standards for Early Action Compact Areas.''

On April 15, 2004, EPA designated all areas for the 8-hour ozone standard. The EPA deferred the effective date of nonattainment designations for those EAC areas that were violating the 8-hour standard, but continue to meet the compact milestones. We announced the details of this deferral on April 15, 2004 as part of the Clean Air Rules of 2004. See our April 30, 2004 (69 FR 23858), publication entitled ''Air Quality Designations and Classifications for the 8-Hour Ozone National Ambient Air Quality Standards; Early Action Compact Areas with Deferred Effective Dates.''

III. What Is a SIP?

The SIP is a set of air pollution regulations, control strategies and technical analyses developed by the state, to ensure that the state meets the NAAQS. These ambient standards are established under section 109 of the Act and they currently address six criteria pollutants: carbon monoxide, nitrogen dioxide, ozone, lead, particulate matter, and sulfur dioxide. The SIP is required by Section 110 of the Act. These SIPs can be extensive, containing state regulations or other enforceable documents and supporting information such as emission inventories, monitoring networks, and modeling demonstrations.

IV. What Is the Content of the Central Oklahoma EAC Attainment Demonstration?

In support of this proposal, the ODEQ conducted an ozone photochemical modeling study developed for the Central Oklahoma EAC area. The photochemical modeling attainment demonstration includes: (1) Analyses which estimate whether selected emissions reductions will result in ambient concentrations that meet the 8-hour ozone standard in the Central Oklahoma EAC area, and (2) an identified set of measures which will result in the required emissions reductions. The modeled attainment test is passed if all resulting predicted future design values are less than 85 parts per billion (ppb). The design value is the three year average of the annual fourth highest 8-hour ozone readings. The attainment demonstration was supported by results of photochemical modeling and technical documentation. It shows that the 8-hour ozone standard should continue to be attained by 2007 and maintained through 2012. Additionally, the modeling analyses were further supported by some of the weight of evidence analyses that were evaluated for the Central Oklahoma and Tulsa areas.

We believe this study meets EPA's modeling requirements and guidelines, including such items as the base year inventory development, the growth rate projections, and the performance of the model. See Appendix B of our Technical Support Document (TSD) for more information about this modeling study, the weight of evidence analyses, and EPA's evaluation of these items. The modeling submitted in support of this proposal demonstrates that the Central Oklahoma EAC area will be in attainment with the 8-hour ozone NAAQS in 2007. The modeling results for the Central Oklahoma EAC area predict a maximum ozone design value of 80.2 ppb for 2007, which is well below the 8-hour ozone limit of 85 ppb. See section VI of this document for a list of measures that will be implemented within the Central Oklahoma EAC area. We are proposing to approve ODEQ's 8-hour ozone attainment demonstration plan for the Central Oklahoma EAC area.

V. Why Are We Proposing To Approve This EAC SIP Submittal?

We are proposing to approve this EAC SIP submittal because implementation of the requirements in This EAC will help ensure the Central Oklahoma area's compliance with the 8-hour ozone standard by December 31, 2007 and maintenance of that standard through 2012. We have reviewed these submittals and determined that they are consistent with the requirements of the Act, EPA's policy, and the EAC protocol. Our TSD contains more detailed information concerning this rulemaking action.

Approving the Central Oklahoma EAC area's clean air plans into the SIP with the measures and controls identified within the MOA provide a strengthening of the SIP for the Central Oklahoma EAC area. Consequently, the Central Oklahoma communities will start reducing air pollution at least two years earlier than required by the Act. EPA believes that the State and local area have provided a plan which will continue to fulfill the obligations necessary to maintain the April 15, 2004, attainment designation under the 8-hour ozone standard.

VI. What Measures Are Included in this EAC SIP Submittal?

The EPA designated the Central Oklahoma EAC area as attainment for the 8-hour ozone standard (63 FR 23858), however the EAC area has monitored violations of the federal 8-hour ozone standard. The ODEQ has submitted this revision to the SIP as a preventive and progressive measure to avoid violation of the 8-hour ozone standard within the affected area.

The MOA submitted within this SIP revision sets forth the duties and responsibilities for implementation of the Central Oklahoma EAC area Emission Reduction Strategies. While the implementation of these strategies is estimated to reduce emissions of volatile organic compounds (VOCs) and nitrogen oxides (NO_X), the Central Oklahoma EAC area has demonstrated attainment without including the effects of these measures in their photochemical modeling.

One element within the emission reduction strategies includes intersection and signal improvements, continuous left turn lanes, and freeway corridor management projects. The intersection and signal improvements and continuous left turn lane projects are estimated to reduce emissions of VOCs by 119.97 pounds per day (lb/day) and emissions of NO_X by 78.47 lb/day. The freeway corridor management projects include the installation of closed circuit televisions, webcams and dynamic message signs to direct traffic away from congested areas; these measures are projected to reduce emissions of VOCs by 35.58 lb/day. These Emission Reduction Strategies are described in detail in the TSD and they will be incorporated by reference in the Code of Federal Regulations in the final approval action. Detailed information is necessary for emission reduction measures in the SIP to ensure that they are specific and enforceable as required by the Act and the EAC protocol. The description of these emission reduction measures includes the identification of each project, location, length of each project (if applicable), a brief project description, implementation date and emissions reductions for both VOCs and NO_X.

Another element of the Emission Reduction Strategy includes 4 bicycle/pedestrian projects in the Central Oklahoma EAC area. These projects create a total of 11 miles of new bike/pedestrian trails. Due to minimal trail mileage created there is a low percentage of shift from driving to walking or riding a bike and the actual amount of emission reduction is too low to report. As such, the effect of these projects is not reflected in the photochemical modeling attainment demonstration. However, each project is part of a future regional master trail plan that is comprised of several trails linked

together. The linking of several trails help to reduce vehicle miles traveled by creating safer paths for alternate modes of transportation to work, school and shopping. The master trail plans also serve to create a larger, more accessible recreational area for more citizens.

The Emission Reduction Strategies described above will assist the Central Oklahoma EAC area in achieving and maintaining the 8-hour ozone NAAQS and we are proposing to approve these Emission Reduction Strategies. In compliance with the next EAC milestone, all of these measures will be implemented on or before December 31, 2005.

Per the EAC protocol, the Central Oklahoma Clean Air Action Plan must also include a component to address maintenance for growth at least 5 years beyond 2007, ensuring the area will remain in attainment of the 8-hour ozone standard through 2012. The Central Oklahoma EAC area has developed an emissions inventory for the year 2012, as well as a continuing planning process to address this essential part of the plan. The emissions inventory predicted an overall reduction in emissions through 2012: The VOC emissions predicted are 34 percent less in 2012 than those modeled for 2007, and emissions expected for NO_X are 19 percent less in 2012 than those modeled for 2007. Using air quality models to anticipate the impact of growth, as well as the state-assisted and locally-implemented measures to reduce emissions, the State has projected the area will be in attainment of the 8-hr ozone standard in 2007 and will remain in attainment through 2012.

To fulfill the planning process, the EAC signatories and implementing agencies will review all EAC activities and report on results in their semi-annual reports, beginning in June 2005. This semi-annual review will track and document, at a minimum, control strategy implementation and results, monitoring data and future plans. After review, additional control measures may be considered and adopted through revisions to this SIP if necessary.

VII. What Happens If the Area Does not Meet the EAC Commitments or Milestones?

On April 15, 2004, EPA designated the Central Oklahoma EAC area as attainment for the 8-hour ozone standard. We believe the local and State signatories of the EAC area will continue to meet their commitments to reduce ozone pollution. The measures outlined in the submittal provide sufficient information to conclude that the Central Oklahoma EAC area will complete each of the compact milestone requirements, including attainment of the 8-hour ozone standard by 2007. However, one of the principles of the EAC protocol is to provide safeguards to return areas to traditional SIP requirements should an area fail to comply with the terms of the EAC. If, as outlined in our guidance and in 40 CFR 81.300, an EAC milestone is missed and the area is still in attainment of the 8-hour ozone standard, we would take action to propose and promulgate a finding of failure to meet the milestone, but the ozone attainment designation and approved SIP elements would remain in effect. If the design value for the EAC area exceeds the 8-hour ozone standard and the area has missed a compact milestone, we would also consider factors in section 107(d)(3)(A) of the Act in deciding whether to redesignate the area to nonattainment for the 8-hour ozone NAAQS.

VIII. Proposed Action

The EPA is proposing to approve the attainment demonstration, the Emission Reduction Strategies, and the EAC plan into the Oklahoma SIP as a strengthening of the SIP. The modeling of ozone and ozone precursor emissions from sources in the Central Oklahoma EAC area demonstrate that the area will attain the 8-hour ozone NAAQS by December 31, 2007.

IV. Statutory and Executive Order Reviews

Under Executive Order 12866 (58 FR 51735, October 4, 1993), this proposed action is not a ''significant regulatory action'' and therefore is not subject to review by the Office of Management and Budget. For this reason and because this action will not have a significant, adverse effect on the supply, distribution, or use of energy, 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 proposed action merely proposes to approve state law as meeting Federal requirements and imposes no additional requirements beyond those imposed by state law. Accordingly, the Administrator certifies that this proposed 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 proposes to approve 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 proposed 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). This action merely proposes to approve 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 proposed 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 under the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note), 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 do not apply. This proposed 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.*).

List of Subjects in 40 CFR Part 52

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

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

Dated: May 5, 2005.

Richard E. Greene,

Regional Administrator, Region 6.

[FR Doc. 05–9588 Filed 5–12–05; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 141

[FRL–7911–5]

Notice of a Public Meeting To Discuss the Development of Regulations for Aircraft Public Water Systems

AGENCY: Environmental Protection Agency.

ACTION: Notice of a public meeting.

SUMMARY: The Environmental Protection Agency (EPA) is holding a public meeting to discuss the development of regulations for aircraft public water systems. To support the rulemaking process, EPA will undertake a collaborative stakeholder process with representatives from industry, government, public interest groups, and the general public.

DATES: The public meeting will be held from 9:30 a.m. to 4 p.m., Eastern standard time, on Wednesday, June 1, 2005. There will be a one hour break for lunch between 12 p.m. and 1 p.m.

ADDRESSES: The meeting will be held at the Hamilton Crowne Plaza Hotel, 14th & K Street, NW., Washington, DC 20005. The hotel is located one block north of the McPherson Square Metro stop on the orange and blue lines. The hotel's telephone number is (202) 682–0111.

FOR FURTHER INFORMATION CONTACT: For general information about this meeting or to pre-register, please contact Travis Creighton by phone at (202) 564–3858, by e-mail at *creighton.travis@epa.gov,* or by mail at: U.S. Environmental Protection Agency, Mail Code 4606M, 1200 Pennsylvania Ave., NW., Washington, DC 20460. You may also pre-register for the meeting online at *http://www.lcgnet.com/ePA/aircraft_conference/.* For technical inquiries regarding the Aircraft Drinking Water Rule, contact Rick Naylor at (202) 564–3847, or by e-mail: *naylor.richard@epa.gov.*

SUPPLEMENTARY INFORMATION: The purpose of this public meeting is to discuss EPA's plan to develop regulations for aircraft public water systems. Specifically, EPA will provide a presentation on:

1. Current National Primary Drinking Water Regulations as they apply to aircraft public water systems.

2. Recent EPA aircraft drinking water sampling results.

3. The process that will be followed in developing an aircraft drinking water rule.

4. Key issues that must be addressed in the development of a new aircraft drinking water rule. These issues include:

a. Which contaminates are of concern for aircraft water systems that take on water from domestic sources only, or from both domestic and foreign sources?

b. What is the appropriate monitoring frequency for aircraft water systems that take on water from domestic sources only, or both domestic and foreign sources?

c. What is the appropriate frequency of disinfecting and flushing aircraft water systems?

d. Should aircraft that obtain all of their water from another public water system be classified as a ''consecutive'' public water system that can obtain reduced monitoring requirements under EPA's regulations (40 CFR 141.29)?

e. How should EPA address aircraft water from foreign sources?

f. What should be done to address the low disinfectant residual levels in the drinking water found on a high percentage of aircraft?

Attendees will have an opportunity to make oral remarks at specific points during the meeting. EPA also welcomes written remarks received by June 22, 2005, which can be sent to Travis Creighton by e-mail or by mail at the address listed in the **FOR FURTHER INFORMATION CONTACT** section.

Special Accommodations

Any person needing special accommodations at this meeting, including wheelchair access, should contact Travis Creighton at the phone number or e-mail address listed in the **FOR FURTHER INFORMATION CONTACT** section of this notice. Requests for special accommodations should be made at least five business days in advance of the public meeting.

Dated: May 9, 2005.

Cynthia C. Dougherty,

Director, Office of Ground Water and Drinking Water.

[FR Doc. 05–9484 Filed 5–12–05; 8:45 am]

BILLING CODE 6560–50–P

Notices

Federal Register
Vol. 70, No. 92
Friday, May 13, 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

Office of the Secretary

Notice of Appointment of Members to the Specialty Crop Committee

AGENCY: Research, Education, and Economics, USDA.

ACTION: Appointment of members.

SUMMARY: The Specialty Crops Competitiveness Act of 2004, Pub. L. 108–465, Title III, Sec. 303, amends the National Agricultural Research, Extension, and Teaching Policy Act of 1977 to insert after section 1408 (7 U.S.C. 3123) the following new section: ''Sec. 1408A. Specialty Crop Committee.'' This notice announces the individuals who were recently appointed to the Specialty Crop Committee by the Executive Committee of the USDA National Agricultural Research, Extension, Education, and Economics Advisory Board, as required in the legislation. Four of the eight appointees are members serving terms on the Advisory Board. The members of the Specialty Crop Committee are as follows: Chair, Dr. Walter Armbruster, President, Farm Foundation, Oak Brook, IL; Dr. Jeffrey Armstrong, Dean, College of Agriculture and Natural Resources, Michigan State University, East Lansing, MI; Mr. Daniel Botts, Director, Environment and Pest Management Division, Florida Fruit and Vegetable Association, Maitland, FL; Dr. Nancy Cremer, Director, Center for Environmental Farming Systems, North Carolina State University, Raleigh, NC; Mr. James Lugg, President, TransFRESH Corporation, Salinas, CA; Mr. William J. Lyons, Jr., Former California Secretary of Agriculture and Owner, Mape's Ranch, Modesto, CA; Dr. Philip Nelson, Scholle Chair Professor, Department of Food Sciences, Purdue University, West Lafayette, IN; Mr. Craig Regelbrugge, Senior Director, American Nursery and Landscape Association, Washington, DC. The Specialty Crop Committee is a permanent committee, whose members serve at the discretion of the Advisory Board's Executive Committee.

DATES: Members to the Specialty Crop Committee were appointed by the Executive Committee of the USDA National Agricultural Research, Extension, Education, and Economics Advisory Board during the Board's March 9–11, 2005 public meeting in Washington, DC.

ADDRESSES: National Agricultural Research, Extension, Education, and Economics Advisory Board; Room 344A, Jamie L. Whitten Building; U.S. Department of Agriculture; STOP 2255; 1400 Independence Avenue, SW. Washington, DC 20250–2255.

FOR FURTHER INFORMATION CONTACT: Deborah Hanfman, Executive Director, National Agricultural Research, Extension, Education, and Economics Advisory Board; Room 344A, Jamie L. Whitten Building; U.S. Department of Agriculture, STOP 2255; 1400 Independence Avenue, SW.; Washington, DC 20250–2255. Telephone: 202–720–3684 Fax: 202–720–6199; or e-mail: *dhanfman@csrees.usda.gov*

SUPPLEMENTARY INFORMATION: The Specialty Crop Committee is responsible for studying the scope and effectiveness of research, extension, and economics programs affecting the specialty crop industry. The term ''specialty crop'' means fruits and vegetables, tree nuts, dried fruits, and nursery crops (including floriculture). Findings contained in the Specialty Crop Committee's annual study along with recommendations that address items specified in the legislation will be submitted in a report to the Advisory Board. Those findings and recommendations approved by the Board will be considered by the Secretary in preparing annual budget recommendations for the Department of Agriculture.

Done at Washington, DC this 5th day of May 2005.

Joseph J. Jen,

Under Secretary, Research, Education, and Economics.

[FR Doc. 05–9540 Filed 5–12–05; 8:45 am]

BILLING CODE 3410–22–P

DEPARTMENT OF AGRICULTURE

Animal and Plant Health Inspection Service

[Docket No. 05–006–2]

Ventria Bioscience; Availability of Revised Environmental Assessment, With Consideration for an Additional Test Site in North Carolina, for Field Tests of Genetically Engineered Rice Expressing Lactoferrin

AGENCY: Animal and Plant Health Inspection Service, USDA.

ACTION: Notice.

SUMMARY: We are advising the public that the Animal and Plant Health Inspection Service has revised an environmental assessment for confined field tests of rice plants genetically engineered to express the protein lactoferrin and has included information on an additional field test site. This environmental assessment is available for public review and comment.

DATES: We will consider all comments that we receive on or before June 2, 2005.

ADDRESSES: You may submit comments by either 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. 05–006–2, 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. 05–006–2.

Reading Room: You may read the environmental assessment and any comments that we receive 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. Levis Handley, Biotechnology Regulatory Services, APHIS, 4700 River Road Unit 147, Riverdale, MD 20737–1236; (301) 734–5721. To obtain copies of the environmental assessment, contact Ms. Ingrid Berlanger, at (301) 734–4885; e-mail *ingrid.e.berlanger@aphis.usda.gov.* The environmental assessment is also available on the Internet at *http://www.aphis.usda.gov/brs/aphisdocs/05_11701r_ea.pdf.*

SUPPLEMENTARY INFORMATION: The regulations in 7 CFR part 340, ''Introduction of Organisms and Products Altered or Produced Through Genetic Engineering Which Are Plant Pests or Which There Is Reason To Believe Are Plant Pests,'' regulate, among other things, the introduction (importation, interstate movement, or release into the environment) of organisms and products altered or produced through genetic engineering that are plant pests or that there is reason to believe are plant pests. Such genetically engineered organisms and products are considered ''regulated articles.'' A permit must be obtained or a notification acknowledged before a regulated article may be introduced into the United States. The regulations set forth the permit application requirements and the notification procedures for the importation, interstate movement, and release into the environment of a regulated article.

On October 28, 2004, the Animal and Plant Health Inspection Service (APHIS) received a permit application (APHIS permit number 04–302–01r) from Ventria Bioscience, Sacramento, CA, for a permit for a confined field test of rice (*Oryza sativa*) plants genetically engineered to express a gene coding for the protein lactoferrin, rice line LF164–12. According to the permit application, the field test would be conducted in Scott County, MO. On February 23, 2005, APHIS published a notice in the **Federal Register** (70 FR 8763, Docket No. 05–006–1), announcing the availability of an environmental assessment (EA) for the proposed field test and soliciting public comments for 30 days. This 30-day comment period closed on March 25, 2005. During the 30-day comment period, APHIS received 309 comments. Comments were received from rice growers, rice marketing and processing groups, agricultural support businesses, consumer groups, university professionals, private individuals, industry trade organizations, large rice purchasers, growers of crops other than rice, and Federal, State and local government representatives.

On April 27, 2005, while APHIS was evaluating these comments, we received a request from Ventria Biosciences to plant rice line LF164–12 in a second site in Washington County, NC (APHIS permit number 05–117–01r). At this time, Ventria Biosciences has not withdrawn its application to conduct a field test in Scott County, MO. However, it is likely that conducting a field test for this growing season is not feasible due to climatic factors in this location. Because APHIS has not yet considered all of the comments associated with the earlier EA and the issues raised in North Carolina are similar to those in Missouri, APHIS has amended the EA to evaluate the issues in North Carolina as well as Missouri. These are covered in Appendices V and VI. In addition to evaluating site-specific issues presented by the North Carolina application, this revised EA also corrects errors in the original EA. These changes are described in the summary of the EA.

APHIS is seeking comments on the additional information provided in this revised EA. We are particularly interested in comments related to Appendices V and VI that address issues in North Carolina. APHIS will consider all comments received during the previous comment period (70 FR 8763, Docket No. 05–006–1) as well as any new comments received during this comment period (see **DATES** above). The expanded EA will be open for public comment for an additional 20 days.

The subject rice plants have been genetically engineered, using micro-projectile bombardment, to express human lactoferrin protein. Expression of the gene is controlled by the rice glutelin 1 promoter, the rice glutelin 1 signal peptide, and the *nos* (nopaline synthase) terminator sequence from *Agrobacterium tumefaciens.* The gene is expressed only in the endosperm. In addition, the plants contain the coding sequence for the gene hygromycin phosphotransferase (*hpt*), an enzyme which confers tolerance to the antibiotic hygromycin. This gene is a selectable marker that is only expressed during plant cell culture and is not expressed in any tissues of the mature plant. Expression of the gene is controlled by the rice glucanase 9 (*Gns 9*) promoter and the Rice Alpha Amylase 1A (RAmy1A) terminator. The genetically engineered rice plants are considered regulated articles under the regulations in 7 CFR part 340 because they contain gene sequences from plant pathogens.

The purpose of the field planting is for pure seed production and for the extraction of lactoferrin for a variety of research and commercial products. The planting will be conducted using physical confinement measures. In addition, the experimental protocols and field plot design, as well as the procedures for termination of the field planting, are designed to ensure that none of the subject rice plants persist in the environment beyond the termination of the experiments.

To provide the public with documentation of APHIS' review and analysis of any potential environmental impacts and plant pest risk associated with the proposed confined field planting of the subject rice plants, an environment assessment (EA) has been prepared. The EA was prepared in accordance with (1) The National Environmental Policy Act of 1969 (NEPA), as amended (42 U.S.C. 4321 *et seq.*), (2) regulations of the Council on Environmental Quality for implementing the procedural provisions of NEPA (40 CFR parts 1500–1508), (3) USDA regulations implementing NEPA (7 CFR part 1b), and (4) APHIS' NEPA Implementing Procedures (7 CFR part 372). Copies of the EA are available from the individual listed under **FOR FURTHER INFORMATION CONTACT**.

Done in Washington, DC, this 9th day of May 2005.

Elizabeth E. Gaston,

Acting Administrator, Animal and Plant Health Inspection Service.

[FR Doc. 05–9606 Filed 5–12–05; 8:45 am]

BILLING CODE 3410–34–P

DEPARTMENT OF AGRICULTURE

Animal and Plant Health Inspection Service

[Docket No. 05–007–2]

Ventria Bioscience; Availability of Revised Environmental Assessment, With Consideration for an Additional Test Site in North Carolina, for Field Tests of Genetically Engineered Rice Expressing Lysozyme

AGENCY: Animal and Plant Health Inspection Service, USDA.

ACTION: Notice.

SUMMARY: We are advising the public that the Animal and Plant Health Inspection Service has revised an environmental assessment for confined

field tests of rice plants genetically engineered to express the protein lysozyme and has included information on an additional field test site. This environmental assessment is available for public review and comment.

DATES: We will consider all comments that we receive on or before June 2, 2005.

ADDRESSES: You may submit comments by either 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. 05–007–2, 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. 05–007–2.

Reading Room: You may read the environmental assessment and any comments that we receive 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. Levis Handley, Biotechnology Regulatory Services, APHIS, 4700 River Road Unit 147, Riverdale, MD 20737–1236; (301) 734–5721. To obtain copies of the environmental assessment, contact Ms. Ingrid Berlanger, at (301) 734–4885; e-mail *ingrid.e.berlanger@aphis.usda.gov.* The environmental assessment is also available on the Internet at *http://www.aphis.usda.gov/brs/aphisdocs/05_11702r_ea.pdf.*

SUPPLEMENTARY INFORMATION: The regulations in 7 CFR part 340, ''Introduction of Organisms and Products Altered or Produced Through Genetic Engineering Which Are Plant Pests or Which There Is Reason To Believe Are Plant Pests,'' regulate, among other things, the introduction (importation, interstate movement, or release into the environment) of organisms and products altered or produced through genetic engineering that are plant pests or that there is reason to believe are plant pests. Such genetically engineered organisms and products are considered ''regulated articles.'' A permit must be obtained or a notification acknowledged before a regulated article may be introduced into the United States. The regulations set forth the permit application requirements and the notification procedures for the importation, interstate movement, and release into the environment of a regulated article.

On October 28, 2004, the Animal and Plant Health Inspection Service (APHIS) received a permit application (APHIS permit number 04–309–01r) from Ventria Bioscience, Sacramento, CA, for a permit for a confined field test of rice (*Oryza sativa*) plants genetically engineered to express a gene coding for the protein lysozyme, rice line LZ159–53. According to the permit application, the field test would be conducted in Scott County, MO. On February 23, 2005, APHIS published a notice in the **Federal Register** (70 FR 8762–8763, Docket No. 05–007–1), announcing the availability of an environmental assessment (EA) for the proposed field test and soliciting public comments for 30 days. This 30-day comment period closed on March 25, 2005. During the 30-day comment period, APHIS received 243 comments. Comments were received from rice growers, rice marketing and processing groups, agricultural support businesses, consumer groups, university professionals, private individuals, industry trade organizations, large rice purchasers, growers of crops other than rice, and Federal, State and local government representatives.

On April 27, 2005, while APHIS was evaluating these comments, we received a request from Ventria Biosciences to plant rice line LF164–12 in a second site in Washington County, NC (APHIS permit number 05–117–02r). At this time, Ventria Biosciences has not withdrawn its application to conduct a field test in Scott County, MO. However, it is likely that conducting a field test for this growing season is not feasible due to climatic factors in this location. Because APHIS has not yet considered all of the comments associated with the earlier EA and the issues raised in North Carolina are similar to those in Missouri, APHIS has amended the EA to evaluate the issues in North Carolina as well as Missouri. These are covered in Appendices V and VI. In addition to evaluating site-specific issues presented by the North Carolina application, this revised EA also corrects errors in the original EA. These changes are described in the summary of the EA.

APHIS is seeking comments on the additional information provided in this revised EA. We are particularly interested in comments related to Appendices V and VI that address issues in North Carolina. APHIS will consider all comments received during the previous comment period (70 FR 8762–8763, Docket No. 05–007–1) as well as any new comments received during this comment period (see DATES above). The expanded EA will be open for public comment for an additional 20 days.

The subject rice plants have been genetically engineered, using micro-projectile bombardment, to express human lysozyme protein. Expression of the gene is controlled by the rice glutelin 1 promoter, the rice glutelin 1 signal peptide, and the *nos* (nopaline synthase) terminator sequence from *Agrobacterium tumefaciens.* The gene is expressed only in the endosperm. In addition, the plants contain the coding sequence for the gene hygromycin phosphotransferase (*hpt*), an enzyme which confers tolerance to the antibiotic hygromycin. This gene is a selectable marker that is only expressed during plant cell culture and is not expressed in any tissues of the mature plant. Expression of the gene is controlled by the rice glucanase 9 (*Gns 9*) promoter and the Rice Alpha Amylase 1A (RAmy1A) terminator. The genetically engineered rice plants are considered regulated articles under the regulations in 7 CFR part 340 because they contain gene sequences from plant pathogens.

The purpose of the field planting is for pure seed production and for the extraction of lysozyme for a variety of research and commercial products. The planting will be conducted using physical confinement measures. In addition, the experimental protocols and field plot design, as well as the procedures for termination of the field planting, are designed to ensure that none of the subject rice plants persist in the environment beyond the termination of the experiments.

To provide the public with documentation of APHIS' review and analysis of any potential environmental impacts and plant pest risk associated with the proposed confined field planting of the subject rice plants, an environment assessment (EA) has been prepared. The EA was prepared in accordance with (1) The National

Environmental Policy Act of 1969 (NEPA), as amended (42 U.S.C. 4321 *et seq.*), (2) regulations of the Council on Environmental Quality for implementing the procedural provisions of NEPA (40 CFR parts 1500–1508), (3) USDA regulations implementing NEPA (7 CFR part 1b), and (4) APHIS' NEPA Implementing Procedures (7 CFR part 372). Copies of the EA are available from the individual listed under **FOR FURTHER INFORMATION CONTACT**.

Done in Washington, DC, this 9th day of May 2005.

Elizabeth E. Gaston,

Acting Administrator, Animal and Plant Health Inspection Service.

[FR Doc. 05–9607 Filed 5–12–05; 8:45 am]

BILLING CODE 3410–34–P

DEPARTMENT OF AGRICULTURE

Forest Service

Cibola National Forest; New Mexico; Canadian River Tamarisk Control Project

AGENCY: Forest Service, USDA.

ACTION: Notice of intent to prepare an environmental impact statement.

SUMMARY: The Department of Agriculture, Forest Service has initiated the process to prepare an Environmental Impact Statement for the Canadian River Tamarisk Control Project on the Cibola National Forest, Kiowa National Grassland. The proposed action would restore the hydrologic function of the Canadian River by eradicating tamarisk (salt cedar) along the river corridor and tributaries, covering 16 miles (approximately 540 acres) that occur on Federal administrative lands. This proposal includes the use of a helicopter to aerially apply the herbicide imazapyr (common trade names Arsenal and Habitat) along with an approved surfactant and drift control agent, and/or use mechanical treatments and backpack sprayers to apply the same herbicide to cut stumps in designated areas. The objective is to eradicate tamarisk from this section of the Canadian River and promote the re-establishment of native riparian vegetation and habitat conditions for wildlife.

Salt cedar has actively invaded the riparian area along the Canadian River, replacing native plants and wildlife. The Canadian River supplies irrigation water to thousands of acres of agriculture land, provides for recreational opportunities, and is home to several indigenous wildlife species. Tamarisk is listed by both the State of New Mexico Department of Agriculture and the Federal government as a noxious weed. The State of New Mexico has identified tamarisk as a species that is causing an ecological crisis in several river systems throughout the state, including the Canadian River. Land owners both above and below the National Grassland segment of the Canadian River are in the process of treating their lands to control tamarisk using the same types of treatment methods. This effort would be coordinated with those other treatment efforts within this watershed.

Tamarisk is known to cause a change in ecological conditions that tend to eliminate native species and reduce water delivery, due to its ability to transpire large amounts of water during the growing season. Herbicide treatments have been shown to be an effective and efficient method for eradicating tamarisk and returning the riparian habitat to a healthy functioning ecosystem that is beneficial to both the biotic and human environments.

The Canadian River Canyon has been identified as an inventoried roadless area. The Canadian River also has eligibility status as a scenic river under the Wild and Scenic Rivers Act, and outstanding remarkable values would be protected until a decision is made on the future use of the river and adjacent lands or until an action is taken by Congress to designate the river as such.

DATES: Comments concerning the scope of the analysis must be received by June 15, 2005. The draft environmental impact statement is expected to be published in October, 2005, and the final environmental impact statement is expected in December 2005.

ADDRESSES: Send written comments to Deborah Walker, NEPA Coordinator; Cibola National Forest; 2113 Osuna Road NE; Albuquerque, NM 87113 or FAX to 505–346–3901. Copies of the proposed action, project location map, or the Environmental Impact Statement, when available, may be obtained from the Cibola National Forest; 2113 Osuna Road, NE; Albuquerque, NM 87113; or from the Kiowa National Grassland; 714 Main Street; Clayton, NM 88415, or from the Forest Web site at *www.fs.fed.us/r3/cibola/projects/index.shtml.*

FOR FURTHER INFORMATION CONTACT: For further information, mail correspondence to Deborah Walker, NEPA Coordinator; Cibola National Forest; 2113 Osuna Road NE; Albuquerque, NM 87113 or phone 505–346–3888.

SUPPLEMENTARY INFORMATION:

Purpose and Need for Action

The purpose of the Canadian River Tamarisk Control project is to:

1. Restore the hydrologic function of the Canadian River by eradicating tamarisk along the river corridor and tributaries using methods that have proven to be both safe and effective.

2. Re-establish native riparian species and the habitat it provides for wildlife.

3. Coordinate activities with adjacent landowners both above and below the Kiowa National Grassland boundary in an effort to control tamarisk within the entire Canadian River corridor.

Proposed Action

The Cibola National Forest, Kiowa National Grassland, proposes to apply imazapyr using aerial and backpack spray application methods to 16 miles of the Canadian River and tributaries. Aerial application would be made using a helicopter with spray boom on an estimated 380 acres where the tamarisk is very dense or where the stands are inaccessible to vehicles. Backpack spray (hand treatment) would be used after tamarisk has been cut with either chainsaws or tractor, and the herbicide is applied to the cut stump, or the herbicide is applied over the top of stems as a foliar application (estimated 160 acres). Backpack spray treatments would occur on Forest Service administered lands near the Mills Canyon campground and in areas where there is a predominance of native riparian vegetation that are accessible by existing roads or trails. A nonionic surfactant and drift control agent (vegetable oil based) would be mixed with imazapyr in order to improve effectiveness. An estimated 1 pound of acid equivalent of active ingredient would be applied per acre. Treatments would be applied between late July and late September. Re-treatments would be applied on a limited basis as needed to control re-sprouting tamarisk for up to five years following initial treatment. Dead trees would remain in place for a minimum of two growing seasons after which hazardous trees would be removed within the campground or other accessible places as needed for public safety.

Rehabilitation efforts following treatment would include replanting with native riparian species (*i.e.*, cottonwood, willow, or maple) and reseeding areas disturbed by equipment with native grasses in order to stabilize soil and provide ground cover, as needed.

Resource protection measures that would be implemented as part of this proposal include protection of known

historical sites, campground closure during treatments, mechanical and/or hand treatments near the campground, clean picnic tables following treatments, no operations during bird nesting season (April thru mid July), and use of best management practices to protect soil and water resources.

Possible Alternatives

At this time, the only alternative to the proposed action is the no action alternative, which would not propose any treatments within the Canadian River corridor to eradicate tamarisk. Additional alternatives may be included based on issues received during public scoping.

Responsible Official

The responsible official is Nancy Rose, Forest Supervisor, Cibola National Forest Supervisor's Office, 2113 Osuna Road NE, Albuquerque, NM 87113–1001.

Nature of Decision To Be Made

The decision to be made is whether to implement the proposed action as described above, to vary the design of the proposed action to meet the purpose and need through some other combination of activities, or to take no action at this time.

Scoping Process

The Council on Environmental Quality (CEQ) emphasizes an early and open process for determining the scope of issues to be addressed and for identifying significant issues related to the proposed action. As part of the scoping process, the lead agency shall invite the participation of affected Federal, State, and local agencies, any affected Indian tribe, and other interested persons (40 CFR 1501.7). In order to meet the intent of the CEQ regulations, the Cibola Forest will implement the following steps to ensure an early and open public involvement process:

1. Include the proposed action on the list of projects for annual tribal consultation. Address concerns identified during tribal consultation as part of the analysis.

2. Submit the proposed action to the public during scoping, and request comments or issues (points of dispute, debate, or disagreement) regarding the potential effects.

3. Include the proposal on the Cibola Schedule of Proposed Actions quarterly report.

4. Provide an opportunity for the public to comment during an open public meeting in the community of Roy, New Mexico, which is closest to the project area. Date and location is yet to be determined.

5. Use comments received to determine significant issues and additional alternatives to address within the analysis.

6. Consult with the U.S. Fish and Wildlife Service and the State Historical Preservation Office regarding potential affects to listed species and heritage sites.

7. Prepare and distribute a draft environmental impact statement for a 45-day public comment period.

Comment Requested

This notice of intent initiates the scoping process which guides the development of the environmental impact statement. Comments should focus on the nature of the action proposed and should be relevant to the decision under consideration. Comments received from the public will be evaluated for significant issues and used to assist in the development of additional alternatives.

Early Notice of Importance of Public Participation in Subsequent Environmental Review

A draft environmental impact statement will be prepared for comment. The comment period on the draft environmental impact statement will be 45 days from the date the Environmental Protection Agency publishes the notice of availability in the **Federal Register**.

The Forest Service believes, at this early stage, it is important to give reviewers notice of several court rulings related to public participation in the environmental review process. First, reviewers of draft environmental impact statements must structure their participation in the environmental review of the proposal so that it is meaningful and alerts an agency to the reviewer's position and contentions. [*Vermont Yankee Nuclear Power Corp.* v. *NRDC,* 435 U.S. 519, 553 (1978)] Also, environmental objections that could be raised at the draft 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 draft environmental impact statement should be as specific as possible. It is also helpful if comments refer to specific pages or chapters in the draft statement. Comments may also address the adequacy of the draft environmental impact statement or the merits of the alternatives formulated and discussed in the statement. Reviewers may wish to refer to the Council on Environmental Quality regulations for implementing the procedural provisions of the National Environmental Policy Act at 40 CFR 1503.3 in addressing these points.

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.

(Authority: 40 CFR 1501.7 and 1508.22; Forest Service Handbook 1909.15, Section 21)

Dated: May 6, 2005.

Nancy Rose,

Forest Supervisor, Cibola National Forest.

[FR Doc. 05–9452 Filed 5–12–05; 8:45 am]

BILLING CODE 3410–11–P

DEPARTMENT OF AGRICULTURE

Forest Service

Thorne Bay Ranger District, Tongass National Forest, Alaska; Logjam Environmental Impact Statement

AGENCY: Forest Service, USDA

ACTION: Notice of intent to prepare an Environmental Impact Statement.

SUMMARY: The U.S. Department of Agriculture, Forest Service will prepare an Environmental Impact Statement (EIS) to harvest timber on north Prince of Wales Island, in a location south of Coffman Cove, west of Luck Lake and East of the Naukati/Sarkar on the Thorne Bay Ranger District, Tongass National Forest. The proposed action would harvest up to 50 million board feet (MMBF) of timber on approximately 4,500 acres. The project would require up to 32 miles of new road construction (14 of these would be temporary road) and seven miles of road reconstruction.

DATES: Comments concerning the scope of the analysis must be received within 30 days of the date of this notice. The draft environmental impact statement is expected November 2005 and will begin a 45-day public comment period. The

final environmental impact statement and Record of Decision is expected June 2006.

ADDRESSES: You may comment on the project the the following ways:

• Mail: Thorne Bay Ranger District, Attn: Logjam EIS scoping comments, P.O. Box 19001, Thorne Bay, AK 99919.

• Fax to (907) 828–3309. Subject line: Logjam EIS scoping comments.

• E-mail: *comments-alaska-tongass-thorne-bay@fs.fed.us* Subject line: Logjam EIS scoping comments.

Include your name, address, and organization name if you are commenting as a representative. Scanned signatures are accepted on e-mails.

FOR FURTHER INFORMATION CONTACT: Chuck Klee, Project Leader, P.O. Box 19001, Thorne Bay, AK 99919. Phone (907) 828–3264.

SUPPLEMENTARY INFORMATION:

Purpose and Need for Action

The purpose of and need for the Logjam Timber Sale project is to provide timber harvest opportunities suitable for both large and small timber purchasers, mill operators, and the value-added wood product industries in Southeast Alaska in accordance with Forest Plan direction. The need for the project comes from a lack of timber volume under contract per requirements of the Tongass Timber Reform Act (TTRA) of 1990. The Logjam Timber Sale project is proposed at this time to respond to these needs, and to move the project area toward the desired condition as described in the Forest Plan. The Forest Supervisor will decide whether or not to harvest timber from the Logjam Timber Sale project area, and if so, how this timber will be harvested. The decision will be based on the information that is disclosed in the Environmental Impact Statement. The responsible official will consider comments, responses, the disclosure of environmental consequences, as well as applicable laws, regulations, and policies in making the decision and will state that rationale in the record of Decision.

The following Forest-wide goals and objectives as applied to the Logjam Project Area include:

(1) Improve timber growth and productivity on suitable timber lands made available for timber harvest, and manage these lands for long-term sustained yield of timber.

(2) Contribute to a timber supply from the Tongass that seeks to meet annual and Forest Plan planning cycle market demand.

(3) Provide opportunities for local employment in the wood products industry, which in turn contribute to the local and regional economies of Southeast Alaska.

The project area is located within Value Comparison Units (VCUs) 5770 and 5730s. All units are located within four of the six Land Use Designations (LUDs) that occur within the Project Area. The Logjam Timber Sale Project will respond to these goals and objectives, and help move the forest toward the Desired Future Condition of those LUDs as specified in the Forest Plan. It will do this by: (a) Managing suitable timber lands for the production of saw timber and other wood products on a sustained basis (Timber Production LUD, p. 3–144); (b) allowing for a variety of successional stages that provide for a range of wildlife habitat conditions, (Modified Landscape LUD, pp. 3–135 and 3–136); (c) the use of small openings or uneven-aged systems (Scenic Viewshed LUD, p. 3–127); and (d) providing for a variety of visual conditions (Recreational River LUD, p. 3–112). All four LUDs provide for timber harvest which contributes to Forest-wide sustained yield. The remaining two LUDs that do not contain proposed units are Scenic River and Old-Growth.

The need for the project comes from a lack of timber volume under contract per requirements of the Tongass Timber Reform Act (TTRA) of 1990. Seeking to meet timber demand for the Tongass National Forest is required by Section 101 of TTRA which states that, ''* * * to the extent consistent with providing for the multiple use and sustained yield of all renewable forest resources, seek to provide a supply of timber from the Tongass National Forest which (1) meets the annual market demand for timber from such forest and (2) meets the market demand from such forest for each planning cycle.''

The determination of market demand and implementation of TTRA is measured periodically. Using the FY04 Timber Demand model, the estimate of volume to be offered to meet demand, by market scenarios, ranges from 153 million board feet (mmbf) in the Low, 177 mmbf Medium, and 254 mmbf High. The projected FY04 demand is based on the low market of 153 mmbf. With approximately 230 mmbf of NEPA-cleared timber currently under litigation it is expected that about 80 mmbf will actually be offered (Tongass Timber Demand Estimate for FY 2004; *http://www.fs.fed.us/r10/tongass/forest_facts/faqs/demand*).

There is a demand on Prince of Wales Island for small timber sales that offer lower investment opportunities suitable for the small business entities. The wood products harvested from such small sales contribute to a wide range of natural resource employment opportunities and value added wood products industries. Industry capacity on Prince of Wales for 2005 has been estimated at 120 MMBF (USFS spreadsheet ''050128Timber_Demand _2005_Final.xls''). Currently, the remaining volume under contract to Prince of Wales businesses is 42 MMBF (Tongass NF pdf: ''vol_under_ contract_fy2004.pdf''). The project area is within reasonable proximity to local mills and communities on Prince of Wales Island.

Proposed Action

The proposed action is to harvest approximately 50 million board feet (MMBF) of timber from 82 units on approximately 4,500 acres resulting in a variety of small and large timber sales, using a combination of two-aged, uneven-aged, and even-aged silvicultural prescriptions. These prescriptions will be written to meet Forest Plan standards and guidelines, which will result in units with smaller openings and more partial cut harvesting overall that has historically occurred within the Project Area. The project would require up to 32 miles of new road construction (18 of these would be temporary road) and six miles of road reconstruction.

Public Participation

Public participation has been an integral component of the study process and will continue to be especially important at several points during the analysis. The Forest Service will be seeking information, comments, and assistance from Tribal governments, Federal, State, and local agencies, individuals and organizations that may be interested in, or affected by, the proposed activities.

In addition to this Notice of Intent, legal notices will be put in the Juneau Empire, the paper of record for this project. Publication is expected in the paper of record in early May. As a courtesy to island communities, legal notices will also be printed in the Island News and Ketchikan Daily News. Written scoping comments are being solicited through the scoping letters that were mailed to individuals and agencies on the Thorne Bay Ranger District public involvement list in May, 2005. The scoping process includes the following: (1) Identification of potential issues; (2) identification of issues to be analyzed in depth; and (3) elimination of non-significant issues or those which have been covered by a previous environmental review. Based on the

results of scoping and the resource capabilities within the project area, alternatives including a ''no-action'' alternative will be developed for the Draft Environmental Impact Statement. Subsistence hearings, as provided for in Title VIII, Section 810 of the Alaska National Interest Lands Conservation Act (ANILCA), will be conducted, if necessary, during the comment period fo the Draft Environmental Impact Statement. A draft environmental impact statement will be prepared for comment. the comment period on the Draft Environmental Impact Statement will be 45 days from the date the Environmental Protection Agency publishes the notice of availability in the **Federal Register**.

The Forest Service believes, at this early stage, it is important to give reviewers notice of several court rulings related to public participation in the environmental review process. First, reviewers of draft environmental impact statements must structure their participation in the environmental review of the proposal so that it is meaningful and alerts an agency to the reviewer's position and contentions. *Vermont Yankee Nuclear Power Corp.* v. *NRDC,* 435 U.S. 519, 553 (1978). Also, environmental objections that could be raised at the Draft 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 Draft Environmental Impact Statement should be as specific as possible. It is also helpful if comments refer to specific pages or chapters of the draft statement. Comments may also address the adequacy of the Draft Environmental Impact Statement or the merits of the alternatives formulated and discussed in the statement. Reviewers may wish to refer to the Council on Environmental Quality Regulations for implementing the procedural provisions of the National Environmental Policy Act at 40 CFR 1503.3 in addressing these points. 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.

Comments submitted anonymously will be accepted and considered; however, those who submit anonymous comments will not have standing to appeal the subsequent decision under 36 CFR parts 215 or 217. Additionally, pursuant to 7 CFR 1.27(d), any person may require the agency to withhold submission from the public record by showing how the Freedom of Information Act (FOIA) permits such confidentiality. Requesters should be aware that, under FIOA, confidentiality may be granted in only very limited circumstance, such as to protect trade secrets. The Forest Service will inform the requester of the agency's decision regarding the request of confidentiality, and where the request is denied; the agency will return the submission and notify the requester that the comments may be resubmitted with or without name and address within seven days.

To be most helpful and timely, scoping comments should be received within 30 days of the publication of this Notice of Intent. Public scoping meetings are planned for mid-May at four locations on Price of Wales Island where written comments can be given.

Preliminary Issues

Based on preliminary analysis and internal scoping efforts, we have developed an initial list of issues to be analyzed in the EIS:

- Increased hunting and trapping pressure, as a result of additional open road densities, may have an adverse affect on the wolf population in the project area.
- Cumulative effects of the proposed harvest and road construction may increase sedimentation, which could alter stream channel morphology and degrade fish habitat in the project area.
- The proposed action may adversely affect deer winter range, which could affect subsistence and sport hunting of deer.
- The proposed action would benefit local communities by providing additional employment opportunities and income.

Permits or Licenses Required

Permits required for implementation include the following:

1. U.S. Army Corp of Engineers:
   —Approval of discharge of dredge or fill material into the waters for the United States under Section 404 of the Clean Water Act;
   —Approval of the construction of structures or work in navigable waters of the United States under Section 10 of the Rivers and Harbor Act of 1899;
2. Environmental Protection Agency:
   —General National Pollutant Discharge Elimination System for Log Transfer Facilities in Alaska;
   —Review Spill Prevention Control and Countermeasure Plan;
3. State of Alaska, Department of Natural Resources:
   —Tideland Permit and Lease or Easement;
   —Certification of Compliance with Alaska Water Quality Standards (401 Certification) Chapter 20;
4. Office of Project Management & Permitting (DNR):
   —Coastal Zone Consistency Determination concurrence.

Responsible Official

Forrest Cole, Forest Supervisor, Tongass National Forest Supervisor, Federal Building, 648 Mission Street, Ketchikan, Alaska 99901.

Nature of Decision To Be Made

The Forest Supervisor will decide: (1) The estimated timber volume to make available from the project, as well as the location, design, and scheduling of timber harvest, road construction and reconstruction, and silvicultural practices used; (2) access management measures (road, trail, and area restrictions and closures); (3) mitigation measures and monitoring requirements; (4) whether to make adjustments to the small old-growth reserve (OGR) in VCU 5700; and (5) whether there may be a significant restriction on subsistence uses.

(Authority: 40 CFR 1501.7 and 1508.22; Forest Service Handbook 1909.15, Section 21)

Dated: May 2, 2005.

Forrest Cole,

Forest Supervisor, Tongass National Forest.

[FR Doc. 05–9379 Filed 5–12–05; 8:45 am]

BILLING CODE 3410–11–M

DEPARTMENT OF AGRICULTURE

Rural Business-Cooperative Service

Notice of Request for Extension of a Currently Approved Information Collection

AGENCY: Rural Business-Cooperative Service, USDA.

ACTION: Proposed collection; Comments requested.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, this

notice announces the Rural Business-Cooperative Service's (RBS) intention to request an extension for a currently approved information collection in support of the program for 7 CFR part 4279.

DATES: Comments on this notice must be received by July 12, 2005 to be assured of consideration.

FOR FURTHER INFORMATION CONTACT: Brenda Griffin, Loan Specialist, Business and Industry Division, Rural Business-Cooperative Service, U.S. Department of Agriculture, STOP 3224, 1400 Independence Ave., SW., Washington, DC 20250–3224. Telephone: (202) 720–6802. The TDD number is (800) 877–8339 or (202) 708–9300.

SUPPLEMENTARY INFORMATION:

Title: Guaranteed Loanmaking—Business and Industry Loans.

OMB Number: 0570–0017.

Expiration Date of Approval: October 31, 2005.

Type of Request: Extension of a Currently Approved Information Collection.

Abstract: The Business and Industry (B&I) Guaranteed Loan Program was legislated in 1972 under Section 310B of the Consolidated Farm and Rural Development Act, as amended. The purpose of the program is to improve, develop, or finance businesses, industries, and employment and improve the economic and environmental climate in rural communities. This purpose is achieved through bolstering the existing private credit structure through the guaranteeing of quality loans made by lending institutions, thereby providing lasting community benefits.

Estimate of Burden: Public reporting for this collection of information is estimated to average 2 hours per response.

Respondents: Business or other for-profit; State, local or tribal; lenders, accountants, attorneys.

Estimated Number of Respondents: 10,269.

Estimated Number of Responses per Respondent: 1.

Estimated Number of Responses: 10,269.

Estimated Total Annual Burden on Respondents: 20,624 hours.

Copies of this information collection can be obtained from Cheryl Thompson, Regulations and Paperwork Management Branch, Support Services Division at (202) 692–0043.

Comments: Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of RBS, including whether the information will have practical utility; (b) the accuracy of RBS's estimate of the burden of the proposed collection of information 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 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. Comments may be sent to Cheryl Thompson, Regulations and Paperwork Management Branch, Support Services Division, U.S. Department of Agriculture, Rural Development, STOP 0742, 1400 Independence Ave., SW., Washington, DC 20250. All responses to this notice will be summarized and included in the request for OMB approval. All comments will also become a matter of public record.

Dated: May 4, 2005.

Peter J. Thomas,

Administrator, Rural Business-Cooperative Service.

[FR Doc. 05–9614 Filed 5–12–05; 8:45 am]

BILLING CODE 3410–XY–P

DEPARTMENT OF AGRICULTURE

Rural Business-Cooperative Service

Announcement of Rural Cooperative Development Grant Application Deadlines and Funding Levels

AGENCY: Rural Business-Cooperative Service, USDA.

ACTION: Notice of solicitation of applications.

SUMMARY: The Rural Business-Cooperative Service (RBS) announces the availability of approximately $5.952 million in competing Rural Cooperative Development Grant (RCDG) funds for fiscal year (FY) 2005. Of this amount, up to $1.488 million will be reserved for applications that focus on assistance to small, minority producers through their cooperative businesses. This action will comply with legislation that authorizes grants for establishing and operating centers for rural cooperative development. The intended effect of this notice is to solicit applications for FY 2005 and award grants on or before September 15, 2005. The maximum award per grant is $300,000 and matching funds are required.

DATES: You must submit completed applications for grants on paper or electronically by 4 p.m. eastern time on July 1, 2005.

ADDRESSES: You may obtain application materials for a Rural Cooperative Development Grant via the Internet at the following Web address: *http://www.rurdev.usda.gov/rbs/coops/rcdg/rcdg.htm* or by contacting the Agency Contact for your State listed on the following Web site: *http://www.rurdev.usda.gov/rbs/coops/rcdg/contacts.htm*.

Submit completed paper applications via commercial delivery or mail to USDA–RBS-Cooperative Services (CS), Attn: RCDG Program, 1400 Independence Avenue SW., Mail Stop 3250, Room 4016—South, Washington, DC 20250–3250. The phone number that should be used for FedEx packages is (202) 720–7558.

Submit electronic grant applications to the following Internet address: *http://www.grants.gov*. Applicants will need to complete a registration process before a grant application can be submitted through Grants.gov. Applicants should register at least 2 weeks prior to the application deadline to ensure timely submission of their applications.

FOR FURTHER INFORMATION CONTACT: The Agency contact for your State listed on the program Web site at *http://www.rurdev.usda.gov/rbs/coops/rcdg/rcdg.htm*. The program Web site contains application guidance, including a Frequently Asked Questions section, and an application guide.

SUPPLEMENTARY INFORMATION:

Overview

Federal Agency: Rural Business-Cooperative Service (RBS).

Funding Opportunity Title: Rural Cooperative Development Grant.

Announcement Type: Initial announcement.

Catalog of Federal Domestic Assistance Number: 10.771.

Dates: Application Deadline: 4 p.m. eastern time on July 1, 2005.

I. Funding Opportunity Description

RCDGs are authorized by section 310B(e) of the Consolidated Farm and Rural Development Act (7 U.S.C. 1932(e)). Regulations are contained in 7 CFR part 4284, subparts A and F. The primary objective of the RCDG program is to improve the economic condition of rural areas through cooperative development by Centers. RCDG grants are used to facilitate the creation or retention of jobs in rural areas through the development of new rural cooperatives, value-added processing and other rural businesses. The program

is administered through USDA Rural Development State Offices acting on behalf of RBS.

Definitions

The definitions published at 7 CFR 4284.3 and 4284.504 are incorporated by reference.

II. Award Information

Type of Award: Grant.
Fiscal Year Funds: FY 2005.
Approximate Total Funding: $5.952.0 million (up to $1.488 million reserved for small, minority producers).
Approximate Number of Awards: 20.
Approximate Average Award: $250,000.
Floor of Award Range: None.
Ceiling of Award Range: $300,000.
Anticipated Award Date: 15 September 2005.
Budget Period Length: 12 months.
Project Period Length: 12 months.

III. Eligibility Information

A. *Eligible Applicants:* Grants may be made to non-profit corporations and institutions of higher education. Grants may not be made to Public bodies.

B. *Cost Sharing or Matching:* Matching funds are required. Applicants must verify in their applications that matching funds are available for the time period of the grant. The matching fund requirement is 25 percent of total project costs (5 percent in the case of 1994 Institutions) comprised of private funds and in-kind contributions. Preference points will be awarded where applicants commit to providing greater than the minimum 25 percent matching contribution (5 percent in the case of 1994 Institutions). Unless provided by other authorizing legislation, other Federal grant funds cannot be used as matching funds. However, matching funds contributed by the applicant may include proceeds from a loan from another Federal source. Matching funds must be spent at a rate equal to or greater than the rate at which grant funds are expended. Matching funds must be provided by either the applicant or by a third party in the form of cash or in-kind contributions. Matching funds must be spent on eligible expenses and must be from eligible sources.

C. *Other Eligibility Requirements:*

• Grant Period Eligibility: Applications should have a timeframe of no more than 365 days with the time period beginning no later than January 1, 2006.

• Applications without sufficient information to determine eligibility will not be considered for funding.

• Applications that are non-responsive to the submission requirements detailed in Section IV of this notice will not be considered for funding.

• Applications that are missing any required elements (in whole or in part) will not be considered for funding.

Because the primary objective of the cooperative development center concept is to provide technical assistance services, including feasibility analysis, applications that do not propose the development or continuation of the cooperative development center concept will not be considered. Also, applications that focus on assistance to only one cooperative within the project area will not be considered. Nor will projects proposing to pay for operating costs of cooperatives be considered. To enhance the long-term viability of cooperative development centers, the strengthening of technical assistance capacity within new and existing centers is strongly encouraged.

IV. Application and Submission Information

A. *Address to Request Application Package:* You can obtain the application package for this funding opportunity at the following Internet address: *http://www.rurdev.usda.gov/rbs/coops/rcdg/rcdg.htm*. If you do not have access to the Internet, or if you have difficulty accessing the forms online, you may contact the Rural Development State Office in your State listed on the following Web site: *http://www.rurdev.usda.gov/rbs/coops/rcdg/contacts.htm*. Application forms can be mailed to you. To submit an application electronically, you may access *http://www.grants.gov* to obtain the correct forms.

B. *Content and Form of Submission:* You may submit your application in paper or in an electronic format. If you submit your application in paper form, you must submit a signed original and one copy of your complete application. The application must be in the following format:

• Font size: 12 point unreduced.
• Paper size: 8.5 by 11 inches.
• Page margin size: 1 inch on the top, bottom, left, and right.
• Printed on only one side of each page.
• Held together only by rubber bands or metal or plastic clips; not bound in any other way.

Language: English, avoid jargon.

The submission must include all pages of the application. It is recommended that the application be in black and white, and not color. All paper applications will be scanned electronically for further review upon receipt by the Agency and the scanned images will all be in black and white. Those evaluating the application will only receive black and white images.

If you submit your application electronically, you must follow the instructions given at the Internet address: *http://www.grants.gov*. Applicants are advised to visit the site well in advance of the application deadline if they plan to apply electronically to ensure they have obtained the proper authentication and have sufficient computer resources to complete the application.

An application must contain all of the following elements. Any application that is missing any element or contains an incomplete element will not be considered for funding.

1. Form SF–424, ''Application for Federal Assistance.'' In order for this form to be considered complete, it must contain the legal name of the applicant, the applicant's Data Universal Numbering System (DUNS) number, the applicant's complete mailing address, the name and telephone number of a contact person, the employer identification number, the start and end dates of the project, the Federal funds requested, other funds that will be used as matching funds, an answer to the question, ''Is applicant delinquent on any Federal debt?,'' and the name and signature of an authorized representative.

You are required to have a DUNS number to apply for a grant from RBS. 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.dnb.com/us/* or call 866–705–5711. For more information, see the RCDG Web site at: *http://www.rurdev.usda.gov/rbs/coops/rcdg/rcdg.htm* or contact the State Office in your State from the list on the following Web site: *http://www.rurdev.usda.gov/rbs/coops/rcdg/contacts.htm*.

2. Form SF–424A, ''Budget Information—Non-Construction Programs.'' In order for this form to be considered complete, the applicant must fill out sections A, B, C, and D. The applicant must include both Federal and matching funds.

3. Form SF–424B, ''Assurances—Non-Construction Programs.'' In order for this form to be considered complete, the form must be signed by an authorized official.

4. Survey on Ensuring Equal Opportunity for Applicants. RBS is required to give this survey to all non-profit applicants. Submitting this survey is voluntary.

5. Proposal. Each proposal must contain the following elements:

i. Title Page. The Title Page should include the title of the project as well as any other relevant identifying information. The length should not exceed one page.

ii. Table of Contents. For ease of locating information, each proposal must contain a detailed Table of Contents (TOC) immediately following the Title Page. The TOC should include page numbers for each component of the proposal. Pagination should begin immediately following the TOC. In order for this element to be considered complete, the TOC should include page numbers for the Executive Summary, the Eligibility discussion, the Proposal Narrative and its 11 subcomponents, Conflict of Interest Disclosure, Certification of Judgment, Verification of Matching Funds, and Certification of Matching Funds.

iii. Executive Summary. Summarize the project in three (3) pages or less. Pages in excess of the three-page limit will not be considered. This summary must briefly describe the Center, including goals and tasks to be completed, the amount requested, how the work will be performed, and whether organizational staff, consultants, or contractors will be used. It should also include the title of the project, the names of the primary project contacts, and a list of the main goals. The project summary should immediately follow the TOC.

iv. Eligibility. Describe in detail how the applicant meets the eligibility requirements. This discussion is limited to two (2) pages. Pages in excess of the two-page limit will not be considered.

v. Proposal Narrative. The proposal narrative is limited to a total of 50 pages. Pages in excess of the 50-page limit will not be considered. The narrative portion of the proposal must include, but is not limited to, the following:

a. Project Title. The title of the proposed project must be brief, not to exceed 75 characters, yet describe the essentials of the project. It should match the Project Title submitted on the SF–424. The Project Title does not need to appear on a separate page. It can be included on the Title Page and/or on the Information Sheet.

b. Information Sheet. A separate one-page information sheet which lists each of the 12 evaluation criteria (Section V.A.) followed by the page numbers of all relevant material and documentation contained in the application which supports that criteria.

c. Goals of the Project. This section must include the following:

1. A provision that substantiates that the Center will effectively serve rural areas in the United States;

2. A provision that the primary objective of the Center will be to improve the economic condition of rural areas through cooperative development;

3. A description of the contributions that the proposed activities are likely to make to the improvement of the economic conditions of the rural areas for which the Center will provide services; and

4. Provisions stating that the Center, in carrying out the activities, will seek, where appropriate, the advice, participation, expertise, and assistance of representatives of business, industry, educational institutions, the Federal government, and State and local governments.

5. A provision stating that the proposed activities develop or continue the cooperative development center concept. The agency strongly encourages proposals to strengthen technical assistance capacity within new and existing centers.

6. A provision stating that proposed activities focus assistance to more than one cooperative within the project area.

d. Work Plan. Applicants must discuss the specific tasks to be completed using grant and matching funds. The work plan should show how customers will be identified, key personnel to be involved, and the evaluation methods to be used to determine the success of specific tasks and overall objectives of Center operations. The budget must present a breakdown of the estimated costs associated with cooperative development activities as well as the operation of the Center and allocate these costs to each of the tasks to be undertaken. Projects proposing to pay for the operating costs of cooperatives will not be considered. Matching funds as well as grant funds must be accounted for in the budget.

e. Performance Evaluation Criteria. The applicant must suggest criteria by which the project should be evaluated in the event that a grant is awarded. These suggested criteria are not binding on USDA. Please note that these criteria are different from the Proposal Evaluation Criteria (see Section V.A.) and are a separate requirement. Failure to submit at least one performance criterion by the application deadline will result in the application being determined to be incomplete and the proposal will not be considered for funding.

f. Undertakings. The applicant must expressly undertake to do the following:

1. Take all practicable steps to develop continuing sources of financial support for the Center, particularly from sources in the private sectors;

2. Make arrangements for the activities by the nonprofit institution, including institutions of higher education, operating the Center to be monitored and evaluated; and

3. Provide an accounting for the money received by the grantee in accordance with 7 CFR part 4284, subpart F.

g. Delivery of Cooperative Development Assistance. The applicant must describe its previous accomplishments and outcomes in cooperative development activities and/or its potential for effective delivery of cooperative development services to rural areas. Applicants who have received funding under the RCDG program in Fiscal Years 2003 or 2004 must provide a summation of progress and results for all projects funded fully or partially by the RCDG program in those years. This summary should include the status of cooperative businesses organized and all eligible grant activities. The applicant also should describe the type(s) of assistance to be provided, the expected impacts of that assistance, the sustainability of cooperative organizations receiving the assistance, and the transferability of its Cooperative development strategy and focus to other areas of the U.S.

h. Qualifications of Personnel. Applicants must describe the qualifications of personnel expected to perform key center tasks, and whether these personnel are to be full/part-time Center employees or contract personnel. Those personnel having a track record of positive solutions for complex cooperative development or marketing problems, or those with a record of conducting feasibility studies that later proved to be accurate, business planning, marketing analysis, or other activities relevant to the Center's success should be highlighted.

i. Support and Commitments. Applicants must describe the level of support and commitment in the community for the proposed Center and the services it would provide. This support can be from industry groups, commodity groups, and potential customers of the Center. Plans for coordinating with other developmental organizations in the proposed service area, or with State and local government institutions should be included. Letters supporting cooperation and coordination from potential local customers should be provided. Letters from industry groups, commodity groups, local and State government, and

similar organizations should be referenced, but not included in the application package. When referencing these support letters, provide the name of the organization, date of the letter, the nature of the support (cash, technical assistance, moral), and the name and title of the person signing the letter.

j. Future Support. Applicants should describe their vision for Center operations in future years, including issues such as sources and uses of alternative funding; reliance on Federal, State, and local grants; and the use of in-house personnel for providing services versus contracting out for that expertise. To the extent possible, applicants should document future funding sources that will help achieve long-term sustainability of the Center.

k. Proposal Evaluation Criteria. Each of the evaluation criteria referenced in Section V.A. must be specifically and individually addressed in narrative form. If the information and documentation for these criteria are incorporated in the written narrative, the application may reference that information and documentation by Section number and page. The applicant does not have to repeat information and documentation in Section V.A. if it is presented elsewhere. However, the applicant must correctly reference this information and documentation. Reviewers will not be required to search for information and documentation that is incorrectly referenced.

6. Conflict of Interest Disclosure. If the applicant plans to conduct business with any family members, company owners, or other identities of interest using grant or matching funds, the nature of the business to be conducted and the nature of the relationship between the applicant and the identity of interest must be disclosed. Examples include in-kind matching funds donated by the applicant's immediate family and contracting with someone who has a financial interest in the venture for services paid by grant or matching funds.

7. Certification of Judgment Owed to the United States. Applicants must certify that the United States has not obtained a judgment against them. No grant funds shall be used to pay a judgment owed to the United States. Applicants should include a statement for this section that reads as follows: ''[INSERT NAME OF APPLICANT] certifies that the United States has not obtained a judgment against it.''

8. Verification of Matching Funds. All proposed matching funds must be specifically documented in the application. Matching funds may be cash or in-kind contributions. If matching funds are to be provided by the applicant in cash, there must be a statement that cash will be available, the amount of the cash, and the source of the cash. If the matching funds are to be provided by a third party in cash, the application must include a signed letter from that third party verifying how much cash will be donated and when it will be donated. Verification for funds donated outside the proposed time period of the grant will not be accepted. If the matching funds are to be provided by a third party in-kind donation, the application must include a signed letter from the third party verifying the goods or services to be donated, when the goods and services will be donated, and the value of the goods or services in accordance with 7 CFR section 3019.23(c). Verification for in-kind contributions donated outside the proposed time period of the grant will not be accepted. Verification for in-kind contributions that are over-valued will not be accepted.

If matching funds are in cash, they must be spent on goods and services that are eligible expenditures for this grant program. If matching funds are in-kind contributions, the donated goods or services must be considered eligible expenditures for this grant program as well as be used for eligible purposes. The matching funds must be spent or donated during the grant period and the funds must be expended at a rate equal to or greater than the rate grant funds are expended. Some examples of unacceptable matching funds are donations of fixed equipment and buildings, and the preparation of your RCDG application package.

If acceptable verification for all proposed matching funds is missing from the application, the application will be determined to be incomplete and will not be considered for funding.

9. Certification of Matching Funds. Applicants must certify that matching funds will be available at the same time grant funds are anticipated to be spent and that matching funds will be spent in advance of grant funding, such that for every dollar of grant funds advanced, not less than the required amount of matching funds will have been expended prior to submitting the request for reimbursement. Please note that this certification is a separate requirement from the Verification of Matching Funds requirement. Applicants should include a statement for this section that reads as follows: ''[INSERT NAME OF APPLICANT] certifies that matching funds will be available at the same time grant funds are anticipated to be spent and that matching funds will be spent in advance of grant funding, such that for every dollar of grant funds advanced, not less than 25 cents (5 cents for 1994 Institutions) of matching funds will have been expended prior to submitting the request for reimbursement.'' A separate signature is not required.

C. Submission Dates and Times:

Application Deadline Date: 4 p.m. eastern time on July 1, 2005.

Explanation of Deadlines: Paper applications must be received at USDA–RBS–CS, Attn: RCDG Program, 1400 Independence Avenue, SW., Mail Stop 3250, Room 4016—South, Washington, DC 20250 by 4 p.m. eastern time on the deadline date. If you send your application by the United States Postal Service or commercial delivery service, you must ensure that the carrier will be able to guarantee delivery of the application by the closing date and time. If your application does not meet the deadline above, it will not be considered for funding. You will be notified that your application did not meet the submission requirements. You will also be notified by mail or by e-mail if your application is received on time.

Electronic Submission: Submit electronic grant applications to the following Internet address: *http://www.grants.gov.*

D. Intergovernmental Review of Applications: Executive Order 12372 does apply to this program.

E. Funding Restrictions: Funding restrictions apply to both grant funds and matching funds. Grant funds may be used to pay up to 75 percent (95 percent where the grantee is a 1994 Institution) of the total project costs. Unless provided by other authorizing legislation, other Federal grant funds cannot be used as matching funds. However, matching funds contributed by the applicant may include proceeds from Federal loan.

In general, grant and matching funds can be used to assist farmers and ranchers in organizing new or improving existing agriculture cooperatives, including those involved in value-added activities. Grant and matching funds can also be used to help rural residents form other cooperatively operated businesses such as housing cooperatives, including the conversion of properties administered under the section 515 program administered by the Rural Housing Service to housing cooperatives. Finally, grant and matching funds can be used to help rural residents form shared-services businesses to support their individually owned rural businesses.

1. Grant funds and matching funds may be used for, but are not limited to, providing the following to individuals,

cooperatives, small businesses and other similar entities in rural areas served by the Center:

i. Applied research, feasibility, environmental and other studies that may be useful for the purpose of cooperative development.

ii. Collection, interpretation and dissemination of principles, facts, technical knowledge, or other information for the purpose of cooperative development.

iii. Providing training and instruction for the purpose of cooperative development.

iv. Providing loans and grants for the purpose of cooperative development in accordance with this notice and applicable regulations.

v. Providing technical assistance, research services and advisory services for the purpose of cooperative development.

2. No funds made available under this solicitation shall be used to do any of the following activities:

i. Duplicate current services or replace or substitute support previously provided. If the current service is inadequate, however, grant funds may be used to expand the level of effort or services beyond that which is currently being provided;

ii. Pay costs of preparing the application package for funding under this program;

iii. Pay costs of the project incurred prior to the date of grant approval;

iv. Fund political activities;

v. Pay for assistance to any private business enterprise that does not have at least 51 percent ownership by those who are either citizens of the United States or reside in the United States after being legally admitted for permanent residence;

vi. Pay any judgment or debt owed to the United States;

vii. Plan, repair, rehabilitate, acquire, or construct a building or facility, including a processing facility;

viii. Purchase, rent, or install fixed equipment, including laboratory equipment or processing machinery;

ix. Pay for the repair of privately owned vehicles;

x. Pay for operating costs of cooperatives;

xi. Fund research and development; or

xii. Fund any activities prohibited by 7 CFR part 3015 or 3019.

F. Other Submission Requirements: Applications must be received at USDA–RBS–CS, Attn: RCDG Program, 1400 Independence Avenue, SW., Mail Stop 3250, Room 4016—South, Washington, DC 20250 by 4 p.m. eastern time on the deadline date. Each application submission must contain all required documents in one envelope, if by mail or commercial delivery service, or submitted through *http://www.grants.gov,* if electronic.

V. Application Review Information

A. *Proposal Evaluation Criteria:* All eligible and complete applications will be evaluated based on the following criteria. Failure to address any one of the following criteria will render the application incomplete, and the application will not be considered for funding.

For information and documentation that appear in other sections of this funding announcement that already address the following criteria, the applicant may reference that information and documentation by Section number and page number. The applicant does not have to repeat information and documentation in this section if it is presented elsewhere. However, the applicant must correctly reference this information and documentation. Reviewers will not be required to search for information and documentation that is incorrectly referenced.

1. *Administrative capabilities.* (1–10 points) The application will be evaluated to determine whether the subject Center has a track record of administering a nationally coordinated, regional or State-wide operated project. Centers that have capable financial systems and audit controls, personnel and program administration performance measures and clear rules of governance will receive more points than those not evidencing this capacity.

2. *Technical assistance and other services.* (1–6 points) The Agency will evaluate the applicant's demonstrated expertise in providing technical assistance in rural areas. This includes conducting feasibility studies, developing marketing plans, developing business plans, conducting applied research related to cooperative development, and performing those other activities necessary for a group of individuals to form a cooperative.

3. *Economic development.* (1–5 points) The Agency will evaluate the applicant's demonstrated ability to assist in the retention of businesses, facilitate the establishment of cooperatives and new cooperative approaches and generate employment opportunities that will improve the economic conditions of rural areas.

4. *Linkages.* (1–5 points) The Agency will evaluate the applicant's demonstrated ability to create horizontal linkages among businesses within and among various sectors in rural areas of the United States and vertical linkages to domestic and international markets. These linkages must be among cooperatives and businesses, not development organizations.

5. *Commitment.* (1–10 points) The Agency will evaluate the applicant's commitment to providing technical assistance and other services to underserved and economically distressed areas in rural areas of the United States.

6. *Matching Funds.* (1–5 points) All applicants must demonstrate matching funds equal to at least 25 percent (5 percent for 1994 Institutions) of total project costs. Applications exceeding these minimum commitment levels will receive more points. If the applicant provides eligible matching funds of 25 percent, 1 point will be awarded; 26 to 35 percent, 2 points will be awarded; 36 to 45 percent, 3 points; 46 to 55 percent, 4 points; or 56 or greater percent, 5 points will be awarded. If the applicant is a 1994 Institution and provides eligible matching funds of 5 percent, 1 point will be awarded; 6 to 9 percent, 2 points will be awarded; 10 to 14 percent, 3 points; 15 to 19 percent, 4 points; or 20 or greater percent, 5 points will be awarded.

7. *Delivery.* (1–12 points) The Agency will evaluate whether the Center has a track record in providing technical assistance in rural areas and accomplishing effective outcomes in cooperative development. The Center's potential for delivering effective cooperative development assistance, the expected effects of that assistance, the sustainability of cooperative organizations receiving the assistance, and the transferability of the Center's cooperative development strategy and focus to other States will also be assessed.

8. *Work Plan/Budget.* (1–10 points) The work plan will be reviewed for detailed actions and an accompanying timetable for implementing the proposal. Clear, logical, realistic and efficient plans will result in a higher score. Budgets will be reviewed for completeness and the quality of non-Federal funding commitments.

9. Qualifications of those Performing the Tasks. (1–5 points) The application will be evaluated to determine if the personnel expected to perform key center tasks have a track record of positive solutions for complex cooperative development or marketing problems, or a successful record of conducting accurate feasibility studies, business plans, marketing analysis, or other activities relevant to Cooperative development center success.

10. Local support. (1–5 points) Applications will be reviewed for previous and expected local support for the Center, plans for coordinating with other developmental organizations in the proposed service area, and coordination with State and local institutions. Support documentation should include recognition of rural values that balance employment opportunities with environmental stewardship and other positive rural amenities. Other than support from potential customers, support letters and documentation should be referenced and not submitted. Centers that demonstrate strong support from potential beneficiaries and formal evidence of the Center's intent to coordinate with other developmental organizations will receive more points than those not evidencing such support and formal intent.

11. Future support. (1–2 points) Applications that demonstrate their vision for funding center operations for future years, including diversification of funding sources and building in-house technical assistance capacity, will receive more points for this criterion.

12. Non-Agricultural Rural Cooperative Development. (0 or 5 points) Applicants that propose to use more than 50 percent of grant and matching funds to work with rural residents and businesses who are not engaged in production agriculture to develop cooperative businesses will receive 5 points. All other applicants will receive zero points. The types of cooperative development that meet this criterion include, but are not limited to, broadband cooperatives, housing cooperatives, healthcare cooperatives, shared-services cooperatives, daycare cooperatives, and any other type of cooperative that is not producing or marketing agricultural products.

B. Review and Selection Process: The Agency will conduct an initial screening of all proposals to determine whether the applicant is eligible, complete, and sufficiently responsive to the requirements set forth in this funding announcement so as to allow for an informed review. Incomplete or non-responsive applications will not be evaluated further. Reviewers appointed by the Agency will evaluate applications.

C. Anticipated Announcement and Award Dates:

Award Date: The announcement of award selections is expected to occur on or about September 15, 2005.

VI. Award Administration Information

A. Award Notices: Successful applicants will receive a notification of tentative selection for funding from Rural Development. Applicants must comply with all applicable statutes and regulations before the grant award will be approved. Unsuccessful applicants will receive notification by mail.

B. Administrative and National Policy Requirements: 7 CFR parts 3015, 3019, and 4284. To view these regulations, please see the following Internet address: *http://www.access.gpo.gov/nara/cfr/cfr-table-search.html.*

Grantees selected for awards under this program will be required to enter into a Grant Agreement and will be subject to the written conditions of the award. In addition, the following forms must be executed:

- Form RD 1940–1, ''Request for Obligation of Funds.''
- Form RD 1942–46, ''Letter of Intent to Meet Conditions.''
- Form AD–1047, ''Certification Regarding Debarment, Suspension, and Other Responsibility Matters-Primary Covered Transactions.''
- Form AD–1048, ''Certification Regarding Debarment, Suspension, Ineligibility and Voluntary Exclusion-Lower Tier Covered Transactions.''
- Form AD–1049, ''Certification Regarding Drug-Free Workplace Requirements (Grants).''
- Form RD 400–1, ''Equal Opportunity Agreement.''
- Form RD 400–4, ''Assurance Agreement.''
- RD Instruction 1940–Q, Exhibit A–1, ''Certification for Contracts, Grants and Loans.''

Additional information on these requirements can be found on the RBS Web site at the following Internet address: *http://www.rurdev.usda.gov/rbs/coops/rcdg/rcdg.htm.*

Reporting Requirements: You must provide Rural Development with an original hard copy of the following reports. RBS is currently developing an online reporting system. Once the system is developed, you may be required to submit some or all of your reports online instead of in hard copy. The hard copies of your reports should be submitted to the Rural Development State Office of the state in which the Center is located. Failure to submit satisfactory reports on time may result in suspension or termination of your grant.

1. A ''Financial Status Report'' listing expenditures according to agreed upon budget categories, on a semi-annual basis. Reporting periods end each March 31 and September 30. Reports are due 30 days after the reporting period ends.

2. Semi-annual performance reports that compare accomplishments to the objectives stated in the proposal. Identify all tasks completed to date and provide documentation supporting the reported results. If the original schedule provided in the work plan is not being met, the report should discuss the problems or delays that may affect completion of the project. Objectives for the next reporting period should be listed. Compliance with any special conditions on the use of award funds should be discussed. Reports are due as provided in paragraph 1. of this section. The supporting documentation for completed tasks includes, but is not limited to, feasibility studies, marketing plans, business plans, publication quality success stories, applied research reports, copies of surveys conducted, articles of incorporation and bylaws and an accounting of how outreach, training, and other funds were expended.

3. Final project performance reports, including supporting documentation, are due within 90 days of the completion of the project.

VII. Agency Contacts

For general questions about this announcement and for program technical assistance, please contact the State Office for the State in which the Applicant is based. A list is available at the following Web site: *http://www.rurdev.usda.gov/rbs/coops/rcdg/contacts.htm.* If you are unable to contact your State Office, please contact a nearby State Office or you may contact the RBS National Office at USDA–RBS–CS, Attn: RCDG Program, 1400 Independence Avenue, SW., Mail Stop 3250, Rm. 4016—South, Washington, DC 20250–3250, telephone: (202) 720–7558, e-mail: *cpgrants@usda.gov.*

Dated: May 5, 2005.

Peter J. Thomas,

Administrator, Rural Business-Cooperative Service.

[FR Doc. 05–9551 Filed 5–12–05; 8:45 am]

BILLING CODE 3410–XY–P

COMMITTEE FOR PURCHASE FROM PEOPLE WHO ARE BLIND OR SEVERELY DISABLED

Procurement List; Additions

AGENCY: Committee for Purchase From People Who Are Blind or Severely Disabled.

ACTION: Additions to procurement list.

SUMMARY: This action adds to the Procurement List products to be furnished by nonprofit agencies employing persons who are blind or have other severe disabilities.

EFFECTIVE DATE: June 12, 2005.

ADDRESSES: Committee for Purchase From People Who Are Blind or Severely Disabled, Jefferson Plaza 2, Suite 10800, 1421 Jefferson Davis Highway, Arlington, Virginia 22202–3259.

FOR FURTHER INFORMATION OR TO SUBMIT COMMENTS CONTACT: Sheryl D. Kennerly, Telephone: (703) 603–7740, Fax: (703) 603–0655, or e-mail *SKennerly@jwod.gov.*

SUPPLEMENTARY INFORMATION: On March 18, 2005, the Committee for Purchase From People Who Are Blind or Severely Disabled published notice (70 FR 13165) of proposed additions to the Procurement List.

After consideration of the material presented to it concerning capability of qualified nonprofit agencies to provide the products and impact of the additions on the current or most recent contractors, the Committee has determined that the products listed below are suitable for procurement by the Federal Government under 41 U.S.C. 46–48c and 41 CFR 51–2.4.

Regulatory Flexibility Act Certification

I certify that the following action will not have a significant impact on a substantial number of small entities. The major factors considered for this certification were:

1. The action will not result in any additional reporting, recordkeeping or other compliance requirements for small entities other than the small organizations that will furnish the products to the Government.

2. The action will result in authorizing small entities to furnish the products to the Government.

3. There are no known regulatory alternatives which would accomplish the objectives of the Javits-Wagner-O'Day Act (41 U.S.C. 46–48c) in connection with the products proposed for addition to the Procurement List.

End of Certification

Accordingly, the following products are added to the Procurement List:

Products

Product/NSN: Antifoam Compound, Silicon, 6850–01–506–6533.
Product/NSN: Detergent, Laundry, 7930–01–506–7081.
NPA: East Texas Lighthouse for the Blind, Tyler, Texas.
Contracting Activity: Defense Supply Center Philadelphia, Philadelphia, Pennsylvania.
Product/NSN: Marker, Dry Erase (Black, Chisel Tip), 7520–01–294–3791.
NPA: Dallas Lighthouse for the Blind, Inc., Dallas, Texas.
Contracting Activity: GSA/Office Supplies & Paper Product Acquisition Center. New York, New York.

This action does not affect current contracts awarded prior to the effective date of this addition or options that may be exercised under those contracts.

Sheryl D. Kennerly,

Director, Information Management.

[FR Doc. E5–2385 Filed 5–12–05; 8:45 am]

BILLING CODE 6353–01–P

COMMITTEE FOR PURCHASE FROM PEOPLE WHO ARE BLIND OR SEVERELY DISABLED

Procurement List; Proposed Additions

AGENCY: Committee for Purchase From People Who Are Blind Or Severely Disabled.

ACTION: Proposed additions to Procurement List.

SUMMARY: The Committee is proposing to add to the Procurement List products and services to be furnished by nonprofit agencies employing persons who are blind or have other severe disabilities.

Comments Must be Received on or Before: June 12, 2005.

ADDRESSES: Committee for Purchase From People Who Are Blind or Severely Disabled, Jefferson Plaza 2, Suite 10800, 1421 Jefferson Davis Highway, Arlington, Virginia 22202–3259.

FOR FURTHER INFORMATION OR TO SUBMIT COMMENTS CONTACT: Sheryl D. Kennerly, Telephone: (703) 603–7740, Fax: (703) 603–0655, or e-mail *SKennerly@jwod.gov.*

SUPPLEMENTARY INFORMATION: This notice is published pursuant to 41 U.S.C 47(a)(2) and 41 CFR 51–2.3. Its purpose is to provide interested persons an opportunity to submit comments on the proposed actions.

If the Committee approves the proposed additions, the entities of the Federal Government identified in the notice for each product or service will be required to procure the products and services listed below from nonprofit agencies employing persons who are blind or have other severe disabilities.

The following material pertains to the products identified in this **Federal Register** Notice.

New Army Combat Uniform (ACU) Coats & Trousers—Transition Quantities Qualified Nonprofit Agencies under the Committee's program are currently authorized to produce 300,000 Battle Dress Uniform (BDU) trousers and 100,000 BDU coats. During the Army's transition from BDU to the ACU, at the request of the Defense Supply Center—Philadelphia (DSCP), it is proposed that qualified nonprofit agencies produce an additional 200,000 BDU trousers, 900,000 ACU coats, 900,000 ACU trousers, and 50,000 BDU coats annually, for a period of three years. Once the transition period is complete, the additional quantities will be deleted from the Procurement List and the qualified nonprofit agencies will reduce their production, back to 300,000 ACU trousers and 100,000 ACU coats.

The following material pertains to all of the items being added to the Procurement List.

Regulatory Flexibility Act Certification

I certify that the following action will not have a significant impact on a substantial number of small entities. The major factors considered for this certification were:

1. If approved, the action will not result in any additional reporting, recordkeeping or other compliance requirements for small entities other than the small organizations that will furnish the products and services to the Government.

2. If approved, the action will result in authorizing small entities to furnish the products and services to the Government.

3. There are no known regulatory alternatives which would accomplish the objectives of the Javits-Wagner-O'Day Act (41 U.S.C. 46–48c) in connection with the products and services proposed for addition to the Procurement List.

Comments on this certification are invited. Commenters should identify the statement(s) underlying the certification on which they are providing additional information.

End of Certification

The following products and services are proposed for addition to Procurement List for production by the nonprofit agencies listed:

Products

Product/NSN: BDU Trousers, Combat (Additional 200,000 pair of any Type),
8415–01–084–1016,
8415–01–084–1017,
8415–01–084–1705,
8415–01–084–1706,
8415–01–084–1707,
8415–01–084–1708,
8415–01–084–1709,
8415–01–084–1710,
8415–01–084–1711,
8415–01–084–1712,
8415–01–084–1713,
8415–01–084–1714,
8415–01–084–1715,
8415–01–084–1716,
8415–01–084–1717,
8415–01–084–1718,
8415–01–134–3193,
8415–01–134–3194,

8415–01–134–3195,
8415–01–134–3196,
8415–01–134–3197,
8415–01–327–5324,
8415–01–327–5325,
8415–01–327–5326,
8415–01–327–5327,
8415–01–327–5328,
8415–01–327–5329,
8415–01–327–5330,
8415–01–327–5331,
8415–01–327–5332,
8415–01–327–5333,
8415–01–327–5334,
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8415–01–327–5337,
8415–01–327–5338,
8415–01–327–5339,
8415–01–327–5340,
8415–01–327–5341,
8415–01–327–5342,
8415–01–327–5343,
8415–01–327–5344,
8415–01–390–8554,
8415–01–390–8556,
8415–01–390–8939,
8415–01–390–8940,
8415–01–390–8941,
8415–01–390–8942,
8415–01–390–8943,
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8415–01–390–8950,
8415–01–390–8951,
8415–01–390–8952,
8415–01–390–8953,
8415–01–390–8954,
8415–01–391–1062,
8415–01–391–1063,
8415–01–400–3676,
8415–01–400–3677,
8415–01–400–3678,
8415–01–413–6202,
8415–01–413–6207,
8415–01–413–6210,
8415–01–498–7924,
8415–01–498–7926,
8415–01–498–7929.

NPA: Goodwill Industries of South Florida Inc., Miami, Florida.

Contracting Activity: Defense Supply Center Philadelphia, Philadelphia, Pennsylvania.

Product/NSN: BDU Coat, Woodland, Camouflage (Type VI) (Additional 50,000 coats),
8415–01–390–8537,
8415–01–390–8538,
8415–01–390–8539,
8415–01–390–8540,
8415–01–390–8541,
8415–01–390–8542,
8415–01–390–8543,
8415–01–390–8544,
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8415–01–390–8550,
8415–01–390–8551,
8415–01–390–8552,
8415–01–390–8553,
8415–01–390–8555,
8415–01–390–8557,
8415–01–390–9641,
8415–01–390–9646,
8415–01–390–9648.

NPA: Southside Training Employment Placement Services Inc., Victoria, Virginia.

Contracting Activity: Defense Supply Center Philadelphia, Philadelphia, Pennsylvania.

Product/NSN: New Army Combat Uniform (ACU), Coat and Trousers (600,000 sets), 8415–01–519–8277,
8415–01–519–8279,
8415–01–519–8404,
8415–01–519–8408,
8415–01–519–8410,
8415–01–519–8414,
8415–01–519–8416,
8415–01–519–8418,
8415–01–519–8419,
8415–01–519–8422,
8415–01–519–8423,
8415–01–519–8426,
8415–01–519–8427,
8415–01–519–8429,
8415–01–519–8430,
8415–01–519–8431,
8415–01–519–8432,
8415–01–519–8434,
8415–01–519–8435,
8415–01–519–8436,
8415–01–519–8444,
8415–01–519–8445,
8415–01–519–8446,
8415–01–519–8447,
8415–01–519–8487,
8415–01–519–8491,
8415–01–519–8497,
8415–01–519–8499,
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8415–01–519–8514,
8415–01–519–8532,
8415–01–519–8599,
8415–01–519–8607,
8415–01–519–8608,
8415–01–519–8609,
8415–01–519–8610,
8415–01–519–8611,
8415–01–519–8612,
8415–01–519–8613,
8415–01–522–9557,
8415–01–527–5047,
8415–01–527–5048,
8415–01–527–5049,
8415–01–527–5051,
8415–01–527–5053,
8415–01–527–5215,
8415–01–527–5218,
8415–01–527–5219,
8415–01–527–5220,
8415–01–527–5222,
8415–01–527–5223,
8415–01–527–5224,
8415–01–527–5247,
8415–01–527–5266,
8415–01–527–5269,
8415–01–527–5273,
8415–01–527–5274,
8415–01–527–5275,
8415–01–527–5277,
8415–01–527–5290,
8415–01–527–5291,
8415–01–527–5292,
8415–01–527–5293,
8415–01–527–5296.

NPA: National Center for Employment of the Disabled, El Paso, Texas.

Contracting Activity: Defense Supply Center Philadelphia, Philadelphia, Pennsylvania.

Product/NSN: New Army Combat Uniform, Trousers (Up to 300,000 pair), 8415–01–519–8277,
8415–01–519–8404,
8415–01–519–8410,
8415–01–519–8414,
8415–01–519–8416,
8415–01–519–8418,
8415–01–519–8419,
8415–01–519–8422,
8415–01–519–8423,
8415–01–519–8426,
8415–01–519–8427,
8415–01–519–8429,
8415–01–519–8430,
8415–01–519–8431,
8415–01–519–8432,
8415–01–519–8434,
8415–01–519–8435,
8415–01–519–8436,
8415–01–519–8444,
8415–01–519–8445,
8415–01–519–8446,
8415–01–519–8447.

NPA: El Paso Lighthouse for the Blind, El Paso, Texas. New York City Industries for the Blind Inc., Brooklyn, New York. Raleigh Lions Clinic for the Blind Inc., Raleigh, North Carolina. San Antonio Lighthouse, San Antonio, Texas.

Product/NSN: New Army Combat Uniform (ACU), Coats (Up to 300,000 coats), 8415–01–519–8487,
8415–01–519–8491,
8415–01–519–8497,
8415–01–519–8499,
8415–01–519–8500,
8415–01–519–8501,
8415–01–519–8502,
8415–01–519–8504,
8415–01–519–8505,
8415–01–519–8506,
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8415–01–519–8510,
8415–01–519–8512,
8415–01–519–8513,
8415–01–519–8514,
8415–01–519–8532,
8415–01–519–8599,
8415–01–519–8607,
8415–01–519–8608,
8415–01–519–8609,
8415–01–519–8610,
8415–01–519–8611,
8415–01–519–8612,
8415–01–519–8613.

NPA: Bestwork Industries for the Blind Inc.,

Runnemede, New Jersey. Raleigh Lions Clinic for the Blind Inc., Raleigh, North Carolina. Susquehanna Association for the Blind and Visually Impaired, Lancaster, Pennsylvania. Winston-Salem Industries for the Blind, Winston-Salem, North Carolina.

Services

Service Type/Location: Custodial Services, U.S. Federal Building, 400 North Miami Avenue, Miami, Florida.
NPA: Goodwill Industries of South Florida, Inc., Miami, Florida.
Contracting Activity: GSA, Property Management Center (4PMB), Atlanta, Georgia.
Service Type/Location: Document Destruction, Internal Revenue Service, Chicago Appeals Office, 200 W Adams Street, Chicago, Illinois.
NPA: Opportunity, Inc., Highland Park, Illinois.
Contracting Activity: Internal Revenue Service, Dallas, Texas.
Service Type/Location: Food Service, Illinois National Guard, Lincoln's Challenge Academy, 205 W. Dodge, Building 303, Rantoul, Illinois.
NPA: Challenge Unlimited, Inc., Alton, Illinois.
Contracting Activity: Illinois Army National Guard—Camp Lincoln, Springfield, Illinois.
Service Type/Location: Laundry Service, Basewide, Bolling AFB, DC.
NPA: Rappahannock Goodwill Industries, Inc., Fredericksburg, Virginia.
Contracting Activity: HQ Bolling—11th CONS/LGCO, Bolling AFB, DC.

Sheryl D. Kennerly,

Director, Information Management.

[FR Doc. E5–2412 Filed 5–12–05; 8:45 am]

BILLING CODE 6353–01–P

DEPARTMENT OF COMMERCE

Economic Development Administration

Proposed Information Collection; Comment Request; Petition by a Firm for Certification of Eligibility To Apply for Trade Adjustment Assistance

AGENCY: Economic Development Agency (EDA).

ACTION: Notice.

SUMMARY: The Department of Commerce, as required by the Paperwork Reduction Act of 1995 (44 U.S.C. 3506(c)(2)(A)) and as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to comment on proposed and/or continuing information collections.

DATES: Comments must be submitted in writing on or before July 12, 2005.

ADDRESSES: Direct all written comments to Diana Hynek, Departmental Paperwork Clearance Officer, Department of Commerce, Room 6625, 1401 Constitution Avenue, NW., Washington, DC 20230 or via e-mail to *dhynek@doc.gov.*

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the information collection instrument and instructions should be directed to Kenneth M. Kukovich, EDA PRA Liaison, Office of Management Services, HCHB. Room 7227, Economic Development Administration, Department of Commerce, 1401 Constitution Avenue, NW., Washington, DC 20230; telephone: (202) 482–0806; e-mail: *kkukovich@eda.doc.gov.*

SUPPLEMENTARY INFORMATION:

I. Abstract

Pursuant to Chapter 3 of Title II of the Trade Act of 1974, as amended (19 U.S.C. 2341 *et seq.*), the Secretary of Commerce (the ''Secretary'') is given certain responsibilities concerning the provision of adjustment assistance for trade-injured firms. The Secretary has delegated this statutory authority and the corresponding responsibilities to the Economic Development Administration. EDA administers the Trade Adjustment Assistance Program to assist trade-injured U.S. manufacturing and producing firms to develop and implement strategies for competing in the global marketplace. The information is used to determine whether a firm is eligible to apply for trade adjustment assistance.

II. Method of Collection

Paper format of Form ED–840P.

III. Data

OMB Control Number: 0610–0091.
Agency Form Number: ED–840P, Petition by a Firm for Certification of Eligibility for Trade Adjustment Assistance.
Type of Review: Regular submission.
Affected Public: Business or other for-profit organizations.
Estimated Number of Respondents: 200.
Estimated Time Per Response: 8 hours.
Estimated Total Annual Burden Hours: 1,600.
Estimated Total Annual Cost to the Public: $96,000.

IV. Request for Comments

Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden (including hours and cost) of the proposed collection of information; (c) ways to enhance the quality, utility and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology.

Comments submitted in response to this notice will be summarized and/or included in the request for Office of Management and Budget approval of this information collection and they also will become a matter of public record.

Dated: May 9, 2005.

Gwellnar Banks,

Management Analyst, Office of the Chief Information Officer.

[FR Doc. 05–9542 Filed 5–12–05; 8:45 am]

BILLING CODE 3510–24–P

DEPARTMENT OF COMMERCE

Foreign–Trade Zones Board

(Docket 19 -2005)

Foreign–Trade Zone 94 - Laredo, Texas, Application for Expansion

An application has been submitted to the Foreign–Trade Zones Board (the Board) by the City of Laredo, grantee of FTZ 94, requesting authority to expand its zone in the Laredo, Texas area, within the Laredo Customs port of entry. The application was submitted pursuant to the provisions of the Foreign–Trade Zones Act (19 U.S.C. 81a–81u), and the regulations of the Board (15 CFR Part 400). It was formally filed on May 9, 2005.

FTZ 94 was approved by the Board on November 22, 1983 (Board Order 235, 48 FR 53737; 11/29/83) and expanded on March 26, 1990 (Board Order 468, 55 FR 12696; 4/5/90); December 29, 1992 (Board Order 620, 58 FR 3533; 1/11/93); January 17, 1997 (Board Order 866, 62 FR 4028, 1/28/97); and, November 28, 2000 (Board Order 1130, 65 FR 77851, 12/13/00). The zone currently consists of six sites in the Laredo area:

Site 1 - (494 acres) within the 1,600–acre Laredo International Airport Industrial Park;
Site 1a - (1 acre) at 302 Grand Central Boulevard, within the Milo Distribution Center
Site 1b - (1 acre) at 22219 Mines Road, within the Transmaritime Inc.'s Transhipment Terminal (Sites 1a & 1b expire 11/1/06)
Site 2 - (20 acres) industrial park owned by the Texas–Mexican

Railway, along Highway 359 in Webb County;

Site 3 - (550 acres) within the 1,400–acre Killiam Industrial area at 12800 Old Mines Road;

Site 4 - (1,500 acres) within the 7,000–acre International Commerce Center, Laredo;

Site 5 - (930 acres) La Barranca Ranch Industrial Park, at Interstate Highway 35, adjacent to the Union Pacific rail line, northern Webb County; and,

Site 6 - (682 acres) Unitec Industrial Center, Interstate Highway 35, 12 miles northwest of Laredo International Airport.

The applicant is now requesting authority to expand the zone to include a site (831 acres) within the 1,530–acre Embarcadero Business Park, owned by Fasken, Ltd. The site is adjacent to the World Trade Bridge, which is a commercial U.S. - Mexico border crossing.

No specific manufacturing requests are being made at this time. Such requests would be made to the Board on a case–by case basis.

In accordance with the Board's regulations, a member of the FTZ Staff has been designated examiner to investigate the application and report to the Board.

Public comment on the application is invited from interested parties. Submissions (original and 3 copies) shall be addressed to the Board's Executive Secretary at one of the following addresses below:

1. Submissions via Express/Package Delivery Services: Foreign–Trade Zones Board, U.S. Department of Commerce, Franklin Court Building–Suite 4100W, 1099 14th Street, NW, Washington, DC 20005; or

2. Submissions via U.S. Postal Service: Foreign Trade Zones Board, U.S. Department of Commerce, FCB–4100W, 1401 Constitution Ave., NW., Washington, DC 20230.

The closing period for their receipt is [60 days from date of publication]. Rebuttal comments in response to material submitted during the foregoing period may be submitted during the subsequent 15-day period (to [75 days from date of publication]).

A copy of the application will be available for public inspection at the Office of the Foreign–Trade Zones Board's Executive Secretary at address No. 1 listed above and at the Office of the Port Director, U.S. Customs and Border Protection, Lincoln Juarez Bridge, Administrative Building 12, Laredo, TX 78040

Dated: May 9, 2005.

Dennis Puccinelli,

Executive Secretary.

[FR Doc. 05–9601 Filed 5–12–05; 8:45 am]

BILLING CODE 3510–DS–S

DEPARTMENT OF COMMERCE

International Trade Administration

(A–403–801, C–403–802)

Extension of Time Limits for Preliminary Results and Final Results of the Full Sunset Review of the Antidumping Duty Order on Fresh and Chilled Atlantic Salmon from Norway and the Final Results of the Expedited Sunset Review of the Countervailing Duty Order on Fresh and Chilled Atlantic Salmon from Norway

AGENCY: Import Administration, International Trade Administration, U.S. Department of Commerce.

EFFECTIVE DATE: May 13, 2005.

FOR FURTHER INFORMATION CONTACT: Hilary Sadler, Esq. at 202–482–4340, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street & Constitution Avenue, NW, Washington, DC 20230.

Extension of Time Limits:

In accordance with section 751(c)(5)(B) of the Tariff Act of 1930, as amended, (''the Act''), the U.S. Department of Commerce, (''the Department'') may extend the period of time for making its determination by not more than 90 days, if it determines that the review is extraordinarily complicated. As set forth in 751(c)(5)(C)(v) of the Act, the Department may treat a sunset review as extraordinarily complicated if it is a review of a transition order. The sunset reviews subject to this notice are transition orders. Therefore, the Department has determined, pursuant to section 751(c)(5)(C)(v) of the Act, that the sunset reviews of the antidumping and countervailing duty orders on fresh and chilled salmon from Norway are extraordinarily complicated and require additional time for the Department to complete its analysis. The Department's preliminary results of the full sunset review of the antidumping duty order on fresh and chilled Atlantic salmon from Norway were scheduled for May 23, 2005, and the final results of the expedited sunset review of the countervailing duty order on fresh and chilled Atlantic salmon from Norway were scheduled for June 2, 2005. The Department will extend the deadlines in these proceedings. As a result, the Department intends to issue the preliminary results of the full sunset review of the antidumping duty order on fresh and chilled Atlantic salmon from Norway on August 21, 2005 and the final results of that review on December 29, 2005. The final results of the expedited sunset review on the countervailing duty order on fresh and chilled Atlantic salmon from Norway will now be due on August 31, 2005. These dates are 90 days from the original scheduled dates of the preliminary and final results of these sunset reviews. This notice is issued in accordance with sections 751(c)(5)(B) and (C)(v) of the Act.

Dated: May 06, 2005.

Barbara E. Tillman,

Acting Deputy Assistant Secretary for Import Administration.

[FR Doc. E5–2387 Filed 5–12–05; 8:45 am]

BILLING CODE 3510–DS–S

DEPARTMENT OF COMMERCE

International Trade Administration

Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation; Advance Notification of Sunset Reviews

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

ACTION: Notice of Upcoming Sunset Reviews.

SUPPLEMENTARY INFORMATION:

Background

Every five years, pursuant to section 751(c) of the Tariff Act of 1930, as amended, the Department of Commerce (''the Department'') and the International Trade Commission automatically initiate and conduct a review to determine whether revocation of a countervailing or antidumping duty order or termination of an investigation suspended under section 704 or 734 would be likely to lead to continuation or recurrence of dumping or a countervailable subsidy (as the case may be) and of material injury.

Upcoming Sunset Reviews for June 2005

The following sunset reviews are scheduled for initiation in June 2005 and will appear in that month's Notice of Initiation of Five-year Sunset Reviews.

Antidumping Duty Proceedings

Antifriction Bearings, Ball and Spherical Plain from France (A–427–801)

Antifriction Bearings, Ball from Germany (A–428–801)

Antifriction Bearings, Ball from Italy (A–475–801)

Antifriction Bearings, Ball from Japan (A–588–804)

Antifriction Bearings, Ball from Singapore (A–559–801)

Antifriction Bearings, Ball from the United Kingdom (A–412–801)

Glycine from the People's Republic of China (A–570–836)

Tapered Roller Bearings from the People's Republic of China (A–570–601)

Countervailing Duty Proceedings

No countervailing duty proceedings are scheduled for initiation in June 2005.

Suspended Investigations

No suspended investigations are scheduled for initiation in June 2005.

The Department's procedures for the conduct of sunset reviews are set forth in 19 CFR 351.218. Guidance on methodological or analytical issues relevant to the Department's conduct of sunset reviews is set forth in the Department's Policy Bulletin 98.3--Policies Regarding the Conduct of Five-year (''Sunset'') Reviews of Antidumping and Countervailing Duty Orders; Policy Bulletin, 63 FR 18871 (April 16, 1998) (''Sunset Policy Bulletin''). The Notice of Initiation of Five-year (''Sunset'') Reviews provides further information regarding what is required of all parties to participate in sunset reviews.

Please note that if the Department receives a Notice of Intent to Participate from a member of the domestic industry within 15 days of the date of initiation, the review will continue. Thereafter, any interested party wishing to participate in the sunset review must provide substantive comments in response to the notice of initiation no later than 30 days after the date of initiation.

This notice is not required by statute but is published as a service to the international trading community.

Dated: May 6, 2005.

Holly A. Kuga,

Senior Office Director, AD/CVD Operations, Office 4 for Import Administration.

[FR Doc. E5–2388 Filed 5–12–05; 8:45 am]

BILLING CODE 3510–DS–S

DEPARTMENT OF COMMERCE

International Trade Administration

A–427–801, A–428–801, A–475–801, A–588–804, A–559–801, A–412–801

Antifriction Bearings and Parts Thereof from France, Germany, Italy, Japan, Singapore, and the United Kingdom: Preliminary Results and Partial Rescission of Antidumping Duty Administrative Reviews

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

SUMMARY: In response to requests from interested parties, the Department of Commerce is conducting administrative reviews of the antidumping duty orders on antifriction bearings (other than tapered roller bearings) and parts thereof from France, Germany, Italy, Japan, Singapore, and the United Kingdom. The merchandise covered by these orders are ball bearings and parts thereof (ball bearings) from France, Germany, Italy, Japan, Singapore, and the United Kingdom and spherical plain bearings and parts thereof from France. The reviews cover 19 manufacturers/exporters. The period of review is May 1, 2003, through April 30, 2004.

We have preliminarily determined that sales have been made below normal value by various companies subject to these reviews. If these preliminary results are adopted in our final results of administrative reviews, we will instruct U.S. Customs and Border Protection (CBP) to assess antidumping duties on all appropriate entries.

We invite interested parties to comment on these preliminary results. Parties who submit comments in these reviews are requested to submit with each argument (1) a statement of the issue and (2) a brief summary of the argument.

EFFECTIVE DATE: May 13, 2005.

FOR FURTHER INFORMATION CONTACT: Richard Rimlinger or Kristin Case, AD/CVD Operations, Office 5, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW, Washington, DC 20230; telephone: (202) 482–4733.

SUPPLEMENTARY INFORMATION:

Background

On May 15, 1989, the Department published in the **Federal Register** (54 FR 20900) the antidumping duty orders on ball bearings from France, Germany, Italy, Japan, Singapore, and the United Kingdom, and on spherical plain bearings and parts thereof from France. On June 30, 2004, in accordance with 19 CFR 351.213(b), we published a notice of initiation of administrative reviews of these orders (68 FR 39055). The list of companies for which we have initiated administrative reviews are as follows:

France:
* SKF France S.A. or Sarma (SKF France) - ball bearings and spherical plain bearings
* SNR Roulements or SNR Europe (SNR) - ball bearings only
* Weber Kugellager International - ball bearings only

Germany:
* Gebrüder Reinfurt GmbH & Co., KG, Wurzberg, Germany (GRW)
* INA–Schaeffler KG; INA Vermogensverwaltungsgesellschaft GmbH; INA Holding Schaeffler KG; FAG Kugelfischer Georg–Schaefer AG; FAG Automobiltechnik AG; FAG OEM und Handel AG; FAG Komponenten AG; FAG Aircraft/Super Precision Bearings GmbH; FAG Industrial Bearings AG; FAG Sales Europe GmbH; FAG International Sales and Service GmbH (collectively FAG/INA)
* Paul Mueller Industrie GmbH & Co. KG {also listed as GMN (Georg Mueller Nuremberg)}; Paul Mueller GmbH & Co. KG Unternehmensbeteiligungen (collectively Paul Mueller)
* SKF GmbH (SKF Germany)
* Weber Kugellager International

Italy:
* FAG Italia S.p.A.; FAG Automobiltechnik AG; FAG OEM und Handel AG (collectively FAG Italy)
* SKF Industrie S.p.A.; SKF RIV–SKF Officine di Villas Perosa S.p.A.; RFT S.p.A.; OMVP S.p.A. (collectively SKF Italy)
* Weber Kugellager International

Japan:
* Asahi Seiko Co., Ltd. (Asahi)
* Koyo Seiko Co., Ltd. (Koyo)
* NSK Ltd. (NSK)
* NTN Corporation (NTN)
* Nachi–Fujikoshi Corporation (Nachi)
* Nankai Seiko Co., Ltd. (SMT)
* Nippon Pillow Block Company, Ltd. (NPB)
* Osaka Pump Co., Ltd. (Osaka Pump)
* Sapporo Precision Inc. (Sapporo)
* Takeshita Seiko Co., Ltd. (Takeshita)

Singapore:
* NMB Singapore Ltd.; Pelmec Industries (Pte.) Ltd.; NMB Technologies Corporation (collectively NMB/Pelmec)

United Kingdom:
* The Barden Corporation (UK) Limited; FAG (U.K.) Limited (collectively Barden/FAG)

* NSK Bearings Europe (NSK UK)
* SKF Aeroengine Bearings UK (formerly known as Aeroengine Bearings UK or NSK Aerospace) (SKF UK)

Rescission of Reviews

Subsequent to the publication of our initiation notice, we received timely withdrawals of the requests we had received for reviews of NSK UK and Nachi with respect to ball bearings from the United Kingdom and Japan, respectively. Additionally, we received timely withdrawals of the requests we had received for reviews of Weber Kugellager International with respect to ball bearings from France, Germany, and Italy. Finally, we received a timely withdrawal of the request we had received for SKF France with respect to spherical plain bearings. Because there were no other requests for review for these companies and no interested party objected, we are rescinding the reviews with respect to these companies in accordance with 19 CFR 351.213(d). Additionally, because we determined during the previous administrative review to revoke the antidumping duty order on ball bearings and parts thereof from Germany which were produced and exported by Paul Mueller and entered or withdrawn from warehouse for consumption on or after May 1, 2003, we are rescinding the review with respect to Paul Mueller. See *Antifriction Bearings and Parts Thereof From France, Germany, Italy, Japan, Singapore, and the United Kingdom: Final Results of Antidumping Duty Administrative Reviews, Rescission of Administrative Reviews in Part, and Determination To Revoke Order in Part*, 69 FR 55574, 55578 (September 15, 2004) (AFBs 14).

Scope of Orders

The products covered by the orders are ball bearings (other than tapered roller bearings) and parts thereof. These products include all antifriction bearings that employ balls as the rolling element. Imports of these products are classified under the following categories: antifriction balls, ball bearings with integral shafts, ball bearings (including radial ball bearings) and parts thereof, and housed or mounted ball bearing units and parts thereof.

Imports of these products are classified under the following *Harmonized Tariff Schedules* (HTSUS) subheadings: 3926.90.45, 4016.93.00, 4016.93.10, 4016.93.50, 6909.19.5010, 8431.20.00, 8431.39.0010, 8482.10.10, 8482.10.50, 8482.80.00, 8482.91.00, 8482.99.05, 8482.99.2580, 8482.99.35, 8482.99.6595, 8483.20.40, 8483.20.80, 8483.50.8040, 8483.50.90, 8483.90.20, 8483.90.30, 8483.90.70, 8708.50.50, 8708.60.50, 8708.60.80, 8708.70.6060, 8708.70.8050, 8708.93.30, 8708.93.5000, 8708.93.6000, 8708.93.75, 8708.99.06, 8708.99.31, 8708.99.4960, 8708.99.50, 8708.99.5800, 8708.99.8080, 8803.10.00, 8803.20.00, 8803.30.00, 8803.90.30, and 8803.90.90.

Although the HTSUS item numbers above are provided for convenience and customs purposes, the written descriptions of the scope of these orders remain dispositive.

The size or precision grade of a bearing does not influence whether the bearing is covered by one of the orders. These orders cover all the subject bearings and parts thereof (inner race, outer race, cage, rollers, balls, seals, shields, etc.) outlined above with certain limitations. With regard to finished parts, all such parts are included in the scope of the these orders. For unfinished parts, such parts are included if they have been heat–treated or heat treatment is not required to be performed on the part. Thus, the only unfinished parts that are not covered by these orders are those that will be subject to heat treatment after importation. The ultimate application of a bearing also does not influence whether the bearing is covered by the orders. Bearings designed for highly specialized applications are not excluded. Any of the subject bearings, regardless of whether they may ultimately be utilized in aircraft, automobiles, or other equipment, are within the scope of these orders.

For a listing of scope determinations which pertain to the orders, see the Scope Determination Memorandum (Scope Memorandum) from the Antifriction Bearings Team to Laurie Parkhill, dated April 15, 2005. The Scope Memorandum is on file in the Central Records Unit (CRU), Main Commerce Building, Room B–099, in the General Issues record (A–100–001) for the 03/04 reviews.

Verification

As provided in section 782(i) of the Tariff Act of 1930, as amended (''the Act''), we have verified information provided by certain respondents using standard verification procedures, including on–site inspection of the manufacturers' facilities, the examination of relevant sales and financial records, and the selection of original documentation containing relevant information. Specifically, we conducted verifications of the following respondents: Asahi, Barden/FAG, FAG/INA, GRW, NPB, NMB Pelmec, NSK, Sapporo, SKF Germany, SKF Italy, SMT, and Sapporo. Our verification results are outlined in the public versions of the verification reports, which are on file in the CRU, Room B–099.

Use of Adverse Facts Available

In accordance with section 776(a) of the Act, we preliminarily determine that the use of facts available as the basis for the weighted–average dumping margin is appropriate for SKF UK. SKF UK did not submit a response to our antidumping duty questionnaire.[1] Consequently, we find that it has withheld ''information that has been requested by the administering authority'' under section 776(a)(2)(A) of the Act and we must use facts otherwise available to calculate a margin for SKF UK.

In accordance with section 776(b) of the Act, we are making an adverse inference in our application of the facts available. This is appropriate because SKF UK has not provided a response to our request for information and has not provided any acceptable rationale for its failure to respond. Therefore, we find that SKF UK has not acted to the best of its ability in providing us with relevant information which is under its control. As adverse facts available for SKF UK, we have applied the highest rate which we have calculated for any company in any segment of the proceeding on ball bearings from the United Kingdom. We have selected this rate because it is sufficiently high as to reasonably assure that SKF UK does not obtain a more favorable result by failing to cooperate. We calculated this rate, 61.14 percent, for SKF UK in the original less–than-fair–value investigation. See *Final Determinations of Sales at Less Than Fair Value: Antifriction Bearings (Other Than Spherical Plain Bearings and Tapered Roller Bearings) and Parts Thereof From the United Kingdom; and Final Determination of Sales at Not Less Than Fair Value: Spherical Plain Bearings and Parts Thereof From the United Kingdom*, 84 FR 19120, 19125 (May 3, 1989).

Section 776(c) of the Act provides that the Department shall, to the extent practicable, corroborate secondary information used for facts available by reviewing independent sources reasonably at its disposal. Information

[1] See memorandum from analyst to Laurie Parkhill, ''*The Use of Facts Available and Corroboration of Secondary Information for Aeroengine Bearings UK in the 2003/2004 Administrative Review of the Antidumping Duty Order on Ball Bearings and Parts Thereof from the United Kingdom*,'' dated May 6, 2005 (*Corroboration Memo*).

from a prior segment of the proceeding or from another company in the same proceeding constitutes secondary information. The Statement of Administrative Action accompanying the Uruguay Round Agreements Act, H.R. Doc. 103–316, at 870 (1994) (SAA), provides that the word ''corroborate'' means that the Department will satisfy itself that the secondary information to be used has probative value. As explained in *Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, from Japan, and Tapered Roller Bearings Four Inches or Less in Outside Diameter, and Components Thereof, from Japan: Preliminary Results of Antidumping Duty Administrative Reviews and Partial Termination of Administrative Reviews*, 61 FR 57391, 57392 (November 6, 1996) (*Tapered Roller Bearings and Parts Thereof from Japan*), in order to corroborate secondary information, the Department will examine, to the extent practicable, the reliability and relevance of the information used. Unlike other types of information, however, such as input costs or selling expenses, there are no independent sources for calculated dumping margins. The only source for margins is administrative determinations. Thus, with respect to an administrative review, if the Department chooses as facts available a calculated dumping margin from a prior segment of the proceeding, it is not necessary to question the reliability of the margin for that time period.

With respect to the relevance aspect of corroboration, however, the Department will consider information reasonably at its disposal as to whether there are circumstances that would render a margin not relevant. Where circumstances indicate that the selected margin is not appropriate as adverse facts available, the Department will disregard the margin and determine an appropriate margin. See *Fresh Cut Flowers from Mexico; Final Results of Antidumping Duty Administrative Review*, 61 FR 6812, 6814 (February 22, 1996), where the Department disregarded the highest dumping margin as best information available because the margin was based on another company's uncharacteristic business expense resulting in an unusually high margin. Further, in accordance with *F.LII De Cecco Di Filippo Fara S. Martino S.p.A. v. United States*, 216 F.3d 1027, 1034 (Fed. Cir. 2000), we also examine whether information on the record would support the selected rates as reasonable facts available. This rate is the current cash–deposit rate for a number of firms, was applied to SKF UK in the previous review, and there is no information reasonably at our disposal that would indicate that there are circumstances which would render the margin not relevant at this time. Therefore, we find that the rate which we are using for these preliminary results has probative value. See *Corroboration Memo*.

Furthermore, there is no information on the record that demonstrates that the rate we have selected is inappropriate for use as the total adverse facts–available rate for the company in question. Therefore, we consider the selected rate to have probative value with respect to the firm in question in this review and to reflect the appropriate adverse inferences.

Export Price and Constructed Export Price

For the price to the United States, we used export price (EP) or constructed export price (CEP) as defined in sections 772(a) and (b) of the Act, as appropriate. Due to the extremely large volume of transactions that occurred during the period of review and the resulting administrative burden involved in calculating individual margins for all of these transactions, we sampled CEP sales in accordance with section 777A of the Act. When a firm made more than 10,000 CEP sales transactions to the United States of merchandise subject to a particular order, we reviewed CEP sales that occurred during sample weeks. We selected one week from each two-month period in the review period, for a total of six weeks, and analyzed each transaction made in those six weeks. The sample weeks are as follows: May 11 - May 17, 2003; July 27 - August 2, 2003; September 7 - 13, 2003; December 7 - 13, 2003; January 4 - 10, 2004; April 4 - 10, 2004. We reviewed all EP sales transactions made during the period of review.

We calculated EP and CEP based on the packed F.O.B., C.I.F., or delivered price to unaffiliated purchasers in, or for exportation to, the United States. We made deductions, as appropriate, for discounts and rebates. We also made deductions for any movement expenses in accordance with section 772(c)(2)(A) of the Act.

In accordance with section 772(d)(1) of the Act and the SAA at 823–824, we calculated the CEP by deducting selling expenses associated with economic activities occurring in the United States, which includes commissions, direct selling expenses, and U.S. repacking expenses. In accordance with section 772(d)(1) of the Act, we also deducted those indirect selling expenses associated with economic activities occurring in the United States and the profit allocated to expenses deducted under sections 772(d)(1) in accordance with sections 772(d)(3) and 772(f) of the Act. In accordance with section 772(f) of the Act, we computed profit based on the total revenues realized on sales in both the U.S. and home markets, less all expenses associated with those sales. We then allocated profit to expenses incurred with respect to U.S. economic activity based on the ratio of total U.S. expenses to total expenses for both the U.S. and home market. When appropriate, in accordance with section 772(d)(2) of the Act, we also deducted the cost of any further manufacture or assembly, except where we applied the special rule provided in section 772(e) of the Act. See below. Finally, we made an adjustment for profit allocated to these expenses in accordance with section 772(d)(3) of the Act.

With respect to subject merchandise to which value was added in the United States prior to sale to unaffiliated U.S. customers, e.g., parts of bearings that were imported by U.S. affiliates of foreign exporters and then further processed into other products which were then sold to unaffiliated parties, we determined that the special rule for merchandise with value added after importation under section 772(e) of the Act applied to all firms that added value in the United States except NPB and Asahi.

Section 772(e) of the Act provides that, when the subject merchandise is imported by an affiliated person and the value added in the United States by the affiliated person is likely to exceed substantially the value of the subject merchandise, we shall determine the CEP for such merchandise using the price of identical or other subject merchandise sold by the exporter or producer to an unaffiliated customer, if there is a sufficient quantity of sales to provide a reasonable basis for comparison and we determine that the use of such sales is appropriate. If there is not a sufficient quantity of such sales or if we determine that using the price of identical or other subject merchandise is not appropriate, we may use any other reasonable basis to determine the CEP.

To determine whether the value added is likely to exceed substantially the value of the subject merchandise, we estimated the value added based on the difference between the averages of the prices charged to the first unaffiliated purchaser for the merchandise as sold in the United States and the averages of the prices paid for the subject merchandise by the affiliated purchaser. Based on this analysis, we determined that the

estimated value added in the United States by all further–manufacturing firms, except NPB and Asahi, accounted for at least 65 percent of the price charged to the first unaffiliated customer for the merchandise as sold in the United States. See 19 CFR 351.402(c) for an explanation of our practice on this issue. Therefore, we preliminarily determine that for these firms the value added is likely to exceed substantially the value of the subject merchandise. Also, for these firms, we determine that there was a sufficient quantity of sales remaining to provide a reasonable basis for comparison and that the use of these sales is appropriate. See analysis memoranda for Barden U.K., INA/FAG, Koyo, NSK, NTN, SKF France, SKF Germany, and SKF Italy, dated May 6, 2005. Accordingly, for purposes of determining dumping margins for the sales subject to the special rule, we have used the weighted–average dumping margins calculated on sales of identical or other subject merchandise sold to unaffiliated persons.

For NPB and Asahi, we determined that the special rule did not apply because the value added in the United States did not exceed substantially the value of the subject merchandise. Consequently, these firms submitted complete responses to our further–manufacturing questionnaire which included the costs of the further processing performed by their U.S. affiliates. Because the majority of their products sold in the United States were further processed, we analyzed all sales.

No other adjustments to EP or CEP were claimed or allowed.

Home–Market Sales

Based on a comparison of the aggregate quantity of home–market and U.S. sales and absent any information that a particular market situation in the exporting country did not permit a proper comparison, we determined that the quantity of foreign like product sold by all respondents in the exporting country was sufficient to permit a proper comparison with the sales of the subject merchandise to the United States, pursuant to section 773(a) of the Act. Each company's quantity of sales in its home market was greater than five percent of its sales to the U.S. market. Therefore, in accordance with section 773(a)(1)(B)(i) of the Act, we based normal value on the prices at which the foreign like product was first sold for consumption in the exporting country in the usual commercial quantities and in the ordinary course of trade and, to the extent practicable, at the same level of trade as the EP or CEP sales.

Due to the extremely large number of transactions that occurred during the period of review and the resulting administrative burden involved in examining all of these transactions, we sampled sales to calculate normal value in accordance with section 777A of the Act. When a firm had more than 10,000 home–market sales transactions on a country–specific basis, we used sales in sample months that corresponded to the sample weeks which we selected for U.S. CEP sales, sales in a month prior to the period of review, and sales in the month following the period of review. The sample months were February, May, July, September, and December of 2003, and January, April, and May of 2004.

The Department may calculate normal value based on a sale to an affiliated party only if it is satisfied that the price to the affiliated party is comparable to the price at which sales are made to parties not affiliated with the exporter or producer, *i.e.*, sales at arm's–length prices. See 19 CFR 351.403(c). We excluded sales to affiliated customers for consumption in the home market that we determined not to be at arm's–length prices from our analysis. To test whether these sales were made at arm's–length prices, the Department compared the prices of sales of comparable merchandise to affiliated and unaffiliated customers, net of all rebates, movement charges, direct selling expenses, and packing. Pursuant to 19 CFR 351.403(c) and in accordance with our practice, when the prices charged to an affiliated party were, on average, between 98 and 102 percent of the prices charged to unaffiliated parties for merchandise comparable to that sold to the affiliated party, we determined that the sales to the affiliated party were at arm's–length prices. See *Antidumping Proceedings: Affiliated Party Sales in the Ordinary Course of Trade*, 67 FR 69186 (November 15, 2002). We included in our calculation of normal value those sales to affiliated parties that were made at arm's–length prices.

Cost of Production

Because we disregarded below–cost sales in accordance with section 773(b) of the Act in the last completed review with respect to ball bearings sold by Barden, Asahi Seiko, INA/FAG, Koyo, NTN, NPB, NSK, NMB/Pelmec, SKF France, SKF Italy, SNR, FAG Italy, and SKF Germany (see *AFBs 14*, 69 FR at 55576), we had reasonable grounds to believe or suspect that sales of the foreign like product under consideration for the determination of normal value in these reviews may have been made at prices below the cost of production (COP) as provided by section 773(b)(2)(A)(ii) of the Act. Therefore, pursuant to section 773(b)(1) of the Act, we conducted COP investigations of sales by these firms in the home market. Also, we received allegations in proper form that Osaka Pump, Takeshita, and GRW had made home–market sales below their COP and we conducted COP investigations of home–market sales of these firms as well.

In accordance with section 773(b)(3) of the Act, we calculated the COP based on the sum of the costs of materials and fabrication employed in producing the foreign like product, the selling, general, and administrative (SG&A) expenses, and all costs and expenses incidental to packing the merchandise. In our COP analysis, we used the home–market sales and COP information provided by each respondent in its questionnaire responses.

The petitioner requested on January 11, 2005, that, with respect to purchases of the foreign like product from unaffiliated parties, the Department require the respondents to provide the actual cost information from the unaffiliated suppliers instead of the acquisition cost for those items. Because this request came well after the Department had received questionnaire responses and because the Department has accepted the acquisition costs for purposes of the COP test and when calculating constructed value in previous segments of these proceedings, the Department has determined to use the reported acquisition costs for purposes of these ongoing reviews. We will require the respondents to report COP and constructed–value information for purchases from their unaffiliated suppliers where facts in any 2005/06 reviews of these orders reflect the facts in other proceedings in which we have required respondents to report such information from unaffiliated suppliers. For further discussion of this issue see the Memorandum for Barbara E. Tillman from Laurie Parkhill, *Ball Bearings from France, Germany, Italy, Japan, Singapore, and the United Kingdom: Whether to Use Acquisition Cost or Unaffiliated Suppliers' Cost of Production*, dated May 6, 2005, available in the CRU.

After calculating the COP, in accordance with section 773(b)(1) of the Act, we tested whether home–market sales of the foreign like product were made at prices below the COP within an extended period of time in substantial quantities and whether such prices permitted the recovery of all costs within a reasonable period of time. We compared model–specific COPs to the reported home–market prices less any

applicable movement charges, discounts, and rebates.

Pursuant to section 773(b)(2)(C) of the Act, when less than 20 percent of a respondent's sales of a given product during the period of review were at prices less than the COP, we disregarded the below–cost sales because they were made in substantial quantities within an extended period of time pursuant to sections 773(b)(2)(B) and (C) of the Act and because, based on comparisons of prices to weighted–average COPs for the period of review, we determined that these sales were at prices which would not permit recovery of all costs within a reasonable period of time in accordance with section 773(b)(2)(D) of the Act. See analysis memoranda for Asahi Seiko, Barden/FAG, FAG Italy, INA/FAG, Koyo, Nankai Seiko, NMB/Pelmec, NTN, NPB, NSK, Osaka Pump, GRW, Takeshita, SNR, SKF France, SKF Italy, and SKF Germany, dated May 6, 2005. Based on this test, we disregarded below–cost sales with respect to all of the above–mentioned companies.

Model–Match Methodology

In *Antifriction Bearings and Parts Thereof from France, Germany, Italy, Japan, Singapore, and the United Kingdom: Preliminary Results Of Antidumping Duty Administrative Reviews, Partial Rescission Of Administrative Reviews, Notice Of Intent To Rescind Administrative Reviews, And Notice Of Intent To Revoke Order In Part*, 69 FR 5949, 5955–56 (February 9, 2004) (*AFBs 14 Prelim*), we indicated that we had received a suggestion from the petitioner to alter our model–match methodology. The petitioner asserted that, instead of averaging the sales of all of the home–market models within a family as the Department had done in previous reviews, it would be more accurate to compare U.S. sales to sales of the single most similar home–market model in those cases where an identical match cannot be found in the home market. Although we did not change our approach in the 02/03 reviews, we invited comments from all interested parties on the proposed change to our model–match methodology. Based on our review of the record, we have decided to implement a change in our model–match methodology. For a full discussion and analysis of the model–match methodology for these reviews, see Memorandum from Barbara Tillman to Joseph A. Spetrini, *Antidumping Duty Reviews on Antifriction Bearings (and Parts Thereof) From France, Germany, Italy, Japan, Singapore, and the United Kingdom - Model–Match Methodology*, dated May 6, 2005 (Model–Match Memorandum).

We compared U.S. sales with sales of the foreign like product in the home market. Specifically, in making our comparisons, we used the following methodology. If an identical home–market model was reported, we made comparisons to weighted–average home–market prices that were based on all sales which passed the cost test of the identical product during the relevant month. If there were no contemporaneous sales of an identical model, we identified the most similar home–market model. To determine the most similar model, we limited our examination to models sold in the home market that had the same bearing design, load direction, number of rows, and precision grade. Next, we calculated the sum of the deviations (expressed as a percentage of the value of the U.S. characteristics) of the inner diameter, outer diameter, width, and load rating for each potential home–market match and selected the bearing with the smallest sum of the deviations. If two or more bearings had the same sum of the deviations, we selected the model that had the smallest difference–in-merchandise adjustment. Finally, if no bearing sold in the home market had a sum of the deviations that was less than 40 percent, we concluded that no appropriate comparison existed in the home market and we used the constructed value of the U.S. model as normal value. See *Model–Match Memorandum*.

As a result of our decision to change the model–match methodology, we collected and examined physical–characteristics information for these reviews which allowed us to ensure that we made appropriate matches under the new methodology. In some instances, we have examined the respondents' information concerning physical characteristics of the merchandise in more depth than in previous reviews under the earlier ''family'' methodology. We expect that, as our use of this methodology continues, we will examine such information in even more detail. See, *e.g.*, analysis memorandum for Asahi Seiko dated May 6, 2005.

Normal Value

Home–market prices were based on the packed, ex–factory, or delivered prices to affiliated or unaffiliated purchasers. When applicable, we made adjustments for differences in packing and for movement expenses in accordance with sections 773(a)(6)(A) and (B) of the Act. We also made adjustments for differences in cost attributable to differences in physical characteristics of the merchandise pursuant to section 773(a)(6)(C)(ii) of the Act and 19 CFR 351.411 and for differences in circumstances of sale in accordance with section 773(a)(6)(C)(iii) of the Act and 19 CFR 351.410. For comparisons to EP, we made circumstance–of-sale adjustments by deducting home–market direct selling expenses from and adding U.S. direct selling expenses to normal value. For comparisons to CEP, we made circumstance–of-sale adjustments by deducting home–market direct selling expenses from normal value. We also made adjustments, when applicable, for home–market indirect selling expenses to offset U.S. commissions in EP and CEP calculations.

For some companies, we recalculated or denied certain claims by respondents for adjustments to normal value. For Barden's home–market sales which were billed in U.S. dollars, we used the actual, unconverted U.S.-dollar–denominated price as the starting point for normal value and converted sterling–denominated adjustments, using the exchange rate on the date of sale of the U.S. sale. For Osaka Pump, we made quantity adjustments to two observations for returned merchandise as reported in Osaka Pump's response. For NSK, we removed the lump–sum billing adjustment NSK reported for one customer because the reported adjustment was not relevant to sales of the foreign like product. For NPB, we used facts available to recalculate credit expenses in the home market because NPB had discounted some of the promissory notes it received for its home–market sales but did not report the details fully including the discount rate it paid with respect to these transactions. For NTN, we changed its bearing–design classifications, did not accept its claim for elimination of so–called sample sales from the calculation of normal value, and recalculated U.S. customs duties, indirect selling expenses for U.S. sales, inventory carrying costs for home–market and U.S. sales, and packing for home–market sales. We rejected Asahi's claim that some models it sold in the United States are virtually identical to models sold in the home market even though the inner–diameter dimensions of the inner ring are different. Finally, for Koyo and consistent with *AFBs 14* (see our response to Comment 21), we denied a home–market billing adjustment that Koyo granted on a model–specific basis but reported on a broad customer–specific basis because we found that the allocation of this adjustment resulted in its allocation over sales of models for

which Koyo had not granted an adjustment, and over sales that had occurred outside the period of time for which Koyo had granted the adjustment to the customer. For a more detailed discussion of the individual changes, please see the Department's company–specific analysis memoranda dated May 6, 2005.

In accordance with section 773(a)(1)(B)(i) of the Act, we based normal value, to the extent practicable, on sales at the same level of trade as the export price or CEP. If normal value was calculated at a different level of trade, we made an adjustment, if appropriate and if possible, in accordance with section 773(a)(7)(A) of the Act. See *Level of Trade* section below.

Constructed Value

In accordance with section 773(a)(4) of the Act, we used constructed value as the basis for normal value when there were no usable sales of the foreign like product in the comparison market. We calculated constructed value in accordance with section 773(e) of the Act. We included the cost of materials and fabrication, SG&A expenses, U.S. packing expenses, and profit in the calculation of constructed value. In accordance with section 773(e)(2)(A) of the Act, we based SG&A expenses and profit on the amounts incurred and realized by each respondent in connection with the production and sale of the foreign like product in the ordinary course of trade for consumption in the home market.

When appropriate, we made adjustments to constructed value in accordance with section 773(a)(8) of the Act, 19 CFR 351.410, and 19 CFR 351.412 for circumstance–of-sale differences and level–of-trade differences. For comparisons to EP, we made circumstance–of-sale adjustments by deducting home–market direct selling expenses from and adding U.S. direct selling expenses to constructed value. For comparisons to CEP, we made circumstance–of-sale adjustments by deducting home–market direct selling expenses from constructed value. We also made adjustments, when applicable, for home–market indirect selling expenses to offset U.S. commissions in EP and CEP comparisons.

When possible, we calculated constructed value at the same level of trade as the export price or CEP. If constructed value was calculated at a different level of trade, we made an adjustment, if appropriate and if possible, in accordance with sections 773(a)(7) and (8) of the Act.

Level of Trade

To the extent practicable, we determined normal value for sales at the same level of trade as the U.S. sales (either export price or CEP). When there were no sales at the same level of trade, we compared U.S. sales to home–market sales at a different level of trade. The normal–value level of trade is that of the starting–price sales in the home market. When normal value is based on constructed value, the level of trade is that of the sales from which we derived SG&A and profit.

To determine whether home–market sales are at a different level of trade than U.S. sales, we examined stages in the marketing process and selling functions along the chain of distribution between the producer and the unaffiliated customer. If the comparison–market sales were at a different level of trade from that of a U.S. sale and the difference affected price comparability, as manifested in a pattern of consistent price differences between the sales on which normal value is based and comparison–market sales at the level of trade of the export transaction, we made a level–of-trade adjustment under section 773(a)(7)(A) of the Act. See, e.g., *Notice of Final Determination of Sales at Less Than Fair Value: Certain Cut–to-Length Carbon Steel Plate from South Africa*, 62 FR 61731, 61732 (November 19, 1997).

Where the respondent reported no home–market levels of trade that were equivalent to the CEP level of trade and where the CEP level of trade was at a less advanced stage than any of the home–market levels of trade, we were unable to determine a level–of-trade adjustment based on the respondent's home–market sales of merchandise under review. Furthermore, we have no other information that provides an appropriate basis for determining a level–of-trade adjustment. For respondents' CEP sales, to the extent possible, we determined normal value at the same level of trade as the U.S. sale to the unaffiliated customer and made a CEP–offset adjustment in accordance with section 773(a)(7)(B) of the Act.

For a company–specific description of our level–of-trade analyses for these preliminary results, see Memorandum to Laurie Parkhill from Antifriction Bearings Team Regarding Level of Trade, dated May 6, 2005, on file in the CRU, Room B–099.

Collapsing Decision

During the administrative review of the antidumping duty order on antifriction bearings and parts thereof from Germany for the period from May 1, 2002, through April 30, 2003, the Department determined that it was appropriate to collapse FAG and INA as affiliated producers for the purposes of calculating an antidumping duty margin. See *AFBs 14 Prelim*, 69 FR at 5956. As a result of our analysis of the responses of INA and FAG to our supplemental questionnaires, we have found that the totality of factual information indicate that it is appropriate to continue to collapse FAG and INA as affiliated producers for the purpose of calculating an antidumping duty margin.

Preliminary Results of Reviews

As a result of our reviews, we preliminarily determine the following percentage weighted–average dumping margins on ball bearings and parts thereof for the period May 1, 2003, through April 30, 2004:

FRANCE

Company	Margin (percent)
SKF France	7.04
SNR	13.27

GERMANY

Company	Margin
FAG/INA	3.79
GRW	61.96
SKF Germany	17.50

ITALY

Company	Margin
FAG Italy	5.83
SKF Italy	2.81

JAPAN

Company	Margin
Asahi	25.71
Koyo	15.66
NSK	11.88
NTN	6.75
Nankai Seiko (SMT)	2.38
NPB	18.17
Osaka Pump	11.73
Sapporo	12.47
Takeshita	7.38

SINGAPORE

Company	Margin
NMB/Pelmec	3.67

UNITED KINGDOM

Company	Margin
Barden/FAG	2.68
SKF UK	61.14

Comments

We will disclose the calculations used in our analysis to parties to these reviews within five days of the date of publication of this notice. Any interested party may request a hearing within 30 days of the date of publication of this notice. A general–issues hearing, if requested, and any hearings regarding issues related solely to specific countries, if requested, will be held at the main Commerce Department building at a time and location to be determined.

Interested parties who wish to request a hearing or to participate if one is requested, must submit a written request to the Assistant Secretary for Import Administration, Room B–099, within 30 days of the date of publication of this notice. Requests should contain the following: (1) the party's name, address, and telephone number; (2) the number of participants; (3) a list of issues to be discussed. See 19 CFR 351.310(c).

Issues raised in the hearing will be limited to those raised in case briefs and rebuttal briefs. The Department will notify all parties in each country–specific review as to the applicable briefing schedule. Parties who submit case briefs or rebuttal briefs in this proceeding are requested to submit with each argument (1) a statement of the issue and (2) a brief summary of the argument. Parties are also encouraged to provide a summary of the arguments not to exceed five pages and a table of statutes, regulations, and cases cited.

The Department will issue the final results of these administrative reviews, including the results of its analysis of issues raised in any such written briefs or at the hearings, if held, not later than 120 days after the date of publication of this notice.

Assessment Rates

The Department shall determine, and CBP shall assess, antidumping duties on all appropriate entries. In accordance with 19 CFR 351.212(b)(1), we have calculated, whenever possible, an exporter/importer (or customer)-specific assessment rate or value for merchandise subject to these reviews.

The Department clarified its ''automatic assessment'' regulation on May 6, 2003 (68 FR 23954). This clarification will apply to entries of subject merchandise during the period of review produced by companies included in these preliminary results of reviews for which the reviewed companies did not know their merchandise was destined for the United States. In such instances, we will instruct CBP to liquidate unreviewed entries at the all–others rate if there is no rate for the intermediate company(ies) involved in the transaction. For a full discussion of this clarification, see Notice of Policy Concerning Assessment of Antidumping Duties, 68 FR 23954 (May 6, 2003).

Export–Price Sales

With respect to EP sales, for these preliminary results, we divided the total dumping margins (calculated as the difference between normal value and EP) for each exporter's importer or customer by the total number of units the exporter sold to that importer or customer. We will direct CBP to assess the resulting per–unit dollar amount against each unit of merchandise in each of that importer's/customer's entries under the relevant order during the review period.

Constructed Export–Price Sales

For CEP sales (sampled and non–sampled), we divided the total dumping margins for the reviewed sales by the total entered value of those reviewed sales for each importer. We will direct the CBP to assess the resulting percentage margin against the entered customs values for the subject merchandise on each of that importer's entries under the relevant order during the review period. See 19 CFR 351.212(b).

Cash–Deposit Requirements

In order to derive a single weighted–average margin for each respondent, we weight–averaged the EP and CEP weighted–average deposit rates (using the EP and CEP, respectively, as the weighting factors). To accomplish this when we sampled CEP sales, we first calculated the total dumping margins for all CEP sales during the review period by multiplying the sample CEP margins by the ratio of total days in the review period to days in the sample weeks. We then calculated a total net value for all CEP sales during the review period by multiplying the sample CEP total net value by the same ratio. Finally, we divided the combined total dumping margins for both EP and CEP sales by the combined total value for both EP and CEP sales to obtain the deposit rate.

Furthermore, the following deposit requirements will be effective upon publication of the notice of final results of administrative reviews for all shipments of ball bearings and parts thereof entered, or withdrawn from warehouse, for consumption on or after the date of publication, as provided by section 751(a)(1) of the Act: (1) the cash–deposit rates for the reviewed companies will be the rates established in the final results of reviews; (2) for previously reviewed or investigated companies not listed above, the cash–deposit rate will continue to be the company–specific rate published for the most recent period; (3) if the exporter is not a firm covered in this review, a prior review, or the less–than-fair–value investigation but the manufacturer is, the cash–deposit rate will be the rate established for the most recent period for the manufacturer of the merchandise; and (4) the cash–deposit rate for all other manufacturers or exporters will continue to be the ''All Others'' rate for the relevant order made effective by the final results of review published on July 26, 1993. See *Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From France, et al; Final Results of Antidumping Duty Administrative Reviews and Revocation in Part of an Antidumping Duty Order*, 58 FR 39729, 39730 (July 26, 1993). For ball bearings from Italy, see *Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From France, et al; Final Results of Antidumping Duty Administrative Reviews, Partial Termination of Administrative Reviews, and Revocation in Part of Antidumping Duty Orders*, 61 FR 66472, 66521 (December 17, 1996). These rates are the ''All Others'' rates from the relevant less–than-fair–value investigations. These deposit requirements, when imposed, shall remain in effect until publication of the final results of the next administrative reviews.

Notification to Importer

This notice also serves as a preliminary reminder to importers of their responsibility under 19 CFR 351.402(f) to file a certificate regarding the reimbursement of antidumping duties prior to liquidation of the relevant entries during this review period. Failure to comply with this requirement could result in the Department's presumption that reimbursement of antidumping duties occurred and the subsequent assessment of doubled antidumping duties.

These preliminary results of administrative reviews are issued and published in accordance with sections 751(a)(1) and 777(i)(1) of the Act.

Dated: May 6, 2005.

Joseph A. Spetrini,

Acting Assistant Secretary for Import Administration.

[FR Doc. 05–9623 Filed 5–12–05; 8:45 am]

BILLING CODE 3510–DS–S

DEPARTMENT OF COMMERCE

International Trade Administration

(A–570–846)

Brake Rotors From the People's Republic of China: Preliminary Results of Changed Circumstances Antidumping Duty Administrative Review

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

SUMMARY: The Department of Commerce (''the Department'') is currently conducting a changed circumstances administrative review of the antidumping duty order on brake rotors from the People's Republic of China (''PRC''). We have preliminarily determined that Shanxi Fengkun Foundry Ltd., Co. (''Fengkun Foundry'') is not the successor–in-interest to Shanxi Fengkun Metallurgical Ltd., Co. (''Fengkun Metallurgical'') for purposes of determining antidumping liability.

Interested parties are invited to comment on these preliminary results. In accordance with 19 CFR 351.216(e), the Department will issue the final results of this antidumping duty changed circumstances review not later than July 11, 2005 (i.e., 270 days after the date on which this review was initiated).

EFFECTIVE DATE: May 13, 2005.

FOR FURTHER INFORMATION CONTACT: Steve Winkates or Brian Smith, AD/CVD Operations, Office 9, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW, Washington, DC 20230; telephone: (202) 482–1904 or (202) 482–1766, respectively.

SUPPLEMENTARY INFORMATION:

Background

On October 19, 2004, the Department initiated a changed circumstances review of Fengkun Foundry's claim that it is the successor–of-interest to Fengkun Metallurgical. *See Brake Rotors from the People's Republic of China: Notice of Initiation of Changed Circumstances Review*, 69 FR 61468 (October 19, 2004) (''*Initiation Notice*''). Since the publication of the Initiation Notice, the following events have occurred.

On November 3, 2004, the petitioner submitted comments on Fengkun Foundry's response to the Department's separate rates questionnaire. On December 22, 2004, the petitioner submitted a request that the Department verify Fengkun Foundry in the context of the changed circumstances review.[1]

On January 6, 2005, the Department issued a Supplemental Questionnaire to Fengkun Foundry. On January 31, 2005, Fengkun Foundry submitted its response to the Department's Supplemental Questionnaire. On February 15, 2005, the petitioner submitted comments on Fengkun Foundry's response to the Department's Supplemental Questionnaire. On March 16, 2005, the Department issued Fengkun Foundry a second Supplemental Questionnaire. On March 30, 2005, Fengkun Foundry submitted its response to the Department's second Supplemental Questionnaire.

Scope of the Order

The products covered by the order are brake rotors made of gray cast iron, whether finished, semifinished, or unfinished, ranging in diameter from 8 to 16 inches (20.32 to 40.64 centimeters) and in weight from 8 to 45 pounds (3.63 to 20.41 kilograms). The size parameters (weight and dimension) of the brake rotors limit their use to the following types of motor vehicles: automobiles, all–terrain vehicles, vans, recreational vehicles under ''one ton and a half,'' and light trucks designated as ''one ton and a half.''

Finished brake rotors are those that are ready for sale and installation without any further operations. Semi–finished rotors are those rotors which have undergone some drilling and on which the surface is not entirely smooth. Unfinished rotors are those which have undergone some grinding or turning.

These brake rotors are for motor vehicles and do not contain in the casting a logo of an original equipment manufacturer (''OEM'') which produces vehicles sold in the United States (*e.g.*, General Motors, Ford, Chrysler, Honda, Toyota, and Volvo). Brake rotors covered in this review are not certified by OEM producers of vehicles sold in the United States. The scope also includes composite brake rotors that are made of gray cast iron which contain a steel plate but otherwise meet the above criteria. Excluded from the scope of the review are brake rotors made of gray cast iron, whether finished, semifinished, or unfinished, with a diameter less than 8 inches or greater than 16 inches (less than 20.32 centimeters or greater than 40.64 centimeters) and a weight less than 8 pounds or greater than 45 pounds (less than 3.63 kilograms or greater than 20.41 kilograms).

Brake rotors are classifiable under subheading 8708.39.5010 of the Harmonized Tariff Schedule of the United States (''HTSUS''). Although the HTSUS subheading is provided for convenience and customs purposes, the written description of the scope of the order is dispositive.

Preliminary Results

In its January 31, 2005, supplemental questionnaire response, Fengkun Metallurgical provided documentation to support further its claim that effective November 28, 2003, it received approval from the Shanxi Industrial and Commercial Administration Bureau (''SICAB'') to change its name to ''Shanxi Fengkun Foundry ltd., Co.'' The company stated that the idea to change the name came as a result of decisions made by Fengkun Metallurgical's original owners to reflect a change in the company's emphasis from metallurgical operations to foundry operations. Specifically, this documentation consisted of: (1) board meeting minutes detailing the company's reasoning for the name change; (2) the application to SICAB requesting approval for the name change; (3) a notice from SICAB granting Fengkun Metallurgical's proposed name change to Fengkun Foundry; and (4) Fengkun Foundry's business license issued by SICAB (see Exhibits 1 and 2 of the supplemental questionnaire response). Both the notice from SICAB granting the name change and Fengkun Foundry's business license indicate that Fengkun Metallurgical no longer exists as a legal entity in the PRC.

In its responses to the Department's supplemental questionnaires, Fengkun Metallurgical also provided information in support of its statements that all personnel, operations, and facilities remain essentially unchanged as a result of changing the name of the company to Fengkun Foundry.

In contrast, the petitioner contended in its February 15, 2005, submission that Fengkun Foundry has not sufficiently demonstrated that it is the successor–in-interest of Fengkun Metallurgical because Fengkun Metallurgical, unlike Fengkun Foundry,

[1] The petitioner also requested that the Department verify the company in the context of the Seventh Administrative/Eleventh New Shipper Review, of which Fengkun Foundry's predecessor, Fengkun Metallurgical, is a respondent.

is both an exporter and producer of the subject merchandise.

In making such a successor–in-interest determination, the Department examines several factors including, but not limited to, changes in: (1) management; (2) production facilities; (3) supplier relationships; and (4) customer base. *See*, *e.g.*, *Brass Sheet and Strip from Canada: Final Results of Antidumping Duty Administrative Review*, 57 FR 20460 (May 13, 1992). While no single factor or combination of these factors will necessarily provide a dispositive indication of a successor–in-interest relationship, the Department will generally consider the new company to be the successor to the previous company if the new company's resulting operation is not materially dissimilar to that of its predecessor. *See*, *e.g.*, *Industrial Phosphoric Acid from Israel: Final Results of Changed Circumstances Review*, 59 FR 6944 (February 14, 1994); *Canadian Brass, and Fresh and Chilled Atlantic Salmon from Norway: Initiation and Preliminary Results of Changed Circumstances Antidumping Duty Administrative Review*, 63 FR 50880 (September 23, 1998). Thus, if the evidence demonstrates that, with respect to the production and sale of the subject merchandise, the new company operates as the same business entity as the former company, the Department will accord the new company the same antidumping treatment as its predecessor.

We preliminarily determine that Fengkun Foundry is not the successor–in-interest to Fengkun Metallurgical for the reasons mentioned below.

Data placed on the record of this review indicates that Fengkun Foundry has the same management, production facilities, and supplier relationships as Fengkun Metallurgical. Fengkun Foundry's managers are the same individuals, the company occupies the same facilities, and its vendor listing is unchanged. However, Fengkun Foundry does not have the same customer base as Fengkun Metallurgical as a result of neither having made any sales since its name change nor obtaining the ability to export its product under its new name.

Specifically, Fengkun Metallurgical has indicated that it has made no domestic or export sales since changing its name to Fengkun Foundry (see page one of the March 30, 2005, second supplemental questionnaire response). Although Fengkun Metallurgical also stated that it exported one shipment of subject merchandise to the U.S. market since its name change became effective on November 28, 2003, the date of that sales invoice preceded the effective date of its name change, and Fengkun Metallurgical's name was on the invoice (see Exhibit 1 of the March 30, 2005, second supplemental questionnaire response).

In addition, Fengkun Foundry has also stated that it does not have a Certificate of Approval for Enterprises with Foreign Trade Rights (*see* page 3 of the January 31, 2005, supplemental questionnaire response). Thus, according to PRC law, Fengkun Foundry cannot export to the United States. Therefore, whereas Fengkun Metallurgical was both an exporter and producer of the subject merchandise, evidence on the record demonstrates that Fengkun Foundry is only a producer of the subject merchandise. Given that only an exporter may receive a separate rate, we consider this kind of fundamental change to be dispositive in this case.

As discussed above, we determine that the resulting operation of Fengkun Foundry is not materially the same as that of Fengkun Metallurgical in accordance with the Department's practice (*see also Certain Stainless Steel Pipe from the Republic of Korea: Preliminary Results of Antidumping Duty Changed Circumstances Review*, 63 FR 6153, 6154 (February 6, 1998). Furthermore, as Fengkun Foundry has not sufficiently demonstrated that it is the successor–of-interest of Fengkun Metallurgical, we have not applied the Department's separate rates criteria for purposes of determining whether Fengkun Foundry is eligible for a separate rate in this review.

Therefore, for the reasons stated above, we preliminarily determine that Fengkun Foundry should not receive the same antidumping duty treatment with respect to brake rotors as the former entity Fengkun Metallurgical because Fengkun Foundry, unlike Fengkun Metallurgical, has not demonstrated that it has the right to export the subject merchandise. Nevertheless, should Fengkun Foundry obtain a valid Certificate of Approval for Enterprises with Foreign Trade Rights (''Certificate of Approval'') and otherwise demonstrate that it is both an exporter and producer of the subject merchandise, we may revisit the issue and review the totality of information to determine if Fengkun Foundry should receive the same antidumping duty treatment with respect to brake rotors as the former Fengkun Metallurgical.[2] The deadline for Fengkun Foundry to submit a Certificate of Approval is May 27, 2005. If Fengkun Foundry submits this document by this deadline, interested parties may comment on the submission by June 3, 2005, and rebuttal comments may be submitted by June 8, 2005. No new information will be accepted in either comments or rebuttal comments.

If these preliminary results are adopted in our final results of this changed circumstances review, we will instruct the U.S. Customs and Border Protection (''CBP'') to suspend liquidation of shipments of subject merchandise made by Fengkun Foundry at the PRC–wide rate (*i.e.*, 43.32 percent). In addition, because Fengkun Metallurgical has placed information on this record which indicates that it no longer exists as a legal entity in the PRC, we will also instruct CBP to suspend liquidation of shipments of subject merchandise made by Fengkun Metallurgical at the PRC–wide rate. The shipments of subject merchandise to be suspended are those which are entered, or withdrawn from warehouse, for consumption on or after the publication date of the final results of this changed circumstances review.

Any interested party may request a hearing within 10 days of publication of this notice. Any hearing, if requested, will be held no later than 30 days after the date of publication of this notice, or the first workday thereafter.

Interested parties who wish to request a hearing or to participate if one is requested, must submit a written request to the Assistant Secretary for Import Administration, Room B–099. Requests should contain: (1) the party's name, address, and telephone number; (2) the number of participants; and (3) a list of issues to be discussed. *See* 19 CFR 351.310(c).

Issues raised in the hearing will be limited to those raised in case briefs and rebuttal briefs. Case briefs from interested parties may be submitted not later than June 3, 2005. Rebuttal briefs, limited to the issues raised in the case briefs, may be filed not later than June 10, 2005. Parties who submit case briefs or rebuttal briefs in this proceeding are requested to submit with each argument (1) a statement of the issue and (2) a brief summary of the argument. Parties are also encouraged to provide a summary of the arguments not to exceed five pages and a table of statutes, regulations, and cases cited. Persons interested in attending the hearing, if one is requested, should contact the Department for the date and time of the hearing.

The Department will publish the final results of this changed circumstances review, including the results of its

[2] Should Fengkun Foundry submit a Certificate of Approval, it must submit an explanation as to the license's effective date and that date's link to the effective date of the name change.

analysis of issues raised in any written comments, not later than July 11, 2005 (*i.e.*, 270 days after the date on which this review was initiated).

We are issuing and publishing this determination and notice in accordance with sections 751(b)(1) and 777(I)(1) of the Act and 19 CFR 351.216.

Dated: May 6, 2005.

Joseph A. Spetrini,

Acting Assistant Secretary for Import Administration.

[FR Doc. E5–2390 Filed 5–12–05; 8:45 am]

BILLING CODE 3510–DS–S

DEPARTMENT OF COMMERCE

International Trade Administration

[A–485–806]

Certain Hot–Rolled Carbon Steel Flat Products from Romania: Initiation and Preliminary Results of Changed–Circumstances Review

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

SUMMARY: In response to a letter from S.C. Ispat Sidex S.A. notifying the Department of Commerce (the Department) that its corporate name has changed to Mittal Steel Galati S.A., the Department is initiating a changed–circumstances review of the antidumping duty order on certain hot–rolled carbon steel flat products from Romania (see *Notice of Amended Final Antidumping Duty Determination and Antidumping Duty Order: Certain Hot–Rolled Carbon Steel Flat Products from Romania*, 66 FR 59566 (November 29, 2001) (*Amended Determination and Order*). We have preliminarily concluded that Mittal Steel Galati S.A. is the successor–in-interest to S.C. Ispat Sidex S.A. (Sidex) and, as a result, should be accorded the same treatment previously accorded to Sidex in regards to the antidumping duty order on certain hot–rolled carbon steel flat products from Romania. Interested parties are invited to comment on these preliminary results.

EFFECTIVE DATE: May 13, 2005.

FOR FURTHER INFORMATION CONTACT: Dunyako Ahmadu at (202) 482–0198 or Dave Dirstine at (202) 482–4033, AD/CVD Operations, Office 5, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW, Washington, DC 20230.

SUPPLEMENTARY INFORMATION:

Background

On November 29, 2001, the Department published in the **Federal Register** an antidumping duty order on certain hot–rolled carbon steel flat products from Romania. *See Amended Determination and Order*. Since publication, there have been two review periods of this order. Sidex was a participant in both reviews. In a letter dated March 24, 2005, Sidex advised the Department that on February 7, 2005, it changed its corporate name to Mittal Steel Galati, S.A. (Mittal Steel), and that Mittal Steel is the successor–in-interest to Sidex. As such, Sidex requested that the Department initiate a changed–circumstances review to confirm that Mittal Steel is the successor–in-interest to Sidex for purposes of determining antidumping–duty liabilities. Sidex also requested that the Department conduct a changed–circumstances review on an expedited basis, pursuant to 19 CFR 351.221(c)(3)(ii). We did not receive any other comments.

Scope of the Order

For purposes of the order, the products covered include hot–rolled carbon steel flat products. For a complete description of the scope of the order, see *Certain Hot–Rolled Carbon Steel Flat Products from Romania: Preliminary Results of Antidumping Duty Administrative Review*, 69 FR 70644 (December 7, 2004).

Initiation of Changed–Circumstances Review

Pursuant to section 751(b)(1) of the Tariff Act of 1930, as amended (the Act), and 19 CFR 351.216, the Department will conduct a changed–circumstances review upon receipt of information concerning, or a request from an interested party for a review of, an antidumping duty order which shows changed circumstances sufficient to warrant a review of the order. The information submitted by Mittal Steel claiming that it is the successor–in-interest to Sidex demonstrates changed circumstances sufficient to warrant a review. See 19 CFR 351.216(d).

In accordance with the above–referenced regulation, the Department is initiating a changed–circumstances review to determine whether Mittal Steel is the successor–in-interest to Sidex. In determining whether one company is the successor to another for purposes of applying the antidumping duty law, the Department examines a number of factors including, but not limited to, changes in management, production facilities, supplier relationships, and customer base. See *Industrial Phosphoric Acid From Israel: Final Results of Antidumping Duty Changed Circumstances Review,* 59 FR 6944 (February 14, 1994). While no single or even several of these factors will necessarily provide a dispositive indication of succession, generally the Department will consider one company to be a successor to another company if its resulting operation is similar to that of its predecessor. See *Brass Sheet and Strip from Canada; Notice of Final Results of Antidumping Duty Administrative Review*, 57 FR 20460 (May 13, 1992), and the attached Decision Memorandum at Comment 1.[1] Thus, if the evidence demonstrates that, with respect to the production and sale of the subject merchandise, the new company operates as the same business entity as the prior company, the Department will assign the new company the cash–deposit rate of its predecessor.

On March 24, 2005, Mittal Steel submitted information demonstrating that it is the successor to Sidex. With respect to the name change itself, Mittal Steel provided the minutes to its January 10, 2005, ''Extraordinary General Meeting of Shareholders'' at which the name change was approved. In addition, Mittal Steel provided a copy of the new company registration certificate issued by the Ministry of Justice Trade Register Office of the Galati Tribunal on February 7, 2005, the decision of Galati Tribunal to allow the name change (notarized by a delegated, tribunal judge), and the certificate issued by the National Office of the Trade Registry, Romanian Ministry of Justice, which established that Sidex would adopt the Mittal Steel name and logo. See *Request for Initiation of Changed–Circumstances Review*, dated March 24, 2005, at Exhibit 1.

According to information provided in Mittal Steel's March 24, 2005, request for a changed–circumstances review, we observed that Mittal Steel's management, production facilities, suppliers, and customer base were consistent with the management, production facilities, suppliers, and customer base of Sidex.

With respect to management prior to and following the name change, the record includes a ''Good Standing Certificate'' issued by the Trade Registry Office of the Galati Tribunal for Mittal Steel. This document lists the members

[1] ''{G}enerally, in the case of an asset acquisition, the Department will consider the acquiring company to be a successor to the company covered by the antidumping duty order, and thus subject to its duty deposit rate, if the resulting operation is essentially similar to that existing before the acquisition.''

of the board of directors and their respective tenure. *Id.* at Exhibit 5. Based on this information, we conclude that the name change did not affect board membership nor the identity of the board members.

Mittal Steel provided excerpts from the 15th edition of *Iron and Steel Works of the World* published in 2004 which details Sidex's production facilities. It also included a print–out from the Mittal Steel website (dated February 23, 2005) indicating that the production facilities have not changed location nor has the equipment used for the production of merchandise changed following the name change from Sidex to Mittal Steel.

Mittal Steel states in its request for initiation that it is still part of the same corporate group to which Sidex belonged and that the affiliated suppliers in its corporate group are the same affiliated suppliers which Sidex used previously. Similarly, the record shows that the relationships with unaffiliated suppliers have not been altered as a consequence of the name change. In support of this position, Mittal Steel provided reports identifying Mittal Steel's suppliers of raw materials for the production of subject merchandise from September to December 2004 (*i.e.*, before the name change) and from January to February 28, 2005. *Id.* at Exhibit 9.

Regarding its customer base, Mittal Steel stated that the distribution channels for export and domestic sales, established by Sidex prior to the name change, remain the same after the name change. For example, Mittal Steel stated that the name change had no influence on its relationship with Ispat North America, an affiliated reseller of subject merchandise in the U.S. market. As further evidence that Mittal Steel's customer base remained the same after the name change, Mittal Steel attached a copy of a signed February 15, 2005, customer contract where the company's name is amended in the contract transferring legal rights and obligations of Sidex to Mittal Steel. *Id.* at Exhibit 10.

Therefore, the information provided in Mittal Steel's March 24, 2005, request for a changed–circumstances review demonstrates that no major changes have occurred with respect to Mittal Steel's management, production facilities, suppliers or customer base.

When it concludes that expedited action is warranted, the Department may publish the notice of initiation and preliminary results for a changed–circumstances review concurrently. See 19 CFR 351.221(c)(3)(ii). See also *Canned Pineapple Fruit from Thailand; Initiation and Preliminary Results of Antidumping Duty Changed Circumstances Review*, 69 FR 30878 (June 1, 2004). Based on the information on the record, we have determined that expedition of this changed–circumstances review is warranted. In this case, we preliminarily find that Mittal Steel is the successor–in-interest to Sidex and, as such, is entitled to Sidex's cash–deposit rate with respect to entries of subject merchandise.[2]

Should our final results remain the same as these preliminary results, we will instruct U.S. Customs and Border Protection to assign Mittal Steel the antidumping duty cash–deposit rate applicable to Sidex.

Public Comment

Any interested party may request a hearing within 14 days of publication of this notice. See 19 CFR 351.310(c). Any hearing, if requested, will be held 28 days after the date of publication of this notice or the first working day thereafter. Interested parties may submit case briefs and/or written comments not later than 14 days after the date of publication of this notice. Rebuttal briefs and rebuttals to written comments, which must be limited to issues raised in such briefs or comments, may be filed not later than 21 days after the date of publication of this notice. Parties who submit case briefs or rebuttal briefs in this changed–circumstances review are requested to submit with each argument (1) a statement of the issue and (2) a brief summary of the argument with an electronic version included. Consistent with 19 CFR 351.216(e), we will issue the final results of this changed–circumstances review no later than 270 days after the date on which this review was initiated or within 45 days of publication of these preliminary results if all parties agree to our preliminary finding.

We are issuing and publishing this initiation and preliminary results notice in accordance with sections 751(b)(1) and 777(i)(1) of the Act and 19 CFR 351.216 and 351.221(c)(3).

Dated: May 9, 2005.

Joseph A. Spetrini,

Acting Assistant Secretary for Import Administration.

[FR Doc. E5–2392 Filed 5–12–05; 8:45 am]

(BILLING CODE: 3510–DS–S)

[2] *See, e.g., Circular Welded Non-Alloy Steel Pipe From Korea; Final Results of Antidumping Duty Changed Circumstances Review*, 63 FR 20572 (April 27, 1998), where the Department found successorship where the company only changed its name and did not change its operations.

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[I.D. 042505D]

Taking and Importing of Marine Mammals

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

ACTION: Notice of affirmative finding.

SUMMARY: The Assistant Administrator for Fisheries, NMFS, (Assistant Administrator) renewed the affirmative finding for the Republic of El Salvador under the Marine Mammal Protection Act (MMPA). This affirmative finding renewal will allow yellowfin tuna harvested in the Eastern Tropical Pacific (ETP) in compliance with the International Dolphin Conservation Program (IDCP) by El Salvadorian-flag purse seine vessels or purse seine vessels operating under El Salvador's jurisdiction to continue to be imported into the United States. The affirmative finding was based on review of documentary evidence submitted by the Republic of El Salvador and obtained from the Inter-American Tropical Tuna Commission (IATTC) and the Department of State.

DATES: Effective April 1, 2005, through March 31, 2006.

FOR FURTHER INFORMATION CONTACT: Regional Administrator, Southwest Region, NMFS, 501 West Ocean Boulevard, Suite 4200, Long Beach, CA 90802–4213; Phone 562–980–4000; Fax 562–980–4018.

SUPPLEMENTARY INFORMATION: The MMPA, 16 U.S.C. 1361 *et seq.*, allows the entry into the United States of yellowfin tuna harvested by purse seine vessels in the ETP under certain conditions. If requested by the harvesting nation, the Assistant Administrator will determine whether to make an affirmative finding based upon documentary evidence provided by the government of the harvesting nation, the IATTC, or the Department of State.

The affirmative finding process requires that the harvesting nation meet several conditions related to compliance with the IDCP. Every five years, the government of the harvesting nation must request an affirmative finding and submit the required documentary evidence directly to the Assistant Administrator. On an annual basis NMFS will review the affirmative finding and determine whether El

Salvador continues to meet the requirements. A nation may opt to provide information regarding compliance with the IDCP directly to NMFS on an annual basis or authorize the IATTC to release the information to NMFS in years when NMFS will conduct an annual review of the affirmative finding.

An affirmative finding will be terminated, in consultation with the Secretary of State, if the Assistant Administrator determines that the requirements of 50 CFR 216.24(f) are no longer being met or that a nation is consistently failing to take enforcement actions on violations which diminish the effectiveness of the IDCP.

As a part of the affirmative finding process set forth in 50 CFR 216.24(f), the Assistant Administrator considered documentary evidence submitted by the Republic of El Salvador and obtained from the IATTC and the Department of State and determined that El Salvador has met the MMPA's requirements to receive and affirmative finding.

After consultation with the Department of State, NMFS renewed the Republic of El Salvador's affirmative finding allowing the continued importation into the United States of yellowfin tuna and products derived from yellowfin tuna harvested in the ETP, by El Salvadorian-flag purse seine vessels or vessels under El Salvadorian jurisdiction. The affirmative finding will remain in effect until March 31, 2006.

Dated: May 10, 2005.

John Oliver,

Deputy Assistant Administrator for Operations, National Marine Fisheries Service.

[FR Doc. 05–9603 Filed 5–12–05; 8:45 am]

BILLING CODE 3510–22–S

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[I.D. 041905D]

Taking and Importing of Marine Mammals

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

ACTION: Notice of affirmative finding renewal.

SUMMARY: The Assistant Administrator for Fisheries, NMFS, (Assistant Administrator) renewed the affirmative finding for the Republic of Ecuador under the Marine Mammal Protection Act (MMPA). This affirmative finding renewal will allow yellowfin tuna harvested in the ETP in compliance with the International Dolphin Conservation Program (IDCP) by Ecuadorian-flag purse seine vessels or purse seine vessels operating under Ecuadorian jurisdiction to continue to be imported into the United States. The affirmative finding renewal was based on review of documentary evidence submitted by the Republic of Ecuador and obtained from the Inter-American Tropical Tuna Commission (IATTC) and the Department of State.

DATES: Effective April 1, 2005, through March 31,2006.

FOR FURTHER INFORMATION CONTACT: Regional Administrator, Southwest Region, NMFS, 501 West Ocean Boulevard, Suite 4200, Long Beach, CA 90802–4213; Phone 562–980–4000; Fax 562–980–4018.

SUPPLEMENTARY INFORMATION: The MMPA, 16 U.S.C. 1361 *et seq.*, allows the entry into the United States of yellowfin tuna harvested by purse seine vessels in the ETP under certain conditions. If requested by the harvesting nation, the Assistant Administrator will determine whether to make an affirmative finding based upon documentary evidence provided by the government of the harvesting nation, the IATTC, or the Department of State.

The affirmative finding process requires that the harvesting nation meet several conditions related to compliance with the IDCP. Every 5 years, the government of the harvesting nation must request an affirmative finding and submit the required documentary evidence directly to the Assistant Administrator. On an annual basis NMFS will review the affirmative finding and determine whether Ecuador continues to meet the requirements. A nation may provide information regarding compliance with the IDCP directly to NMFS on an annual basis or may authorize the IATTC to release the information to NMFS in years when NMFS will review and consider whether to issue an affirmative finding determination without an application from the harvesting nation.

An affirmative finding will be terminated, in consultation with the Secretary of State, if the Assistant Administrator determines that the requirements of 50 CFR 216.24(f) are no longer being met or that a nation is consistently failing to take enforcement actions on violations, thereby diminishing the effectiveness of the IDCP.

As a part of the affirmative finding process set forth in 50 CFR 216.24(f), the Assistant Administrator considered documentary evidence submitted by the Republic of Ecuador or obtained from the IATTC and the Department of State and determined that Ecuador has met the MMPA's requirements to receive an affirmative finding.

After consultation with the Department of State, NMFS renewed the Republic of Ecuador's affirmative finding allowing the continued importation into the United States of yellowfin tuna and products derived from yellowfin tuna harvested in the ETP by Ecuadorian-flag purse seine vessels or purse seine vessels operating under Ecuadorian jurisdiction. The affirmative finding will remain valid for the period April 1, 2005, through March 31, 2010, subject to annual reviews by NMFS.

Dated: May 10, 2005.

John Oliver,

Deputy Assistant Administrator for Operations, National Marine Fisheries Service.

[FR Doc. 05–9604 Filed 5–12–05; 8:45 am]

BILLING CODE 3510–22–S

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[Docket No. 040825246–5115–02]

Privacy Act of 1974; System of Records; Commerce/NOAA System-16, Crab Economic Data Report for Bering Sea/Aleutian Islands Management Area (BSAI) Off the Coast of Alaska

AGENCY: National Oceanic and Atmospheric Administration, Department of Commerce.

ACTION: Notice.

SUMMARY: The Department of Commerce (Commerce) publishes this notice to announce the effective date of a Privacy Act System of Records notice entitled Commerce/NOAA System-16, Crab Economic Data Report for Bering Sea/Aleutian Islands Management Area (BSAI) off the Coast of Alaska.

DATES: The system of records becomes effective on May 13, 2005.

ADDRESSES: For a copy of the system of records please mail requests to Sue Salveson, Assistant Regional Administrator for Sustainable Fisheries, Alaska Region, National Marine Fisheries Service, P.O. Box 21668, Juneau, AK 99802, Attn: Lori Durall, or deliver to the Federal Building, 709 West 9th Street, Juneau, AK 99802.

FOR FURTHER INFORMATION CONTACT: Patsy A. Bearden, 907–586–7008.

SUPPLEMENTARY INFORMATION: On March 3, 2005, the Commerce published and requested comments on a proposed Privacy Act System of Records notice entitled Commerce/NOAA System-16, Crab Economic Data Report for Bering Sea/Aleutian Islands Management Area (BSAI) off the Coast of Alaska (70 FR 10360, March 3, 2005). No comments were received in response to the request for comments. By this notice, the Department is adopting the proposed system as final without changes effective May 13, 2005.

Dated: May 9, 2005.

Brenda Dolan,

Department of Commerce, Freedom of Information/Privacy Act Officer.

[FR Doc. 05–9579 Filed 5–12–05; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[Docket No. 050225045–5114–02]

Privacy Act of 1974; System of Records, Commerce/NOAA System-17, Permits and Registrations for Fisheries of the Exclusive Economic Zone (EEZ) off the Coast of Alaska

AGENCY: Department of Commerce.

ACTION: Notice.

SUMMARY: The Department of Commerce (Commerce) publishes this notice to announce the effective date of a Privacy Act System of Records notice entitled Commerce/NOAA System-17, Permits and Registrations for Fisheries of the Exclusive Economic Zone (EEZ) off the Coast of Alaska.

DATES: The system of records becomes effective on May 13, 2005.

ADDRESSES: For a copy of the system of records please mail requests to Sue Salveson, Assistant Regional Administrator for Sustainable Fisheries, Alaska Region, National Marine Fisheries Service, P.O. Box 21668, Juneau, AK, 99802, Attn: Lori Durall, or deliver to the Federal Building, 709 West 9th Street, Juneau, AK 99802.

FOR FURTHER INFORMATION CONTACT: Patsy A. Bearden, 907–586–7008.

SUPPLEMENTARY INFORMATION: On March 3, 2005, the Commerce published and requested comments on a proposed Privacy Act System of Records notice entitled Commerce/NOAA System-17, Permits and Registrations for Fisheries of the Exclusive Economic Zone (EEZ) off the Coast of Alaska (70 FR 10362, March 3, 2005). No comments were received in response to the request for comments. By this notice, the Department is adopting the proposed system as final without changes effective May 13, 2005.

Dated: May 9, 2005.

Brenda Dolan,

Department of Commerce, Freedom of Information/Privacy Act Officer.

[FR Doc. 05–9580 Filed 5–12–05; 8:45 am]

BILLING CODE 3510–22–U

DEPARTMENT OF DEFENSE

Office of the Secretary

Change of Location of Meetings of the Defense Base Closure and Realignment Commission (BRAC)

AGENCY: Defense Base Closure and Realignment Commission (BRAC).

ACTION: Notice; Correction—Location Change for Meetings of the Defense Base Closure and Realignment Commission (BRAC).

SUMMARY: The Department of Defense published a document in the **Federal Register** of May 4, 2005, concerning a meeting of the BRAC. The purpose of these meetings is to receive testimony from the Secretary of Defense, the Chairman of the Joint Chiefs of Staff (JCS), or their representatives; the Department of the Air Force; the Department of the Navy; the Department of the Army; and the Department of Defense's Joint Cross Service Groups on the recommendations and methodology regarding the closure and realignment of military installations, are unchanged. The location for these meetings have been changed.

FOR FURTHER INFORMATION CONTACT: Contact Mr. Dan Cowhig, Deputy General Counsel and Designated Federal Officer, 2005 Defense Base Closure and Realignment Commission, 2521 South Clark St., Suite 600, Arlington, VA 22202, telephone (703) 699–2974.

Correction

In the **Federal Register** of May 4, 2005, in the FR Doc. 05–8850, on page 23142, in the second column, correct the ''Dates, Times, and Addresses'' captions to read:

Dates, Times, and Addresses:

Monday, May 16, 2005, 1:30 p.m.–4:30 p.m., Secretary of Defense, Chairman, JCS Senate Hart Building, Room 216, U.S. Senate, Washington, DC.

Tuesday, May 17, 2005, 9:30 a.m.–12:30 p.m., Department of the Air Force Senate Dirksen Building, Room G50, U.S. Senate, Washington, DC.

Tuesday, May 17, 2005, 1:30 p.m.–4:30 p.m., Department of the Navy Senate Hart Building, Room 216, U.S. Senate, Washington, DC.

Wednesday, May 18, 2005, 9:30 a.m.–12:30 p.m., Department of the Army Senate Dirksen Building, Room 106, U.S. Senate, Washington, DC.

Wednesday, May 18, 2005, 1:30 p.m.–4:30 p.m., Defense Joint Cross Service Groups Senate Dirksen Building, Room 106, U.S. Senate, Washington, DC.

Thursday, May 19, 2005, 9:30 a.m.–12:30 p.m., Defense Joint Cross Service Groups Senate Hart Building, Room 216, U.S. Senate, Washington, DC.

Dated: May 17, 2005.

Jeannette Owings-Ballard,

OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 05–9613 Filed 5–12–05; 8:45 am]

BILLING CODE 5001–06–M

DEPARTMENT OF DEFENSE

Office of the Secretary

DOD Advisory Group on Electron Devices

AGENCY: Department of Defense.

ACTION: Notice; Closed Meeting of the DOD Advisory Group on Electron Devices.

SUMMARY: The DoD Advisory Group on Electron Devices (AGED) announces a closed session meeting.

DATES: The meeting will be held on Tuesday, May 24, 2005 at 0830.

ADDRESSES: The meeting will be held at Noesis, Inc., 4100 N. Fairfax Drive, Suite 800, Arlington, VA 22203

FOR FURTHER INFORMATION CONTACT: Ms. Vicki Schneider, Noesis, Inc., 4100 N. Fairfax Drive, Suite 800, Arlington, VA 22203, (703) 741–0300.

SUPPLEMENTARY INFORMATION: The mission of the Advisory Group is to provide advice to the Under Secretary of Defense for Acquisition, Technology and Logistics to the Director of Defense Research and Engineering (DDR&E), and through the DDR&E to the Director, Defense Advanced Research Projects Agency and the Military Departments in planning and managing an effective and economical research and development program in the area of electron devices.

The AGED meeting will be limited to review of research and development efforts in electronics and photonics with a focus on benefits to national defense. These reviews may form the basis for research and development programs

initiated by the Military Departments and Defense Agencies to be conducted by industry, universities or in government laboratories. The agenda for this meeting will include programs on RF technology, microelectronics, electro-optics, and electronic materials.

In accordance with Section 10(d) of Pub. L. No. 92–463, as amended, (5 U.S.C. App. 2), it has been determined that this Advisory Group meeting concerns matters listed in 5 U.S.C. 552b(c)(1), and that accordingly, this meeting will be closed to the public.

Dated: May 17, 2005.

Jeannette Owings-Ballard,

OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 05–9620 Filed 5–12–05; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Department of the Army

Armed Forces Epidemiological Board; Meeting

AGENCY: Department of the Army; DoD.

ACTION: Notice of meeting.

SUMMARY: In accordance with section 10(a)(2) of Pub. L. 92–463, The Federal Advisory Committee Act, announcement is made of the following meeting:

Name of Committee: Armed Forces Epidemiological Board (AFEB).

Dates: June 21, 2005 (Open meeting). June 22, 2005 (Open meeting). *Times:* 8 a.m.–5 p.m. (June 21, 2005). 8 a.m.–4:15 p.m. (June 22, 2005).

Location: The Hope Hotel and Conference Center, Building 823, Area A, Air Force Research Laboratory, Wright-Patterson Air Force Base, Dayton, Ohio 45433–5000.

Agenda: The purpose of the meeting is to address pending and new Board issues, provide briefings for Board members on topics related to ongoing and new Board issues, conduct subcommittee meetings, and conduct an executive working session.

FOR FURTHER INFORMATION CONTACT: Colonel Roger Gibson, Executive Secretary, Armed Forces Epidemiological Board, Skyline Six, 5109 Leesburg Pike, Room 682, Falls Church, VA 22041–3258, (703) 681–8012/3.

SUPPLEMENTARY INFORMATION: The entire sessions on June 21, 2005 and June 22, 2005 will be open to the public in accordance with Section 552b(b) of Title 5, U.S.C., specifically subparagraph (1) thereof and Title 5, U.S.C., appendix 1, subsection 10(d). Open sessions of the meeting will be limited by space accommodations. Any interested person may attend, appear before or file statements with the Board at the time and in the manner permitted by the Board.

Brenda S. Bowen,

Army Federal Register Liaison Officer.

[FR Doc. 05–9582 Filed 5–12–05; 8:45 am]

BILLING CODE 3710–08–M

DEPARTMENT OF DEFENSE

Department of the Army; Corps of Engineers

Availability of Draft Integrated Feasibility Report & Environmental Impact Statement for the Flood Damage Reduction Project, Bloomsburg, PA

AGENCY: Department of the Army, U.S. Army Corps of Engineers, DOD.

ACTION: Notice of availability.

SUMMARY: In accordance with the requirements of the National Environmental Policy Act (NEPA), the U.S. Army Corps of Engineers (USACE), Baltimore District has prepared a Draft Integrated Feasibility Report & Environmental Impact Statement (EIS) for the flood damage reduction project for the Town of Bloomsburg, in Columbia County, PA. The integrated report investigates the potential environmental effects of an array of alternative plans based on reducing flood damages in Bloomsburg. The preferred alternative includes 16,555 linear feet of levee/floodwall systems with fourteen drainage structures, and nine closure structures, six of which incorporate limited road raisings. We are making the integrated report and EIS available to the public for a 45-day review and comment period.

DATES: Comments need to be received on or before June 27, 2005, to ensure consideration in final plan development. A public meeting on the flood damage reduction measures presented in the integrated report and EIS will be held on Thursday, June 16, 2005 beginning at 7 p.m.

ADDRESSES: Send written comments concerning this proposed project to U.S. Army Corps of Engineers, Baltimore District, Attn: Mr. Jeff Trulick, CENAB–PL–P, P.O. Box 1715, Baltimore, MD 21203–1715. Submit electronic comments to *jeff.trulick@usace.army.mil.* The public meeting will be held at the Bloomsburg Fire Department Banquet Hall at 911 South Market Street, in Bloomsburg, PA.

FOR FURTHER INFORMATION CONTACT: Mr. Jeff Trulick, Study Manager, (410) 962–6715 or (800) 295–1610.

SUPPLEMENTARY INFORMATION: The Town of Bloomsburg, PA is located in Columbia County within the Middle Susquehanna River sub-basin. The Susquehanna River forms the Town's southern boundary, and Fishing Creek forms the northern and western boundary.

The primary water resources problem along the Susquehanna River at Bloomsburg is recurrent flooding. Recurrent flooding that occurs in the Bloomsburg study area is a result of the morphology of the Susquehanna River and the regional topography. When the Susquehanna River and a local tributary, Fishing Creek, simultaneously rise above flood stage, overbank flooding can cover up to 33 percent of the landmass within the Town of Bloomsburg's boundaries.

Flood damages are attributable to overbank flooding from the Susquehanna River and to flooding along Fishing Creek. Past flood events have resulted in extensive damages to structures and their contents and have threatened public safety. The Bloomsburg study area includes approximately 525 residential structures and 75 businesses.

The recommended flood damage reduction plan is the National Economic Development (NED) Plan with a Tropical Storm Agnes (440-year) level of protection from Susquehanna river flooding, and 100-year level of protection from Fishing Creek flooding. The recommended plan consists of 16,555 linear feet of levee/floodwall systems with fourteen drainage structures, and nine closure structures, six of which incorporate limited road raisings. The alignment of the line of protection was refined based on physical, environmental, and economic criteria.

The project consists of a system of earthen levees, mechanically stabilized earth (MSE) floodwalls, concrete floodwalls, railroad and road closure structures and roadway relocations to provide ramps over the line of protection. Earthen levees are proposed for the majority of the line of protection, though MSE walls will be required along portions of Fishing Creek in both Bloomsburg and Fernville and a concrete floodwall (H-Pile wall) will be required along portions of Fishing Creek in Bloomsburg. Limited riprap will be used to protect the steep banks of Fishing Creek from bank crest to below the stream invert along the lower project reaches along Fishing Creek.

Permanent environmental impacts would include restricted views by the levee/floodwall system of Fishing Creek from Bloomsburg and Fernville, excavation and off-site disposal of approximately 4,500 cubic yards of hazardous, toxic and radioactive waste materials, conversion of approximately 11.5 acres of farmland designated as Prime Farmland or additional Farmland of Statewide Importance to non-agricultural use, long-term loss of nearly 3,000 linear feet of riparian habitat along Fishing Creek, the loss of less than one acre of wetlands, and taking of residential homes and business structures within the levee/floodwall footprint.

A public hearing on the Draft SEIS will be held at the Bloomsburg Fire Department Banquet Hall (*see* **DATES** and **ADDRESSES**). A map showing the location of the Bloomsburg Fire Department can be found at *http://wphc.us/Default.aspx?alias=wphc.us/bfd.* The meeting will provide an opportunity for the public to present oral and/or written comments. For submission of electronic comments, your comment must be contained in the body of your message; do not send attached files. Include your name and address in your message. All persons and organization that have an interest in the flood damage reduction measures as they affect Columbia County and the environment are urged to attend the meeting and provide comments.

USACE has distributed copies of the Draft report and EIS to appropriate members of Congress, State and local government officials, Federal agencies, and other interested parties. Copies are available for public review at the following locations:

(1) Bloomsburg Public Library, 225 Market Street, Bloomsburg, PA 17815.

(2) Columbia County Historical Library, 225 Market Street, Bloomsburg, PA 17815.

(3) Columbia County Traveling Library, 15 Perry Avenue, Bloomsburg, PA 17815.

You may view the Draft report and EIS in addition to related information on our web page at *http://www.nab.usace.army.mil/publications/non-reg_pub.htm.*

After the public comment period ends on June 27, 2005, USACE will consider all comments received. The integrated report and EIS will be revised as appropriate and a Final Integrated Report and EIS will be issued.

The Draft Integrated Report and EIS has been prepared in accordance with (1) The National Environmental Policy Act (NEPA) of 1969, as amended (42 U.S.C. 4321 *et seq.*), (2) regulations of the Council on Environmental quality for implementing the procedural provisions of NEPA (40 CFR parts 1500–1508), and (3) USACE regulations implementing NEPA (ER–200–2–2).

Jeff Trulick,

Study Manager.

[FR Doc. 05–9583 Filed 5–12–05; 8:45 am]

BILLING CODE 3710–41–M

DEPARTMENT OF DEFENSE

Department of the Army; Corps of Engineers

Intent To Prepare a Draft Environmental Impact Statement in Conjunction With Proposed Sediment Management and Restoration Measures on the Grand Calumet River and non-Federal Portions of the Indiana Harbor Canal in Lake County, IN

AGENCY: Department of the Army, U.S. Army Corps of Engineers, DoD.

ACTION: Notice of intent.

SUMMARY: The study involves sediment management and restoration measures on the Grand Calumet River and non-Federal portions of the Indiana Harbor Canal. Potential alternatives to be evaluated are type and extent of dredging, possibility of capping areas, disposal options and restoration measures.

The Draft Environmental Impact Statement (DEIS) is expected to be released for public review in June 2006. As part of the scoping process, written comments will be accepted for a 60-day period, starting from the date of this notice. Comments should be submitted to Mr. Keith Ryder (*see* **ADDRESSES**).

DATES: Public scoping meetings will be held on:

1. May 24, 2005, 2–4 p.m., East Chicago, IN.

2. May 24, 2005, 5:45–7:45 p.m., Gary, IN.

ADDRESSES: The meeting locations are:

1. East Chicago, IN—East Chicago City Hall, 4525 Indianapolis Boulevard, East Chicago, IN 46312.

2. Gary, IN—Gary Public Library, Main Branch, 220 West Fifth Avenue, Gary, IN 46402.

Submit written comments to Mr. Keith Ryder, U.S. Army Corps of Engineers, Suite 600, 111 North Canal Street; Chicago, IL 60606–7206.

FOR FURTHER INFORMATION CONTACT: Mr. Keith Ryder, (312) 846–5587.

Gary E. Johnston,

Colonel, U.S. Army, District Engineer.

[FR Doc. 05–9584 Filed 5–12–05; 8:45 am]

BILLING CODE 3710–HN–M

DEPARTMENT OF DEFENSE

Department of the Army; Corps of Engineers

Coastal Engineering Research Board (CERB)

AGENCY: Department of the Army, DoD.

ACTION: Notice of meeting.

SUMMARY: In accordance with Section 10(a)(2) of the Federal Advisory Committee Act (Pub. L. 92–463), announcement is made of the following committee meeting:

Name of Committee: Coastal Engineering Research Board (CERB).

Date of Meeting: June 7–9, 2005.

Place: William A. Egan Civic and Convention Center, 555 West 5th Avenue, Anchorage, AK 99501.

Times:

8 a.m. to 4:15 p.m. (June 7, 2005)
8 a.m. to 5 p.m. (June 8, 2005)
8 a.m. to 4:30 p.m. (June 9, 2005)

FOR FURTHER INFORMATION CONTACT: Inquiries and notice of intent to attend the meeting may be addressed to Colonel James R. Rowan, Executive Secretary, Commander, U.S. Army Engineer Research and Development Center, Waterways Experiment Station, 3909 Halls Ferry Road, Vicksburg, MS 39180–6199.

SUPPLEMENTARY INFORMATION: *Proposed Agenda:* On Tuesday morning, June 7, the Board will meet in Executive Session. On Tuesday afternoon, June 7, there will be presentations entitled ''Tsunami Warning Center Operations,'' ''Pacific Risk Management Ohana,'' ''Alaska Modeling and Data Issues,'' ''Alaska Ocean Observing System,'' and ''Island Ocean Observing System.'' On Wednesday morning, June 8, there will be presentations entitled ''Honolulu District Coastal Research and Development Needs,'' ''Climate Change Impacts on Alaska Coastline,'' ''Regional Integrated Sciences and Assessments,'' and ''Subsistence and Cultural Issues.'' The afternoon session on June 8 will include presentations entitled ''Denali Commission,'' ''North Slope Science Initiative,'' and ''Report of Newtok,'' plus a panel discussion pertaining to Shishmaref, Alaska. On Thursday morning, June 9, there will be presentations entitled ''Port of

Anchorage Physical Modeling,'' ''Alaska District Dredging Program,'' and ''Alaska Subsistence Harbors.'' The members of the Board will again meet in Executive Session on Thursday afternoon, June 9, followed by a tour of the Port of Anchorage.

These meetings are open to the public; participation by the public is scheduled for 11:15 a.m. on June 9.

The entire meeting is open to the public, but since seating capacity of the meeting room is limited, advance notice of intent to attend, although not required, is requested in order to assure adequate arrangements. Oral participation by public attendees is encouraged during the time scheduled on the agenda; written statements may be submitted prior to the meeting or up to 30 days after the meeting.

James R. Rowan,

Colonel, Corps of Engineers, Executive Secretary.

[FR Doc. 05–9581 Filed 5–12–05; 8:45 am]

BILLING CODE 3710–61–M

DEPARTMENT OF EDUCATION

Submission for OMB Review; Comment Request

AGENCY: Department of Education.

SUMMARY: The Leader, Information Management Case Services Team, Regulatory Information Management Services, Office of the Chief Information Officer invites comments on the submission for OMB review as required by the Paperwork Reduction Act of 1995.

DATES: Interested persons are invited to submit comments on or before June 13, 2005.

ADDRESSES: Written comments should be addressed to the Office of Information and Regulatory Affairs, Attention: Carolyn Lovett, Desk Officer, Department of Education, Office of Management and Budget, 725 17th Street, NW., Room 10235, New Executive Office Building, Washington, DC 20503 or faxed to (202) 395–6974.

SUPPLEMENTARY INFORMATION: Section 3506 of the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35) requires that the Office of Management and Budget (OMB) provide interested Federal agencies and the public an early opportunity to comment on information collection requests. OMB may amend or waive the requirement for public consultation to the extent that public participation in the approval process would defeat the purpose of the information collection, violate State or Federal law, or substantially interfere with any agency's ability to perform its statutory obligations. The Leader, Information Management Case Services Team, Regulatory Information Management Services, Office of the Chief Information Officer, publishes that notice containing proposed information collection requests prior to submission of these requests to OMB. Each proposed information collection, grouped by office, contains the following: (1) Type of review requested, *e.g.* new, revision, extension, existing or reinstatement; (2) Title; (3) Summary of the collection; (4) Description of the need for, and proposed use of, the information; (5) Respondents and frequency of collection; and (6) Reporting and/or Recordkeeping burden. OMB invites public comment.

Dated: May 9, 2005.

Angela C. Arrington,

Leader, Information Management Case Services Team, Regulatory Information Management Services, Office of the Chief Information Officer.

Office of Vocational and Adult Education

Type of Review: New.

Title: The School Dropout Prevention Program.

Frequency: Annually.

Affected Public: State, Local, or Tribal Gov't, SEAs or LEAs.

Reporting and Recordkeeping Hour Burden: Responses: 25.

Burden Hours: 2,000.

Abstract: The School Dropout Prevention Program provides competitive grants to State Educational Agencies (SEAs) to implement a collaborative, statewide dropout prevention initiative targeted at those schools that exceed the state annual dropout rate. SEAs must partner with at least one other agency responsible for administering programs related to youth and collaborate on development and implementation of a program.

This information collection is being submitted under the Streamlined Clearance Process for Discretionary Grant Information Collections (1890–0001). Therefore, the 30-day public comment period notice will be the only public comment notice published for this information collection.

Requests for copies of the submission for OMB review; comment request may be accessed from *http://edicsweb.ed.gov,* by selecting the ''Browse Pending Collections'' link and by clicking on link number 2756. When you access the information collection, click on ''Download Attachments'' to view. Written requests for information should be addressed to U.S. Department of Education, 400 Maryland Avenue, SW., Potomac Center, 9th Floor, Washington, D.C. 20202–4700. Requests may also be electronically mailed to the Internet address *OCIO_RIMG@ed.gov* or faxed to 202–245–6621. Please specify the complete title of the information collection when making your request.

Comments regarding burden and/or the collection activity requirements should be directed to Sheila Carey at her e-mail address *Sheila.Carey@ed.gov.* Individuals who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339.

[FR Doc. 05–9559 Filed 5–12–05; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF EDUCATION

Office of Postsecondary Education; Overview Information; Underground Railroad Educational and Cultural Program (URR); Notice Inviting Applications for New Awards for Fiscal Year (FY) 2005

Catalog of Federal Domestic Assistance (CFDA) Number: 84.345A.

DATES: *Applications Available:* May 13, 2005.

Deadline for Transmittal of Applications: June 14, 2005.

Deadline for Intergovernmental Review: July 13, 2005.

Eligible Applicants: Nonprofit educational organizations that research, display, interpret, and collect artifacts relating to the history of the Underground Railroad.

Available Funds: $2,204,224.

Estimated Range of Awards: $250,000–$750,000 total for up to three years.

Estimated Number of Awards: 3.

Note: The Department is not bound by any estimates in this notice.

Project Period: Up to 36 months.

Full Text of Announcement

I. Funding Opportunity Description

Purpose of Program: To provide grants to establish a facility to house, display, and interpret artifacts related to the history of the Underground Railroad, and to make the interpretive efforts available to institutions of higher education that award a baccalaureate or graduate degree.

Special Requirements: Each nonprofit educational organization awarded a grant under this program must enter into an agreement with the Department. Each agreement must require the organization:

(1) To demonstrate substantial private support for the facility through the implementation of a public-private partnership between a State or local public entity and a private entity for the support of the facility. The private entity must provide matching funds in an amount equal to *four times* the amount of the contribution of the State or local public entity, except that not more than 20 percent of the matching funds may be provided by the Federal government;

(2) To create an endowment to fund any and all shortfalls in the costs of the ongoing operations of the facility;

(3) To establish a network of satellite centers throughout the United States to help disseminate information regarding the Underground Railroad throughout the United States. These satellite centers must raise 80 percent of the funds required to establish the satellite centers from non-Federal public and private sources;

(4) To establish the capability to link the facility electronically with other local and regional facilities that have collections and programs that interpret the history of the Underground Railroad; and

(5) To submit, for each fiscal year for which an organization receives funding under this program, a report to the Department that contains;

(a) A description of the programs and activities supported by the funding;

(b) The audited financial statement of the organization for the preceding fiscal year;

(c) A plan for the programs and activities to be supported by the funding, as the Secretary may require; and

(d) An evaluation of the programs and activities supported by the funding, as the Secretary may require.

Program Authority: 20 U.S.C. 1153.

Applicable Regulations: The Education Department General Administrative Regulations (EDGAR) in 34 CFR parts 74, 75, 77, 79, 80, 82, 84, 85, 86, 97, 98 and 99.

II. Award Information

Type of Award: Discretionary grants.
Available Funds: $2,204,224.
Estimated Range of Awards: $250,000–$750,000 total for up to three years.
Estimated Number of Awards: 3.

Note: The Department is not bound by any estimates in this notice.

Project Period: Up to 36 months.

III. Eligibility Information

1. *Eligible Applicants:* Nonprofit educational organizations that research, interpret, and collect artifacts relating to the history of the Underground Railroad.

2. *Cost Sharing or Matching:* Not more than 20% of the total funds for this project may be provided by the Federal government. See 20 U.S.C. 1153(b)(2). Other matching requirements are described in the *Special Requirements* section of this notice.

IV. Application and Submission Information

1. *Address to Request Application Package:* Jay Donahue, U.S. Department of Education, room 6162, 1990 K Street, NW., Washington, DC 20006–8544. Telephone: (202) 502–7507 or by e-mail: *jay.donahue@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 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:* Requirements concerning the content of application, together with the forms you must submit, are in the application package for this program.

3. *Submission Dates and Times: Applications Available:* May 13, 2005. *Deadline for Transmittal of Applications:* June 14, 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: July 13, 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 program.

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 the Underground Railroad Educational and Cultural Program, 84.345A, 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 acknowledgement 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 acknowledgement of any system unavailability, you may contact either (1) the person listed elsewhere in this notice under **FOR FURTHER INFORMATION CONTACT** (see VII. Agency Contact) or (2) the e-Grants help desk at 1–888–336–8930. 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 Requirements: 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 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: Beverly Baker, U.S. Department of Education, 1990 K Street, NW., room 6140, Washington, DC 20006–8544. FAX: (202) 502–7877.

Your paper application must be submitted in accordance with the mail or hand delivery instructions described in this notice.

b. *Submission of Paper Application by Mail.* If you qualify for an 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: 84.345A, 400 Maryland Avenue, SW., Washington, DC 20202–4260.

By mail through a commercial carrier: U.S. Department of Education, Application Control Center—Stop 4260, Attention: CFDA Number: 84.345A, 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 legibly dated 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 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 84.345A, 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 acknowledgement to you. If you do not

receive the grant application receipt acknowledgement 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

Selection Criteria: The selection criteria for this program are in 20 U.S.C. 1153.

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 Notice (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:* Under the Government Performance and Results Act (GPRA), the Department is assessing the performance of this program by examining the extent to which projects are being institutionalized and continued after grant funding. These results constitute the Office of Postsecondary Education's indicators of the success of this program.

Consequently, applicants for URR grants are advised to give careful consideration to these outcomes in conceptualizing the design, implementation, and evaluation of the proposed project. If funded, you will be asked to collect and report data in your project's annual performance report on steps taken toward this goal.

VII. Agency Contact

FOR FURTHER INFORMATION CONTACT: Beverly Baker, Fund for the Improvement of Postsecondary Education, U.S. Department of Education, 1990 K Street, NW., suite 6140, Washington, DC 20006–8544. Telephone: (202) 502–7503 or by e-mail: *Beverly.baker@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.

For additional program information call the FIPSE office (202) 502–7500 between the hours of 8 a.m. and 5 p.m., Eastern Time, Monday through Friday.

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.gpoacess.gov/nara/index.htm1.*

Dated: May 10, 2005.

Sally L. Stroup,

Assistant Secretary for Postsecondary Education.

[FR Doc. 05–9617 Filed 5–12–05; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF EDUCATION

School Dropout Prevention Program

AGENCY: Office of Vocational and Adult Education, Department of Education.

ACTION: Notice of proposed priorities, requirements, definitions, and selection criteria.

SUMMARY: The Assistant Secretary for Vocational and Adult Education proposes priorities, requirements, definitions, and selection criteria under the School Dropout Prevention (SDP) program. The Assistant Secretary may use one or more of these priorities, requirements, definitions, and selection criteria for competitions in fiscal year (FY) 2005 and later years. We intend the priorities, requirements, definitions, and selection criteria to strengthen the quality of applications and provide greater understanding of the Department's intent regarding the direction of this program.

DATES: We must receive your comments on or before June 13, 2005.

ADDRESSES: Address all comments about these proposed priorities, requirements, definitions, and selection criteria to Valerie Randall-Walker, U.S. Department of Education, 400 Maryland Avenue, SW., Potomac Center Plaza, room 11081, Washington, DC 20202–7241. If you prefer to send your comments through the Internet, use the following address: *dropoutprevention@ed.gov.*

You must include the phrase ''SDP Comments'' in the subject line of your electronic message.

FOR FURTHER INFORMATION CONTACT: Valerie Randall-Walker. Telephone: (202) 245–7794.

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:

Invitation to Comment

We invite you to submit comments regarding these proposed priorities, requirements, definitions, and selection criteria. To ensure that your comments have maximum effect in developing the notice of final priorities, requirements, definitions, and selection criteria, we urge you to identify clearly the specific priority, requirement, definition, or selection criterion that each comment addresses.

We invite you to assist us in complying with the specific requirements of Executive Order 12866 and its overall requirement of reducing regulatory burden that might result from these proposed priorities, requirements, definitions, and selection criteria. Please let us know of any further opportunities we should take to reduce potential costs or increase potential benefits while preserving the effective and efficient administration of the program.

During and after the comment period, you may inspect all public comments about these proposed priorities, requirements, definitions, and selection

criteria at 550 12th Street, SW., Potomac Center Plaza, room 11081, Washington, DC, between the hours of 8:30 a.m. and 4 p.m., Eastern time, Monday through Friday of each week except Federal holidays.

Assistance to Individuals With Disabilities in Reviewing the Rulemaking Record

On request, we will supply an appropriate aid, such as a reader or print magnifier, to an individual with a disability who needs assistance to review the comments or other documents in the public rulemaking record for these proposed priorities, requirements, definitions, and selection criteria. If you want to schedule an appointment for this type of aid, please contact the person listed under **FOR FURTHER INFORMATION CONTACT.**

Background

With the enactment of the No Child Left Behind Act of 2001 (NCLB), our nation made a commitment to closing the achievement gap between disadvantaged and minority students and their peers and to changing the culture of America's schools so that all students receive the support and high-quality instruction they need to meet higher expectations. A critical part of this challenge, at the high school level, is reducing the number of young people who disengage and drop out of school. As several recent national studies have found, a staggering number of youth fail to graduate on time.

The complexity of the dropout problem requires the attention of multiple agencies because numerous factors contribute to a student's decision to drop out. Therefore, successful dropout prevention and reentry activities should involve many agencies and community organizations and institutions in strong collaborative activities. By combining their expertise and resources, these entities can achieve much more than they could individually. Through these proposed priorities, requirements, definitions, and selection criteria, we propose to limit eligibility for SDP funding to State educational agencies (SEAs) and, under *Priority #1,* to require an SEA to partner with at least one other agency in its efforts to reduce the dropout rate in high schools (grades 9–12) where the annual dropout rate exceeds the State average.

Another vital element for successful dropout prevention and reentry programs is the early identification of at-risk students and the implementation of a customized set of services and interventions that address the needs of those students. We propose *Priority #2* to require applicants to work with local educational agencies (LEAs) to use the State's eighth grade assessment to identify those students who could benefit from intensive early assistance. We believe that by incorporating these strategies into the SDP program, the Department would make grants to SEAs for activities that have the highest probability of reducing dropout rates.

We will announce the final priorities, requirements, definitions, and selection criteria in a notice in the **Federal Register**. We will determine the final priorities, requirements, definitions, and selection criteria after considering responses to this notice and other information available to the Department. This notice does not preclude us from proposing or using additional priorities, requirements, definitions, or selection criteria, subject to meeting applicable rulemaking requirements.

Note: This notice does *not* solicit applications. In any year in which we choose to use these proposed priorities, 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 preference priority (34 CFR 75.105(c)(2)(i)) or (2) selecting an application that meets the competitive preference 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)).

Proposed Priorities

Proposed Priority 1—Collaboration with Other Agencies

Under this priority, an applicant must include in its application evidence that other public or private entities will be involved in, or provide financial support for, the implementation of the activities described in the application. Applicants may involve such State agencies as those responsible for administering postsecondary education, Title I of the Workforce Investment Act, Temporary Assistance for Needy Families, Medicaid, the State Children's Health Insurance Program, foster care, juvenile justice, and others. Applicants also may collaborate with business and industry, civic organizations, foundations, and community- and faith-based organizations, among other private-sector entities. Acceptable evidence of collaboration is a memorandum of understanding or other document signed by the principal officer of each participating agency that identifies (1) how the agency will be involved in the implementation of the project or (2) the financial resources (cash or in-kind) that it will contribute to support the project, or both.

Rationale: The development and implementation of an effective, sustainable, and coordinated statewide school dropout prevention and reentry program requires significant participation by other public or private entities. Students drop out for a myriad of reasons, some of which are beyond the control of schools. The resources and expertise of health, juvenile justice, social services, workforce development, and other agencies can make a powerful contribution to improving student retention in and completion of high school. Business and industry, community- and faith-based organizations, and other private entities also can play valuable roles in a comprehensive dropout prevention and reentry strategy.

Proposed Priority 2—Individual Performance Plans for At-Risk Incoming Ninth Grade Students

Under this priority, an applicant must propose to work with LEAs to assist schools in using eighth grade assessment and other data to develop and implement (in consultation with parents, teachers, and counselors) individual performance plans for students entering the ninth grade who are at risk of failing to meet challenging State academic standards and of dropping out of high school. The plans would identify specific interventions to improve the academic achievement of these students and other supports and services they need in order to succeed in high school.

Rationale: Though junior high schools and middle schools have extensive information about the academic achievement and special needs of their students, this information often does not follow students immediately as they enter ninth grade. Too frequently, the

special needs of at-risk students entering the ninth grade go unrecognized by school administrators and teachers until well into the academic year. Academic assessment and other relevant data about each entering ninth grade student should be immediately and readily accessible to high school administrators, teachers, and counselors at the start of the school year so that they can identify at-risk students and devise a customized set of services and interventions to help them succeed.

Proposed Additional Requirements

The Assistant Secretary proposes the following requirements for the SDP program. We may apply these requirements in any year in which this program is in effect.

Proposed Eligibility Requirement—State Educational Agencies

The Secretary proposes that to be eligible for funding under this program, an applicant must be an SEA.

Rationale: Federal resources under this program can be used most effectively to improve high school completion rates by using those resources to support the implementation of comprehensive, statewide strategies by SEAs. Under this approach, high schools within a State that have dropout rates above the State average would receive technical assistance and support from an SEA that receives funding through the SDP program. Awarding grants to a small number of LEAs would have a far more limited impact.

Proposed Evaluation Requirements

We propose to require that each applicant include in its application a plan to support an independent, third-party evaluation of its SDP project and that the applicant reserve not less than 10 percent of its grant award for this evaluation. We propose that, at a minimum, the evaluation must—

(a) Be both formative and summative in nature;

(b) Include performance measures that are clearly related to the intended outcomes of the project and the Government Performance and Results Act (GPRA) indicators for the SDP program described elsewhere in this notice;

(c) Measure the effectiveness of the project, including a comparison between the intended and observed results and, if appropriate, a demonstration of a clear link between the observed results and the specific treatment given to project participants;

(d) Measure the extent to which the SEA implements an effective, sustainable, and coordinated school dropout prevention and reentry program; and

(e) Measure the extent to which the project implements research-based strategies and practices.

In addition, we propose to require that applicants submit their proposed project evaluation designs to the Department for review and approval prior to the end of the second month of the project period.

We also propose that each evaluation include (i) an annual report for each of the first two years of the project period, and (ii) a final report that would be completed at the end of the third year of implementation and that would include information on implementation during the third year as well as information on the implementation of the project across the entire project period. We would require each grantee to submit each of these annual reports to the Department along with its required annual performance report.

Rationale: The implementation of an effective, sustainable, and coordinated statewide school dropout prevention and reentry program is difficult and complex work that requires coordinating a variety of activities with multiple entities. An evaluation that provides regular feedback on the progress of implementation and the project's outcomes can help the SEA identify successes and areas in which improvement is needed.

Proposed Performance Measures Requirements

Under the GPRA, the Department is currently using the following two performance measures to assess the effectiveness of the SDP program: (1) the dropout rate in schools receiving program funds, and (2) the percentage of students reentering schools who complete their secondary education. Applicants for a grant under this program are advised to consider these two performance measures in conceptualizing the approach and evaluation of their proposed project. To assist the Department in assessing progress under the first measure, we propose that an applicant use its State event dropout rate as the GPRA indicator and submit, as part of its application to the Department, a projected State event dropout rate for each year of the project. If funded, applicants would then be asked to collect and report data for these indicators in their performance and final reports for each year of the project. We will notify grantees if they will be required to provide any additional information related to the two measures.

Proposed Requirements for Accountability for Results

We propose to require applicants to identify in their applications at least two specific performance indicators and annual performance objectives for the schools that receive services and technical assistance through projects funded under this program in addition to the two GPRA indicators. Applicants may identify and report on additional student indicators, such as graduation rates; year-to-year retention; rates of average daily attendance; the percentage of secondary school students who score at the proficient or advanced levels on the reading/English language arts and mathematics assessments used by the State to measure adequate yearly progress under part A of title I of the Elementary and Secondary Education Act of 1965, as amended (ESEA); student achievement and gains in English proficiency; and the incidence of school violence, drug and alcohol use, and disciplinary actions.

We propose to require applicants to identify annual performance objectives for the two GPRA indicators and the two additional indicators identified in the application. The Department intends to negotiate these performance levels with potential grantees.

We are proposing that applicants identify all outcomes in their evaluation plan that are relevant to the scope of the project and will assist in continuous improvement of the services offered.

Proposed Definitions

In addition to the definitions in the authorizing statute and 34 CFR 77.1, we propose that the following definitions also apply to this program. We may apply these definitions in any year in which we conduct a SDP competition.

High school dropout means an individual who

(a) Was enrolled in a district in grades 9–12 at some time during the preceding school year;

(b) Was not enrolled at the beginning of the current school year;

(c) Has not graduated or completed a program of studies by the maximum age established by a State;

(d) Has not transferred to another public school district or to a nonpublic school or to a State-approved educational program; and

(e) Has not left school because of death, illness, or a school-approved absence.

State event dropout rate means the dropout rate calculated by dividing the number of high school dropouts (as defined elsewhere in this notice) in the State by the total number of students

enrolled in grades 9 through 12 in public schools in the State during the current school year. This calculation is based upon the annual school event dropout rate calculation of the National Center for Education Statistics' Common Core of Data.

School event dropout rate means the dropout rate calculated by dividing the number of high school dropouts (as defined elsewhere in this notice) in a school by the total number of students enrolled in grades 9 through 12 in that school during the current school year.

Proposed Selection Criteria

In addition to the selection criteria to be selected by the Department from among the criteria in 34 CFR part 210, we propose to use the following selection criteria to evaluate applications for new grants under this program. We may apply these criteria in any year in which we conduct a SDP competition.

Quality of project design. In determining the quality of the project design, we will consider the extent to which—

(a) The applicant demonstrates its readiness to implement a comprehensive and coordinated statewide dropout and reentry program;

(b) The activities described in the application are evidence-based and likely to be successful in improving the graduation rate within the State, particularly among youth who are at the greatest risk of dropping out;

(c) Other public and private agencies will support and participate in the implementation of the proposed project; and

(d) The technical assistance activities that will be undertaken by the applicant are likely to be successful in helping local educational agencies use eighth grade assessment and other data to develop individual performance plans for entering ninth graders who are at risk of failing to meet challenging State academic standards and of dropping out of high school.

Adequacy of resources. In determining the adequacy of resources for the proposed project, we consider the following factors:

(a) The extent of the cash or in-kind support the SEA will provide.

(b) The extent of the cash or in-kind support other public and private agencies will contribute to the implementation of the proposed project.

Quality of the management plan. In determining the quality of the management plan for the proposed project, we consider the following:

(a) The adequacy of the management plan to achieve the objectives of the proposed project on time and within budget, including the extent to which the plan clearly defines the roles and responsibilities of each agency and its key personnel and establishes detailed timelines and milestones for accomplishing each of the project tasks.

Quality of the project evaluation. In determining the quality of the evaluation, we consider the following factors:

(a) Whether the independent third-party evaluator identified in the application has the necessary background and expertise to carry out the evaluation.

(b) The extent to which the methods of evaluation will yield accurate and reliable data for each of the required performance indicators.

(c) The extent to which the evaluation will produce reports or other documents at appropriate intervals to enable the agencies, organizations, or institutions participating in the project to use the data for planning and decision-making for continuous program improvement.

Executive Order 12866

This notice of proposed priorities, 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 the notice of proposed priorities, 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 proposed priorities, requirements, definitions, and selection criteria, we have determined that the benefits of the proposed priorities, 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.

Electronic Access to This Document

You may view this document, as well as all other Department of Education documents published in the **Federal Register**, in text or Adobe Portable Document Format (PDF) on the Internet at the following site: *http://www.ed.gov/news/fedregister.*

To use PDF you must have Adobe Acrobat Reader, which is available free at this site. If you have questions about using PDF, call the U.S. Government Printing Office (GPO), toll free, at 1–888–293–6498; or in the Washington, DC, area at (202) 512–1530.

Note: The official version of this document is the document published in the **Federal Register**. Free Internet access to the official edition of the **Federal Register** and the Code of Federal Regulations is available on GPO Access at: *http://www.access.gpo.gov/nara/index/html.*

(Catalog of Federal Domestic Assistance Number 84.360A School Dropout Prevention Program)

Program Authority: 20 U.S.C. 6561–6561d.

Dated: May 9, 2005.

Susan Sclafani,

Assistant Secretary for Vocational and Adult Education.

[FR Doc. 05–9618 Filed 5–12–05; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket Nos. EC05–74–000, et al.]

The Governor & Company of the Bank of Scotland, Lehman Commercial Paper, Inc. and Granite Ridge Energy, LLC, *et al.;* Electric Rate and Corporate Filings

May 6, 2005.

The following filings have been made with the Commission. The filings are listed in ascending order within each docket classification.

1. The Governor & Company of the Bank of Scotland, Lehman Commercial Paper Inc. and Granite Ridge Energy, LLC

[Docket Nos. EC05–74–000]

Take notice that on April 21, 2005 The Governor & Company of the Bank of Scotland (bank of Scotland), Lehman Commercial Paper Inc. (Lehman) and Granite Ridge Energy, LLC (Granite Ridge) (collectively, Applicants) filed with the Commission an application

pursuant to section 203 of the Federal Power Act for authorization for the sale of transfer of all of Bank of Scotland's indirect equity interests in Granite Ridge to Lehman.

Comment Date: 5 p.m. Eastern Time on May 16, 2005.

2. Cottonwood Energy Company LP, Magnolia Energy LP, Redbud Energy LP, Cottonwood Energy Company LP, Magnolia Energy LP and Redbud Energy LP

[Docket No. EC05–77–000, ER01–642–002, ER01–1335–004, ER01–1335–004]

Take notice that on May 2, 2005, Cottonwood Energy Company LP, Magnolia Energy LP, and Redbud Energy LP (Applicants) submitted an application pursuant to section 203 of the Federal Power Act for authorization of an internal upstream corporate reorganization. The Applicants also provided notice of change in status with respect to the change in the indirect upstream ownership of each that will be affected by the reorganization.

Comment Date: 5 p.m. Eastern Time on May 24, 2005.

3. Dominion Energy Kewaunee, Inc.

[Docket No. EG05–61–000]

Take notice that on April 22, 2005, Dominion Energy Kewaunee, Inc., c/o Dominion Resources, Inc., 120 Tredegar Street, Richmond, Virginia 23219 (Applicant), filed with the Federal Energy Regulatory Commission (Commission) an application for determination of exempt wholesale generator status pursuant to part 365 of the Commission's regulations. Applicant states that it is a Wisconsin corporation and is an indirect, wholly-owned subsidiary of Dominion Resources, Inc., and that it proposes to acquire, own and operate an approximately 543 megawatt pressurized water single reactor nuclear power plant located in Town of Carlton in Kewaunee County, Wisconsin. Applicant further states that all of the electric energy produced by the facility will be sold at wholesale.

Comment Date: 5 p.m. Eastern Time on May 13, 2005.

4. Duke Energy Hanging Rock, LLC

[Docket No. ER03–17–004]

Take notice that, on April 29, 2005, Duke Energy Hanging Rock, LLC (Duke Hanging Rock) 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). Duke Hanging Rock requests an effective date of March 20, 2005.

Duke Hanging Rock 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 20, 2005.

5. POSDEF Power Company, L.P.

[Docket No. ER04–947–002]

Take notice that on April 29, 2005, POSDEF Power Company, L.P. (POSDEF Power), filed with the Commission a change in status of its ownership. In addition, POSDEF Power states that it is complying with Commission Order No. 652, Reporting Requirement for Changes in Status for Public Utilities with Market-Based Rate Authority.

POSDEF Power states that this filing has been served on the Florida Public Service Commission and all parties listed on the Commission's official service list.

Comment Date: 5 p.m. Eastern Time on May 20, 2005.

6. PJM Interconnection, L.L.C.

[Docket No. ER05–10–000]

Take notice that on April 25, 2005, PJM Interconnection, L.L.C. (PJM) filed an updated analysis of the regulation service market in the portion of the PJM region covered by the geographic territories of Allegheny Power, American Electric Power Company (AEP), Commonwealth Edison Company (including Commonwealth Edison Company of Indiana) (ComEd), The Dayton Power and Light Company (Dayton), and Dusquesne Light Company (Dusquesne).

Comment Date: 5 p.m. Eastern Time on June 6, 2005.

7. Pacific Gas and Electric Company

[Docket No. ER05–390–001]

Take notice that on April 27, 2005, Pacific Gas and Electric Company (PG&E) and Turlock Irrigation District (Turlock) (together, Sponsoring Parties) submitted an Offer of Settlement. The Sponsoring Parties state that the Settlement results in a Revised Interconnection Agreement between PG&E and Turlock which is part of the April 27, 2005 filing and is intended to become a filed rate schedule under this Settlement.

The Sponsoring Parties state that a copy of the Settlement has been served on all parties on the official service list in this proceeding and all persons requited to be served pursuant to Rule 602(d).

Comment Date: 5 p.m. Eastern Time on May 18, 2005.

8. Allegheny Power

[Docket No. ER05–512–002]

Take notice that on April 29, 2005, Monongahela Power Company, The Potomac Edison Company, and West Penn Power Company, all doing business as Allegheny Power, filed an amendment to its previous filing of January 28, 2005 in Docket No. ER05–512–000 relating to eight First Revised Interconnection and Operating Agreements entered in to with Allegheny Power's affiliate, Allegheny Energy Supply Company, LLC (AE Supply). Allegheny Power states that the purpose of the amendment is to provide support for the capital structure utilized in the cost calculations supporting the revised charges pursuant to request by reviewing Commission staff. Allegheny Power requests an effective date of April 1, 2005.

Comment Date: 5 p.m. Eastern Time on May 20, 2005.

9. Grant Energy, Inc.

[Docket No. ER05–557–002]

Take notice that on April 29, 2005, Grant Energy, Inc. (Grant), tendered for filing as part of its market-based rate tariff, Original Volume No. 1, First Revised Sheet No. 3, in compliance with the Commission's Order issued March 30, 2005 Order in Docket Nos. ER05–557–000 and 001.

Comment Date: 5 p.m. Eastern Time on May 20, 2005.

10. Ramco Generating One, Inc.

[Docket No. ER05–564–001]

Take notice that on April 29, 2005, Ramco Generating One, Inc. submitted a compliance filing pursuant to the Commission's order issued March 31, 2005 in Docket No. ER05–564–000 to corporate the change in status reporting requirements of Order No. 652.

Comment Date: 5 p.m. Eastern Time on May 20, 2005.

11. Mill Run Windpower, LLC

[Docket No. ER05–660–001]

Take notice that, on April 22, 2005 and April 29, 2005, Mill Run Windpower, LLC (Mill Run) filed supplements to its April 15, 2005 filing in the above-referenced docket. Mill Run states that the purpose of these filings is to correct an Order No. 614 designation.

Mill Run states that copies of the filing were served on parties on the official service list in the above-captioned proceeding and on the Florida Public Service Commission.

Comment Date: 5 p.m. Eastern Time on May 20, 2005.

12. Wisconsin Electric Power Company

[Docket No. ER05–760–002]

Take notice that on April 29, 2005, Wisconsin Electric Power Company (Wisconsin Electric) tendered for filing an Errata to Amendment No. 2 to the Joint Operating Agreement between Wisconsin Electric and Edison Sault, which was filed by Wisconsin Electric on March 31, 2005. Wisconsin Electric states that the errata is intended to correct a misstatement of a formula on First Revised Sheet No. 24. Wisconsin Electric requests an effective date of April 1, 2005.

Comment Date: 5 p.m. Eastern Time on May 20, 2005.

13. Southern Company Services, Inc.

[Docket No. ER05–914–000]

Take notice that on April 29, 2005, Southern Company Services, Inc. (Southern Companies) submitted for filing to tune-up the charges based on projected data collected for transmission service under their Open Access Transmission Tariff (Tariff) during calendar year 2004.

Comment Date: 5 p.m. Eastern Time on May 20, 2005.

14. Virginia Electric and Power Company and The Potomac Edison Company

[Docket Nos. ER05–915–000 and ER05–916–000]

Take notice that on April 29, 2005, Virginia Electric and Power Company and The Potomac Edison Company (PE), (collectively, Applicants) jointly tendered for filing a revised and integrated Borderline Interchange Agreement (Interchange Agreement) designated as Virginia Electric Power Company's First Revised Rate Schedule FERC No. 122 and a substantively identical Interchange Agreement designated as PE's First Revised Rate Schedule FERC No. 55. Applicants state that the rate schedules have been integrated and modified to reflect the re-establishment of a delivery point. Applicants request an effective date of April 29, 2005.

Applicants state that copies of the filing were served upon Dominion Virginia Power, PE and the Virginia State Corporation Commission.

Comment Date: 5 p.m. Eastern Time on May 20, 2005.

15. PJM Interconnection, L.L.C.

[Docket No. ER05–917–000]

Take notice that on April 29, 2005, PJM Interconnection, L.L.C. (PJM) submitted for filing amendments to the PJM Open Access Transmission Tariff (Tariff) to provide for compliance with the Commission's March 30, 2005 Order, 110 FERC ¶ 61,388 (2005), directing transmission-owning public utilities in the Eastern Interconnection using North American Electric Reliability Council's (NERC) revised Transmission Loading Relief (TLR) procedures to file a notice informing the Commission that they would use the NERC TLR procedures, and that their tariffs should be considered to be so modified. PJM requests an effective date of April 1, 2005.

PJM states that copies of this filing have been served on all PJM members and the utility regulatory commissions in the PJM region.

Comment Date: 5 p.m. Eastern Time on May 20, 2005

16. Northeast Utilities Service Company, The Connecticut Light and Power Company, Western Massachusetts Electric Company, Holyoke Water Power Company, and Holyoke Power and Electric Company

[Docket No. ER05–918–000]

Take notice that on April 29, 2005, Northeast Utilities Service Company (NUSCO, on behalf of The Connecticut Light and Power Company, Western Massachusetts Electric Company, Holyoke Water Power Company, and Holyoke Power and Electric Company (collectively, the NU Companies), tendered for filing an unexecuted Sixth Amendment to a comprehensive long-term transmission service agreement between the NU Companies and the Connecticut Municipal Electric Energy Cooperative (CMEEC). NUSCO requests an effective date of May 1, 2005.

NUSCO states that copies of this filing have been served on CMEEC, the Connecticut Department of Public Utility Control, and the Massachusetts Department of Telecommunications and Energy.

Comment Date: 5 p.m. Eastern Time on May 20, 2005.

17. Mirant Americas Energy Marketing, LP

[Docket No. ER05–919–000]

Take notice that on April 29, 2005, Mirant Americas Energy Marketing, LP (Mirant), with the support of PJM Interconnection, L.L.C. (PJM), filed a Letter Agreement Regarding Offer Price Caps For Mirant Units (proposed FERC Rate Schedule No. 1), which was negotiated and executed between Mirant and PJM pursuant to Section 6.4.2 (a)(iv) of the PJM Operating Agreement. Mirant requests a waiver of section 35.13 (c), (d), (e), and (h), of the Commission's regulations. Mirant also requests that the Commission grant expedited consideration to its filing, and issue an order accepting the Letter Agreement on or before June 15, 2005. PJM states that it supports both of these requests.

Mirant has served copies of this filing on the Maryland Public Service Commission and the DC Public Service Commission.

Comment Date: 5 p.m. Eastern Time on May 20, 2005.

18. New England Power Pool

[Docket No. ER05–920–000]

Take notice that on April 29, 2005, the New England Power Pool (NEPOOL) Participants Committee filed for acceptance materials to permit NEPOOL (1) to expand its membership to include EnerNOC, Inc. (EnerNOC) and Amerada Hess Corporation (Hess) (collectively, the Applicants); and (2) to terminate the memberships of Lew A. Cummings, Inc. (Cummings) and USGen New England, Inc. (USGen). NEPOOL and the Participants Committee requests the following effective dates: April 1, 2005 for the termination of the memberships of Cummings and USGen, May 1, 2005 for the membership of EnerNOC, and July 1 for the membership of Hess.

NEPOOL and the Participants Committee state that copies of these materials were sent to the New England state governors and regulatory commissions and the Participants in NEPOOL.

Comment Date: 5 p.m. Eastern Time on May 20, 2005.

19. Entergy Services, Inc.

[Docket No. ER05–921–000]

Take notice that on April 29, 2005, Entergy Services, Inc., on behalf of the Entergy Operating Companies tendered for filing, a generic amendment to is Open Access Transmission Tariff reflecting the North American Electric Reliability Council's Transmission Loading Relief procedures accepted by the Commission in North American Reliability Council, 110 FERC ¶ 61,388 (2005).

Comment Date: 5 p.m. Eastern Time on May 20, 2005.

20. Unitil Power Corp.

[Docket No. ER05–922–000]

Take notice that on April 28, 2005, Unitil Power Corp. tendered for filing pursuant to Attachment 1 to Rate Schedule FERC No. 1, the Amended Unitil System Agreement, Appendix I, section D, the following material: Statement of all billing transactions under the Amended Unitil System

Agreement for the period January 1, 2004 through December 31, 2004 along with the actual costs incurred by Unitil Power Corp. by FERC account, including the calculation of Contract Release Payments and Administrative Service Charges.

Unitil Power Corp. states that a copy of the filing was served upon the New Hampshire Public Utilities Commission.

Comment Date: 5 p.m. Eastern Time on May 20, 2005.

21. Wisconsin Electric Power Company

[Docket No. ER05–923–000]

Take notice that on April 29, 2005, Wisconsin Electric Power Company (Wisconsin Electric) tendered for filing a proposed amendment to an agreement with Alliant Energy Corporation (Alliant) pursuant to which Wisconsin Electric provides Alliant Wholesale Distribution Export Service. Wisconsin Electric states that the purpose of the amendment is to extend the term of the agreement, to increase the rate Wisconsin Electric charges for the service and to provide for invoicing of calculated losses which is provided under Wisconsin Electric's Rate Schedule FERC No. 102. Wisconsin Electric requests an effective date of May 1, 2005.

Wisconsin Electric states that copies of this filing have been served upon Alliant, the Michigan Public Service Commission and the Public Service Commission of Wisconsin.

Comment Date: 5 p.m. Eastern Time on May 20, 2005.

22. Black Hills Power, Inc.

[Docket No. ER05–924–000]

Take notice that on April 29, 2005, Black Hills Power, Inc. (Black Hills Power), filed a notice of cancellation of its open access transmission tariff on file with the Commission as Black Hills Power & Light Company FERC Electric Tariff Original Volume No. 2 in Docket No. OA96–75–000, effective October 15, 2003 (Black Hills Power OATT). Black Hills Power states that the Black Hills Power OATT has been superseded by the Joint Open Access Transmission Tariff of Black Hills Power, as Joint Tariff Administrator, Basin Electric Power Cooperative, and Powder River Energy Corporation on file with FERC in Docket No. ER03–1354. Black Hills Power requests an effective date of October 15, 2003.

Comment Date: 5 p.m. Eastern Time on May 20, 2005.

23. Apex Power, LLC

[Docket No. QF05–99–000]

Take notice that on April 29, 2005, Apex Power, LLC, (Apex Power) tendered a filing with Commission an application for certification of a facility as a qualifying cogeneration facility pursuant to section 292.207(b) of the Commission's regulations. Apex Power.

Comment Date: 5 p.m. Eastern Time on May 20, 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. On or before the comment date, it is not necessary to serve motions to intervene or protests on persons other than the Applicant.

The Commission encourages electronic submission of protests and interventions in lieu of paper using the ''eFiling'' link at *http://www.ferc.gov*. Persons unable to file electronically should submit an original and 14 copies of the protest or intervention to the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

This filing is accessible on-line at *http://www.ferc.gov*, using the ''eLibrary'' link and is available for review in the Commission's Public Reference Room in Washington, DC. There is an ''eSubscription'' link on the web site that enables subscribers to receive e-mail notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please e-mail *FERCOnlineSupport@ferc.gov*, or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Linda Mitry,

Deputy Secretary.

[FR Doc. E5–2372 Filed 5–12–05; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket Nos. ER00–3767–003, et al.]

Praxair, Inc., et al.; Electric Rate and Corporate Filings

May 9, 2005.

The following filings have been made with the Commission. The filings are listed in ascending order within each docket classification.

1. Praxair, Inc.

[Docket No. ER00–3767–003]

Take notice that on May 2, 2005, Praxair, Inc. (Praxair) filed a supplement to its currently pending triennial market power update and submitted a revised market-based tariff to comply with *Investigation of Terms and Conditions of Public Utility Market-Based Rate Authorizations*, 105 FERC ¶ 61,218 (2003), *on reh'g*, 107 FERC 61,175 (2004) and *Reporting Requirements for Changes of Status for Public Utilities with Market-Based Rate Authority*, 110 FERC ¶ 61,097 (2005).

Comment Date: 5 p.m. Eastern Time on May 23, 2005.

2. Southern California Edison Company

[Docket No. ER02–2263–003]

Take notice that, on May 2, 2005, Southern California Edison Company (SCE) submitted a notification of change in status and a revised market-based tariff sheet reflecting the reporting requirements adopted by the Commission in Order No. 652, *Reporting Requirement for Changes in Status for Public Utilities with Market-Based Rate Authority*, 110 FERC ¶ 61,097 (2005).

SCE states that copies of the filing were served on all parties in Docket No. ER02–2263.

Comment Date: 5 p.m. Eastern Time on May 23, 2005.

3. Southern California Water Company

[Docket No. ER02–2400–003]

Take notice that, on May 2, 2005, Southern California Water Company (SCWC) submitted a compliance filing pursuant to the Commission's April 1, 2005 letter order directing SCWC to amend its market-based tariff to incorporate language required by the Commission in *Reporting Requirement for Changes in Status For Public Utilities With Market-Based Rate Authority*, Order No. 652, 110 FERC ¶ 61,097 (2005).

SCWC 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 23, 2005.

4. Entergy Services, Inc.

[Docket No. ER03–171–005]

Take notice that on May 2, 2005, Entergy Services, Inc. (Entergy Services), on behalf of Entergy Mississippi, Inc. (Entergy Mississippi), tendered for filing an amendment to Entergy Services' November 7, 2002 filing of a unilaterally executed Interconnection and Operating Agreement between Entergy Mississippi and South Mississippi Electric Power Association (SMEPA) under the 1979 Interconnection Agreement between Entergy Mississippi and SMEPA, in response to the Commission's letter requesting further information issued on March 31, 2005.

Comment Date: 5 p.m. Eastern Time on May 23, 2005.

5. Midwest Independent Transmission System Operator, Inc. and PJM Interconnection, L.L.C.

[Docket No. ER04–375–021]

Take notice that on May 2, 2005, the Midwest Independent Transmission System Operator, Inc. (Midwest ISO) and PJM Interconnection, L.L.C. (PJM), submitted revisions to the Joint Operating Agreement between the Midwest ISO and PJM in compliance with the Commission's order issued March 3, 2005 in *Midwest Independent Transmission System Operator, Inc.*, 110 FERC ¶ 61,226 (2005).

Comment Date: 5 p.m. Eastern Time on May 23, 2005.

6. Midwest Independent Transmission System Operator, Inc.

[Docket Nos. ER04–691–036; EL04–104–034; ER04–106–007]

Take notice that on May 2, 2005, as amended on May 3, 2005, the Midwest Independent Transmission System Operator, Inc. (Midwest ISO) submitted a compliance filing pursuant to the Commission's order issued April 15, 2005 in *Midwest Independent Transmission System Operator, Inc.*, 111 FERC ¶ 61,043 (2005).

Comment Date: 5 p.m. Eastern Time on May 23, 2005.

7. New York Independent System Operator, Inc.

[Docket No. ER05–119–000]

Take notice that on May 2, 2005, New York Independent System Operator, Inc. (NYISO) submitted a Report on Status of Voltage Support Service Enhancements in compliance with the Commission's order issued December 28, 2004 in *New York Independent System Operator, Inc.*, 109 FERC ¶ 61,367 (2004).

Comment Date: 5 p.m. Eastern Time on May 23, 2005.

8. ISO New England Inc. and New England Power Pool

[Docket No. ER05–531–002]

Take notice that on May 2, 2005, ISO New England Inc. (the ISO) and the New England Power Pool (NEPOOL) Participants Committee jointly submitted a compliance filing pursuant to the Commission's order issued March 31, 2005 in Docket No. ER05–531–000, *New England Power Pool and ISO New England Inc.*, 110 FERC ¶ 61,396 (2005).

The ISO and NEPOOL state that copies of the filing were served on parties on the official service list in the above-referenced proceeding, as well as, to the governors and state regulatory commissions in the New England states. The ISO and NEPOOL further state that electronic copies were submitted to the NEPOOL Participants Committee members, which constitute the ISO's Governance Participants.

Comment Date: 5 p.m. Eastern Time on May 23, 2005.

9. Michigan Electric Transmission Company, LLC

[Docket No. ER05–704–001]

Take notice that on May 2, 2005 Michigan Electric Transmission Company, LLC (METC) submitted certain information intended to supplement its March 14, 2005 filing in Docket No. ER05–704–000.

Comment Date: 5 p.m. Eastern Time on May 23, 2005.

10. KRK Energy

[Docket No. ER05–713–002]

Take notice that on May 2, 2005, KRK Energy submitted an amendment to it April 15, 2005 filing in Docket No. ER05–713–001

Comment Date: 5 p.m. Eastern Time on May 23, 2005.

11. Puget Sound Energy, Inc.

[Docket No. ER05–861–001]

Take notice that on May 2, 2005, Powerex Corp. (Powerex) submitted for filing a Certificate of Concurrence with respect to Puget Sound Energy, Inc.'s April 26, 2005 filing of an amendment to the agreement for a Temporary Puget Sound Area and Northern Intertie Redispatch Pilot Program in Docket No. ER05–861–000.

Powerex states that copies of the filing have been provided to Bonneville Power Administration, Puget Sound Energy, and City of Seattle, Public Utility District No. 1 of Snohomish County, and Intalco Aluminum Corporation.

Comment Date: 5 p.m. Eastern Time on May 23, 2005.

12. Westar Energy, Inc.

[Docket No. ER05–925–000]

Take notice that on May 2, 2005, Westar Energy, Inc. (Westar) submitted changes to Westar's Open Access Transmission Tariff, FERC Electric Tariff, Second Revised Volume No. 5 (Westar OATT) in order to update its Schedules 1, 2, 3, 5, 6, 7, and 8, and Attachment H and to incorporate a new Attachment H–1 that sets forth a formula to be used annually to update rates for transmission service on the Westar system. Westar proposes an effective date of July 1, 2005 for the changes to the Westar OATT, which is sixty days from the date of filing.

Westar states it has served a copy of this filing on each of the affected customer and state commissions.

Comment Date: 5 p.m. Eastern Time on May 23, 2005.

13. Midwest Independent Transmission System Operator, Inc.

[Docket No. ER05–926–000]

Take notice that on May 2, 2005, the Midwest Independent Transmission System Operator, Inc. (Midwest ISO) submitted a Large Generator Interconnection Agreement among Zilkha Renewable Energy Midwest IV, LLC, Interstate Power and Light Company, a wholly-owned subsidiary of Alliant Energy Corporation, and the Midwest ISO.

Midwest ISO states that a copy of this filing was served on Zilkha Renewable Energy Midwest IV, LLC and Interstate Power and Light Company.

Comment Date: 5 p.m. Eastern Time on May 23, 2005.

14. PJM Interconnection, L.L.C.

[Docket No. ER05–927–000]

Take notice that on May 2, 2005, PJM Interconnection, L.L.C. (PJM), submitted for filing an executed interconnection service agreement (ISA) and an executed construction service agreement (CSA) among PJM, the Harrisburg Authority, and PPL Electric Utilities. PJM requests a waiver of the Commission's 60-day notice requirement to permit a March 31, 2005 effective date for the ISA and CSA.

PJM states that copies of this filing were served upon the parties to the agreements and the state regulatory commissions within the PJM region.

Comment Date: 5 p.m. Eastern Time on May 23, 2005.

15. Duke Energy Corporation

[Docket No. ER05–928–000]

Take notice that, on May 2, 2005, Duke Energy Corporation, on behalf of Duke Electric Transmission, (collectively, Duke), submitted revised tariff sheets in compliance with Order No. 2003–B, *Standardization of Interconnection Agreements and Procedures*, 109 FERC ¶ 61,287. Duke requests as effective date of January 19, 2005

Duke states that copies of the filing were served on all Open Access Transmission Tariff customers as well as the North Carolina and South Carolina Public Service Commissions.

Comment Date: 5 p.m. Eastern Time on May 23, 2005.

16. Premcor Generating LLC

[Docket No. ER05–929–000]

Take notice that on May 2, 2005, Premcor Generating LLC, tendered for filing a Notice of Cancellation pursuant to 18 CFR 35.15 to reflect the cancellation of its FERC Electric Service Tariff, Rate schedule FERC No. 1, Original Sheet Nos. 1–3.

Premcor Generating LLC states that copies of this filing were served upon the public utility's jurisdictional customers, Premcor Power Marketing LLC and Tennessee Valley Authority.

Comment Date: 5 p.m. Eastern Time on May 23, 2005.

17. Black Hills Colorado, LLC

[Docket No. ER05–930–000]

Take notice that on May 2, 2005, Black Hills Colorado, LLC submitted a Notice of Succession, notifying the Commission that it has succeeded, by reason of name change, to the market-based rate wholesale power sales rate schedule of Indeck Colorado, LLC, FERC Electric Rate Schedule No. 1, together with service agreements thereunder. Black Hills requests an effective date of June 29, 2000.

Comment Date: 5 p.m. Eastern Time on May 23, 2005.

18. Midwest Independent Transmission System Operator, Inc.

[Docket No. ER05–932–000]

Take notice that on May 2, 2005, the Midwest Independent Transmission System Operator, Inc. (Midwest ISO) filed proposed revisions to its Open Access Transmission and Energy Markets Tariff to clarify certain provisions of the Tariff.

Comment Date: 5 p.m. Eastern Time on May 23, 2005.

19. Idaho Power Company

[Docket No. ER97–1481–009]

Take notice that on May 2, 2005, Idaho Power Company (Idaho Power) submitted a Notice of Change in Status pursuant to the Commission's Order issued March 3, 2005 in *Idaho Power Co.*, 110 FERC ¶ 61,219 (2005) and Order No. 652, *Reporting Requirements for Changes in Status for Public Utilities with Market-Based Authority*, 110 FERC ¶ 61,097 (2005).

Idaho Power Company states that copies of the filing were served on parties on the official service list.

Comment Date: 5 p.m. Eastern Time on May 23, 2005.

20. The Empire District Electric Company

[Docket Nos. ER99–1757–009]

Take notice that, on May 2, 2005, The Empire District Electric Company (Empire) submitted a compliance filing pursuant to the Commission's order issued March 3, 2005 in *The Empire District Electric Company*, 110 FERC ¶ 61,214 (2005).

Empire states that copies of the filing were served on wholesale customers in Empire's control area in the Southwest Power Pool, Inc., parties on the official service list, and the appropriate state commissions.

Comment Date: 5 p.m. Eastern Time on May 23, 2005.

21. Tampa Electric Company, Panda Gila River, L.P., Union Power Partners, L.P., TECO EnergySource, Inc., Commonwealth Chesapeake Company, L.L.C., TPS Dell, LLC, TPS McAdams, LLC and TECO–PANDA Generating Company, L.P.

[Docket Nos. ER99–2342–007, ER01–931–011; ER01–930–011;. ER96–1563–024; ER99–415–010; ER02–510–007;. ER02–507–007; ER02–1000–002]

Take notice that, on May 2, 2005, Tampa Electric Company, Panda Gila River, L.P., Union Power Partners, L.P., TECO Energy Source, Inc., TPS Dell, LLC, TPS McAdams, LLC, and TECO-PANDA Generating Company, L.P. submitted a filing in compliance with the Commission's Order issued March 3, 2005, in *Tampa Electric Company, et al.*, 110 FERC ¶ 61,206 (2005).

Comment Date: 5 p.m. Eastern Time on May 23, 2005.

22. Baltimore Gas and Electric Company, Constellation Power Source Generation, Inc., Calvert Cliffs Nuclear Power Plant, Inc., Constellation Energy Commodities Group, Inc. (f/k/a Constellation Power Source, Inc.), Handsome Lake Energy, LLC, University Park Energy, LLC, Holland Energy , LLC, Wolf Hills Energy, LLC, Big Sandy Peaker Plant, LLC, Nine Mile Point Nuclear Station, LLC, High Desert Power Project, LLC, Constellation NewEnergy, Inc., Constellation Energy Commodities Group Maine, LLC (f/k/a Constellation Power Source Maine, LLC), Power Provider LLC and R.E. Ginna Nuclear Power Plant, LLC

[Docket Nos. ER99–2948–004, ER00–2918–004, ER00–2917–004, ER05–261–001, ER01–556–003, ER01–557–003, ER01–558–003, ER01–559–003, ER01–560–003, ER01–1654–006, ER01–2641–004, ER02–2567–004, ER05–728–001, ER01–1949–004 and ER04–485–001]

Take notice that on May 2, 2005, the above-captioned entities (Constellation MBR Entities) filed a Notice of Change in Status and revised market-based rate tariff sheets to incorporate the reporting requirements adopted by the Commission in Order No. 652, *Reporting Requirement for Change in Status for Public Utilities with Market-Based Rate Authority*, 110 FERC ¶ 61,097 (2005).

The Constellation MBR Entities state that copies of this notification were served upon all persons on the service lists in the above-captioned dockets.

Comment Date: 5 p.m. Eastern Time on May 23, 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. On or before the comment date, it is not necessary to serve motions to intervene or protests on persons other than the Applicant.

The Commission encourages electronic submission of protests and interventions in lieu of paper using the ''eFiling'' link at *http://www.ferc.gov*. Persons unable to file electronically

should submit an original and 14 copies of the protest or intervention to the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

This filing is accessible on-line at *http://www.ferc.gov*, using the ''eLibrary'' link and is available for review in the Commission's Public Reference Room in Washington, DC. There is an ''eSubscription'' link on the web site that enables subscribers to receive email notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please email *FERCOnlineSupport@ferc.gov*, or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Linda Mitry,

Deputy Secretary.

[FR Doc. E5–2373 Filed 5–12–05; 8:45 am]

BILLING CODE 6717–01–P

ENVIRONMENTAL PROTECTION AGENCY

[FRL–7912–8]

Establishment of a Federal Advisory Committee to Examine Detection and Quantitation Approaches in Clean Water Act Programs

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice; Establishment of FACA Committee and Meeting Announcement.

SUMMARY: As required by the Federal Advisory Committee Act, we are giving notice that the Environmental Protection Agency is establishing the Federal Advisory Committee on Detection and Quantitation Approaches and Uses in Clean Water Act Programs. The purpose of this Committee is to evaluate and recommend detection and quantitation procedures for use in EPA's analytical methods programs for compliance monitoring under 40 CFR part 136. The Committee will analyze and evaluate relevant scientific and statistical approaches, protocols, review data and interpretations of data using current and recommended approaches. The major objectives are to provide advice and recommendations to the EPA Administrator on policy issues related to detection and quantitation and scientific and technical aspects of procedures for detection and quantitation. We have determined that this is in the public interest and will assist the Agency in performing its duties under the Clean Water Act, as amended.

Copies of the Committee Charter will be filed with the appropriate committees of Congress and the Library of Congress.

FOR FURTHER INFORMATION CONTACT: Marion Kelly, Engineering and Analysis Division, MC4303T, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460; Telephone number: (202) 566–1045; Fax number: (202) 566–1053; e-mail address: *Kelly.Marion@epa.gov.*

SUPPLEMENTARY INFORMATION: In 1999, several industry groups filed suit against EPA (*Alliance of Automobile Manufacturers* v. *EPA, DC Cir., No. 99–1420*) as a result of EPA revisions of a test used to measure mercury concentrations at low levels, and in October, 2000, EPA entered into a Settlement Agreement that required EPA to assess and revise procedures to determine detection and quantitation limits under EPA's CWA programs by November 1, 2004.

On March 12, 2003, EPA published two notices in the **Federal Register**. One announced the availability of a Technical Support Document that described EPA's reassessment of detection and quantitation concepts and procedures (68 FR 11791), and the second proposed revisions to the MDL and ML definitions and procedures (68 FR 11770).

Many of the 126 comments EPA received in response to the **Federal Register** notices were critical of the assessment and proposed revisions. Rather than proceeding with the revisions, EPA decided to contract with a neutral third party to conduct a situation assessment to explore the feasibility and design of a stakeholder process. This decision was announced in a **Federal Register** notice dated September 15, 2004.

In October and November 2004, Triangle Associates, Inc. of Seattle, a neutral third party contractor, conducted the situation assessment through phone interviews with 37 representatives of Federal and State agencies, industry, environmental groups, municipal wastewater treatment plants, environmental laboratories, and organizations that establish testing methods and standards.

On November 8, 2004, EPA published a notice of document availability giving EPA's revised assessment of detection and quantitation concepts and procedures (69 FR 64704), and published a notice withdrawing the March 12, 2003, proposal (69 FR 64708). The withdrawal stated that a vast majority of commenters did not favor the proposed revisions, and that EPA planned to work with stakeholders to evaluate one or more of the approaches submitted in comments on the proposal.

As a result of the situation assessment, EPA agreed to establish a Federal Advisory Committee to obtain input from the stakeholder groups regarding detection and quantitation procedures and their use in the analytical methods in Clean Water Act programs. On December 29, 2004 (69 FR 77972), EPA published a notice announcing a public meeting on the Situation Assessment and to request nominations to the Federal Advisory Committee.

Participants: The Committee will be composed of approximately 20 members. As required by the Federal Advisory Committee Act, the FACDQ will be, balanced in terms of points of view represented and the scope of the activities of the Committee. A full-time EPA employee will act as the Designated Federal Official who will be responsible for providing the necessary staffing, operations, and support for the Committee. The committee members will be comprised of qualified senior-level professionals from diverse sectors throughout the United States from among, but not limited to, State government; environmental professionals; regulated industry; environmental laboratories; Publicly Owned Treatment Works; and the environmental community. Establishing a balanced membership with a diversity of policy experience, knowledge, and judgment, will be an important consideration in the selection of members. EPA also plans to use technical experts who will be available to provide technical assistance to the Committee. Such experts will not be members of the Committee and will not participate in the Committee's deliberations.

Dated: April 18, 2005.

Benjamin H. Grumbles,

Assistant Administrator for Water.

[FR Doc. 05–9718 Filed 5–12–05; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[ER–FRL–6663–4]

Environmental Impact Statements and Regulations; Availability of EPA Comments

Availability of EPA comments prepared pursuant to the Environmental Review Process (ERP), under section 309 of the Clean Air Act and Section 102(2)(c) of the National Environmental

Policy Act as amended. Requests for copies of EPA comments can be directed to the Office of Federal Activities at 202–564–7167.

An explanation of the ratings assigned to draft environmental impact statements (EISs) was published in FR dated April 1, 2005, 70 FR 16815.

Draft EISs

EIS No. 20050000, ERP No. D–AFS–J65435–UT, Ogden Ranger District Travel Plan, To Update the Travel Management Plan, Wasatch-Cache National Plan, Ogden Ranger District, Box Elder, Cache, Morgan, Weber and Rich Counties, UT.

Summary: EPA expressed concerns about potential adverse effects to both aquatic and terrestrial resources from the existing and proposed travel systems and from the indirect effects of unauthorized motorized use. Rating EC2.

EIS No. 20050075, ERP No. D–FRC–C03015–00, Crown Landing Liquefied Natural Gas Terminal, Construct and Operate in Gloucester County, NJ and New Castle County, DE; and Logan Lateral Project, Construct and Operate a New Natural Gas Pipeline and Ancillary Facilities in Gloucester County, NJ and Delaware, PA.

Summary: EPA expressed concerns because the Draft EIS did not include detailed mitigation plans, a discussion of Clean Air Act general conformity requirements, and did not thoroughly analyze the cumulative effects on navigation and the environment. Rating EC2.

EIS No. 20050078, ERP No. D–AFS–H65023–00, Black-Tailed Prairie Dog Conservation and Management on the Nebraska National Forest and Associated Units, Implementation, Dawes, Sioux, Blaine, Cherry, Thomas Counties, NE and Custer, Fall River, Jackson, Pennington, Jones, Lyman, Stanley Counties, SD.

Summary: EPA has no objections to any of the alternatives evaluated in the DEIS, but suggests considering non-lethal means to control prairie dog population where feasible. Rating LO.

EIS No. 20050086, ERP No. D–AFS–J65438–WY, Dean Project Area, Proposes to Implement Multiple Resource Management Actions, Black Hills National Forest, Bearlead Ranger District, Sundance, Crook County, WA.

Summary: EPA expressed environmental concerns about potential adverse impacts to water quality from additional runoff, erosion and increased sediments, and potential cumulative impacts from proposed changes to management action designations. The Final EIS should further quantify impacts and describe measures to minimize and/or mitigate environmental impacts. Rating EC2.

EIS No. 20050093, ERP No. D–NOA–K39091–CA, Monterey Accelerated Research Systems (MARS) Cabled Observatory, Proposes to Install and Operate an Advanced Undersea Cabled Observatory, Monterey Bay, Pacific Ocean Offshore of Moss Landing, Monterey County, CA.

Summary: EPA had no objections to the project as proposed. Rating LO.

EIS No. 20050121, ERP No. D–AFS–J65440–MT, Northeast Yak Project, Proposed Harvest to Reduce Fuels in Old Growth, Implementation, Kootenai National Forest, Three River Ranger District, Lincoln County, MT.

Summary: EPA acknowledges and supports the proposed benefits of the activities that will reduce impacts to water quality and fisheries and improve old growth and grizzly bear habitat. However, EPA expressed environmental concerns because it may take from 5–7 years to acquire the necessary funding and possibly longer to implement measures that will significantly reduce sediment loads. Rating EC2.

EIS No. 20050046, ERP No. DS–BLM–J67026–MT, Golden Sunlight Mine Pit Reclamation Alternatives, Updated Information, Operating Permit No. 00065 and Plan-of-Operation #MTM 82855, Whitehall, Jefferson County, MT.

Summary: EPA expressed concerns about the need for perpetual treatment to meet water quality standards under all alternatives, and requested additional consideration of potential mitigation to reduce risks to water quality primarily in the partial pit-backfill alternatives. Rating EC2.

EIS No. 20050087, ERP No. DS–BLM–K67038–NV, Ruby Hill Mine Expansion—East Archimedes Project, Extension of Existing Open Pit and Expansion of Two Existing Waste Rock Disposal Areas, Plan-of-Operations Permit, Eureka County, NV.

Summary: EPA expressed environmental concerns about the potential impacts of pit lake water quality on aquatic life and water fowl, heap leach closure, and surface water diversion structure design and maintenance, and recommended the Final SEIS provide additional information and identify additional mitigation. Rating EC2.

EIS No. 20050109, ERP No. DS–NOA–C91004–00, Amendment to the Fishery Management Plans (FMP), Amendment 2 for the Spiny Lobster Fishery; Amendment 1 for the Queen Conch Resources; Amendment 3 for the Reef Fish Fishery; Amendment 2 Corals and Reef Associated Invertebrate, U.S. Caribbean to Address Required Provisions MSFCMA, Puerto Rico and the U.S. Virgin Island.

Summary: EPA has no objection to the proposed action. Rating LO.

Final EISs

EIS No. 20050101, ERP No. F–AFS–K65266–AZ, Arizona Snowbowl Facilities Improvements, Proposal to Provide a Consistent/Reliable Operating Season, Coconino National Forest, Coconino County, AZ.

Summary: No formal comment letter was sent to the preparing agency.

EIS No. 20050130, ERP No. F–AFS–F65048–WI, Lakewood/Laona Plantation Thinning Project, To Implement Vegetation Management Activities, Chequamegon-Nicolet National Forest, Lakewood Ranger District, Forest, Langlade and Oconto Counties, WI.

Summary: The FEIS adequately addressed EPA's concerns about map depiction in the LRMP, the project's objectives, and indirect and cumulative impacts on surrounding northern hardwoods.

EIS No. 20050164, ERP No. F–FRC–G03024–TX, Vista del Sol Liquefied Natural Gas (LNG) Terminal Project, Construct, Install and Operate and LNG Terminal and Natural Gas Pipeline Facilities, Vista del Sol LNG Terminal LP and Vista del Sol Pipeline LP, TX.

Summary: EPA continues to express environmental concerns about the preferred action, requested that the record of decision include acceptable wetland mitigation plan and recommended that the applicant identify a restoration project to fund within the Corpus Christi Bay watershed.

EIS No. 20050123, ERP No. FB–NOA–E91007–00, South Atlantic Shrimp Fishery Management Plan, Amendment 6, Propose to Amend the Bycatch Reduction Device (BRD) Testing Protocol System, South Atlantic Region.

Summary: EPA had no objection to the project as proposed.

EIS No. 20050069, ERP No. FS–BLM–K67050–NV, Pipeline/South Pipeline Pit Expansion Project, Updated

Information on Modifying the Extending Plan of Operations (Plan), Gold Acres Mining District, Launder County, NV.

Summary: EPA expressed concerns that BLM has deferred until mine closure the designation and evaluation of post-mining beneficial uses and applicability of beneficial use requirements for pit lakes and concerns regarding the long-term mitigation and monitoring fund. EPA is also concerned that the Final SEIS does not address the issues critical to establishing the effectiveness of the fund and whether it will be available for future mitigation and monitoring needs should they arise. EPA recommended additional information on these issues be included in the Record of Decision.

EIS No. 20050115, ERP No. FS–NRC–E06023–AL, Generic EIS—License Renewal of Nuclear Plants, Joseph M. Farley Nuclear Plants, Units 1 and 2, Supplemental 18 to NUREG–1437 (TAC NOS. MC0768 and MC0769; Houston County, AL.

Summary: EPA continues to have environmental concerns about the availability of long-term offsite storages of radioactive waste, and future surface water withdrawals for plant operations which could be affected by State agreements. Radiological monitoring of all plant effluents, and appropriate storage of radioactive waste will be necessary during the license renewal period.

Dated: May 10, 2005.

Robert W. Hargrove,

Director, NEPA Compliance Division, Office of Federal Activities.

[FR Doc. 05–9586 Filed 5–12–05; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[ER–FRL–6663–3]

Environmental Impacts Statements; Notice of Availability

Responsible Agency: Office of Federal Activities, General Information (202) 564–7167 or *http://www.epa.gov/compliance/nepa/*. Weekly receipt of Environmental Impact Statements Filed 05/02/2005 Through 05/06/2005 Pursuant to 40 CFR 1506.9.

EIS No. 20050185, Final EIS, NRC, MI, Generic—Donald C. Cook Nuclear Plant, Units No. 1 and 2, (TAC No. MC1221 and MC1222) License Renewal, Supplement 20 to NUREG 1437, Berrien County, MI, Wait Period Ends: 06/13/2005, Contact: William Dam, 301–415–4014.

EIS No. 20050186, Draft EIS, AFS, NY, Finger Lakes National Forest Project, Proposed Land and Resource Management Plan, Forest Plan Revision, Implementation, Seneca and Schuyler Counties, NY, Comment Period Ends: 08/15/2005, Contact: Jay Strand 802–767–4261. Ext 522.

EIS No. 20050187, Draft EIS, SFW, MN, Upper Mississippi National Wildlife and Fish Refuge Comprehensive Conservation Plan (CCP) Implementation, MN, WI, IL and IA, Comment Period Ends: 08/31/2005, Contact: Don Hultman 507–452–4232.

This document is available on the Internet at: *http://www.fws.gov/midwest/planning/uppermiss/*

EIS No. 20050188, Final EIS, FTA, 00, Permanent World Trade Center (WTC) PATH Terminal Project, Reconstruction of a Permanent Terminal at the WTC Site in Lower Manhattan, Port Authority Trans-Hudson (PATH), Several Permits Required for Approval, The Port Authority of New York and New Jersey, NY and NJ, Wait Period Ends: 06/13/2005, Contact: Bernard Cohen 212–668–1770.

EIS No. 20050189, Draft EIS, COE, PA, The Town of Bloomsburg, Columbia County, Pennsylvania Flood Damage Reduction Project, Implementation, Integrated Feasibility Report, Susquhanna River and Fishing Creek, Town of Bloomsburg, Columbia County, PA, Comment Period Ends: 06/27/2005, Contact: Jeff Trulick 410–962–6715.

EIS No. 20050190, Draft EIS, FHA, MI, Detroit Intermodal Freight Terminal (DIFT) Project, Proposes Improvement to Intermodal Freight Terminals in Wayne and Oakland Counties, MI, Comment Period Ends: , 08/16/2005, Contact: Abdelmoez Abdalla 517–702–1820.

Amended Notices

EIS No. 20050105, Draft EIS, AFS, MI, Huron-Manistee National Forests, Proposed Land and Resource Management Plan, Implementation, Several Counties, MI, 06/20/2005, Contact: Jeff Pullen 231–775–2421 Revision of FR Notice Published on 03/18/2005: CEQ Comment Period Ending 06/16/2005 has been Extended to 06/20/2005.

EIS No. 20050118, Draft EIS, AFS, MI, Ottawa National Forest, Proposed Land and Resource Management Plan, Forest Plan Revision, Implementation, Baraga, Gogebic, Houghton, Iron, Marquette and Ontonagan Counties, MI, Comment Period Ends 06/27/2005, Contact: Robert Brenner 906–932–1330 Revision of FR Notice Published on 03/25/2005: CEQ Comment Period Ending on 06/23/2005 has been Extended to 06/27/2005.

EIS No. 20050153, Final EIS, FHW, UT, Southern Corridor Construction, I–15 at Reference Post 2 in St. George to UT–9 near Hurricane, Funding, Right-of-Way Grant and U.S. Army COE Section 404 Permit Issuance, St. George, Washington and Hurricane, Washington County, UT, 06/22/2005, Wait Period Ends: 06/22/2005, Contact: Gregory Punske 801–963–0182.

Revision of FR Notice Published on 04/22/2005: CEQ Comment Period Ending 05/23/2005 has been Extended to 05/22/2005.

Dated: May 10, 2005.

Robert W. Hargrove,

Director, NEPA Compliance Division, Office of Federal Activities.

[FR Doc. 05–9587 Filed 5–12–05; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[OPPT–2005–0030; FRL–7715–4]

Certain New Chemicals; Receipt and Status Information

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: Section 5 of the Toxic Substances Control Act (TSCA) requires any person who intends to manufacture (defined by statute to include import) a new chemical (i.e., a chemical not on the TSCA Inventory) to notify EPA and comply with the statutory provisions pertaining to the manufacture of new chemicals. Under sections 5(d)(2) and 5(d)(3) of TSC, EPA is required to publish a notice of receipt of a premanufacture notice (PMN) or an application for a test marketing exemption (TME), and to publish periodic status reports on the chemicals under review and the receipt of notices of commencement to manufacture those chemicals. This status report, which covers the period from April 14, 2005 to April 27, 3005, consists of the PMNs pending or expired, and the notices of commencement to manufacture a new chemical that the Agency has received under TSCA section 5 during this time period.

DATES: Comments identified by the docket identification (ID) number OPPT–2005–0030 and the specific PMN

number or TME number, must be received on or before June 13, 2005.

ADDRESSES: Comments may be submitted electronically, by mail, or through hand delivery/courier. Follow the detailed instructions as provided in Unit I. of the **SUPPLEMENTARY INFORMATION**.

FOR FURTHER INFORMATION CONTACT: Colby Lintner, Regulatory Coordinator, Environmental Assistance Division, Office of Pollution Prevention and Toxics (7408M), Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001; telephone number: (202) 554–1404; e-mail address: *TSCA-Hotline@epa.gov*.

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this Action Apply to Me?

This action is directed to the public in general. As such, the Agency has not attempted to describe the specific entities that this action may apply to. Although others may be affected, this action applies directly to the submitter of the premanufacture notices addressed in the action. If you have any questions regarding the applicability of this action to a particular entity, consult the person listed under **FOR FURTHER INFORMATION CONTACT**.

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

1. *Docket.* EPA has established an official public docket for this action under docket ID number OPPT–2005–[insert e-docket no.]. The official public docket consists of the documents specifically referenced in this action, any public comments received, and other information related to this action. Although a part of the official docket, the public docket does not include Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. The official public docket is the collection of materials that is available for public viewing at the EPA Docket Center, Rm. B102-Reading Room, EPA West, 1301 Constitution Ave., NW., Washington, DC. The EPA Docket Center is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The EPA Docket Center Reading Room telephone number is (202) 566–1744 and the telephone number for the OPPT Docket, which is located in EPA Docket Center, is (202) 566–0280.

2. *Electronic access.* You may access this **Federal Register** document electronically through the EPA Internet under the ''**Federal Register**'' listings at *http://www.epa.gov/fedrgstr/*.

An electronic version of the public docket is available through EPA's electronic public docket and comment system, EPA Dockets. You may use EPA Dockets at *http://www.epa.gov/edocket/* to submit or view public comments, access the index listing of the contents of the official public docket, and to access those documents in the public docket that are available electronically. Although not all docket materials may be available electronically, you may still access any of the publicly available docket materials through the docket facility identified in Unit I.B.1. Once in the system, select ''search,'' then key in the appropriate docket ID number.

Certain types of information will not be placed in the EPA Dockets. Information claimed as CBI and other information whose disclosure is restricted by statute, which is not included in the official public docket, will not be available for public viewing in EPA's electronic public docket. EPA's policy is that copyrighted material will not be placed in EPA's electronic public docket but will be available only in printed, paper form in the official public docket. To the extent feasible, publicly available docket materials will be made available in EPA's electronic public docket. When a document is selected from the index list in EPA Dockets, the system will identify whether the document is available for viewing in EPA's electronic public docket. Although not all docket materials may be available electronically, you may still access any of the publicly available docket materials through the docket facility identified in Unit I.B.1. EPA intends to work towards providing electronic access to all of the publicly available docket materials through EPA's electronic public docket.

For public commenters, it is important to note that EPA's policy is that public comments, whether submitted electronically or in paper, will be made available for public viewing in EPA's electronic public docket as EPA receives them and without change, unless the comment contains copyrighted material, CBI, or other information whose disclosure is restricted by statute. When EPA identifies a comment containing copyrighted material, EPA will provide a reference to that material in the version of the comment that is placed in EPA's electronic public docket. The entire printed comment, including the copyrighted material, will be available in the public docket.

Public comments submitted on computer disks that are mailed or delivered to the docket will be transferred to EPA's electronic public docket. Public comments that are mailed or delivered to the docket will be scanned and placed in EPA's electronic public docket. Where practical, physical objects will be photographed, and the photograph will be placed in EPA's electronic public docket along with a brief description written by the docket staff.

C. How and To Whom Do I Submit Comments?

You may submit comments electronically, by mail, or through hand delivery/courier. To ensure proper receipt by EPA, identify the appropriate docket ID number and specific PMN number or TME number in the subject line on the first page of your comment. Please ensure that your comments are submitted within the specified comment period. Comments received after the close of the comment period will be marked ''late.'' EPA is not required to consider these late comments. If you wish to submit CBI or information that is otherwise protected by statute, please follow the instructions in Unit I.D. Do not use EPA Dockets or e-mail to submit CBI or information protected by statute.

1. *Electronically.* If you submit an electronic comment as prescribed in this unit, EPA recommends that you include your name, mailing address, and an e-mail address or other contact information in the body of your comment. Also include this contact information on the outside of any disk or CD ROM you submit, and in any cover letter accompanying the disk or CD ROM. This ensures that you can be identified as the submitter of the comment and allows EPA to contact you in case EPA cannot read your comment due to technical difficulties or needs further information on the substance of your comment. EPA's policy is that EPA will not edit your comment, and any identifying or contact information provided in the body of a comment will be included as part of the comment that is placed in the official public docket, and made available in EPA's electronic public docket. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment.

i. *EPA Dockets.* Your use of EPA's electronic public docket to submit comments to EPA electronically is EPA's preferred method for receiving comments. Go directly to EPA Dockets at *http://www.epa.gov/edocket/*, and follow the online instructions for submitting comments. Once in the system, select ''search,'' and then key in

docket ID number OPPT–2005–0030. The system is an ''anonymous access'' system, which means EPA will not know your identity, e-mail address, or other contact information unless you provide it in the body of your comment.

ii. *E-mail*. Comments may be sent by e-mail to *oppt.ncic@epa.gov*, Attention: Docket ID Number OPPT–2005–0030 and PMN Number or TME Number. In contrast to EPA's electronic public docket, EPA's e-mail system is not an ''anonymous access'' system. If you send an e-mail comment directly to the docket without going through EPA's electronic public docket, EPA's e-mail system automatically captures your e-mail address. E-mail addresses that are automatically captured by EPA's e-mail system are included as part of the comment that is placed in the official public docket, and made available in EPA's electronic public docket.

iii. *Disk or CD ROM*. You may submit comments on a disk or CD ROM that you mail to the mailing address identified in Unit I.C.2. These electronic submissions will be accepted in WordPerfect or ASCII file format. Avoid the use of special characters and any form of encryption.

2. *By mail*. Send your comments to: Document Control Office (7407M), Office of Pollution Prevention and Toxics (OPPT), Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001.

3. *By hand delivery or courier*. Deliver your comments to: OPPT Document Control Office (DCO) in EPA East Bldg., Rm. 6428, 1201 Constitution Ave., NW., Washington, DC. Attention: Docket ID Number OPPT–2005–0030 and PMN Number or TME Number. The DCO is open from 8 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The telephone number for the DCO is (202) 564–8930.

D. How Should I Submit CBI to the Agency?

Do not submit information that you consider to be CBI electronically through EPA's electronic public docket or by e-mail. You may claim information that you submit to EPA as CBI by marking any part or all of that information as CBI (if you submit CBI on disk or CD ROM, mark the outside of the disk or CD ROM as CBI and then identify electronically within the disk or CD ROM the specific information that is CBI). Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2.

In addition to one complete version of the comment that includes any information claimed as CBI, a copy of the comment that does not contain the information claimed as CBI must be submitted for inclusion in the public docket and EPA's electronic public docket. If you submit the copy that does not contain CBI on disk or CD ROM, mark the outside of the disk or CD ROM clearly that it does not contain CBI. Information not marked as CBI will be included in the public docket and EPA's electronic public docket without prior notice. If you have any questions about CBI or the procedures for claiming CBI, please consult the technical person listed under **FOR FURTHER INFORMATION CONTACT**.

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

You may find the following suggestions helpful for preparing your comments:

1. Explain your views as clearly as possible.

2. Describe any assumptions that you used.

3. Provide copies of any technical information and/or data you used that support your views.

4. If you estimate potential burden or costs, explain how you arrived at the estimate that you provide.

5. Provide specific examples to illustrate your concerns.

6. Offer alternative ways to improve the notice or collection activity.

7. Make sure to submit your comments by the deadline in this document.

8. To ensure proper receipt by EPA, be sure to identify the docket ID number assigned to this action and the specific PMN number you are commenting on in the subject line on the first page of your response. You may also provide the name, date, and **Federal Register** citation.

II. Why is EPA Taking this Action?

Section 5 of TSCA requires any person who intends to manufacture (defined by statute to include import) a new chemical (i.e., a chemical not on the TSCA Inventory to notify EPA and comply with the statutory provisions pertaining to the manufacture of new chemicals. Under sections 5(d)(2) and 5(d)(3) of TSCA, EPA is required to publish a notice of receipt of a PMN or an application for a TME and to publish periodic status reports on the chemicals under review and the receipt of notices of commencement to manufacture those chemicals. This status report, which covers the period from April 14, 2005 to April 27, 2005, consists of the PMNs pending or expired, and the notices of commencement to manufacture a new chemical that the Agency has received under TSCA section 5 during this time period.

III. Receipt and Status Report for PMNs

This status report identifies the PMNs pending or expired, and the notices of commencement to manufacture a new chemical that the Agency has received under TSCA section 5 during this time period. If you are interested in information that is not included in the following tables, you may contact EPA as described in Unit II. to access additional non-CBI information that may be available.

In Table I of this unit, EPA provides the following information (to the extent that such information is not claimed as CBI) on the PMNs received by EPA during this period: the EPA case number assigned to the PMN; the date the PMN was received by EPA; the projected end date for EPA's review of the PMN; the submitting manufacturer; the potential uses identified by the manufacturer in the PMN; and the chemical identity.

I. 26 PREMANUFACTURE NOTICES RECEIVED FROM: 04/14/05 TO 04/27/05

Case No.	Received Date	Projected Notice End Date	Manufacturer/Importer	Use	Chemical
P–05–0497	04/14/05	07/12/05	DIC International (USA) LLC	(G) Slip additives	(G) Modified alkyldience
P–05–0498	04/14/05	07/12/05	DIC International (USA) LLC	(G) Modified alkyldience polymer	(G) Sulfurized butadiene
P–05–0499	04/14/05	07/12/05	CBI	(G) Binder for fiber(open, non-dispersive use)	(G) Acrylic copolymer
P–05–0500	04/15/05	07/13/05	Grain Processing Corporation	(G) Dust abatement, animal feed, road stabilization	(G) Thermochemical mechanical processed maize germ

I. 26 PREMANUFACTURE NOTICES RECEIVED FROM: 04/14/05 TO 04/27/05—Continued

Case No.	Received Date	Projected Notice End Date	Manufacturer/Importer	Use	Chemical
P–05–0501	04/15/05	07/13/05	CBI	(G) Amine synergists for coatings and inks	(G) Amino acrylate
P–05–0502	04/15/05	07/13/05	CBI	(G) Inks and coatings	(G) Acrylic oligomer
P–05–0503	04/18/05	07/16/05	CBI	(G) Carpet treatment additive	(G) Fluorochemical urethane
P–05–0504	04/18/05	07/16/05	CBI	(G) Tile surface treatment	(G) Fluoroalkylacrylate copolymer
P–05–0505	04/18/05	07/16/05	CBI	(G) Textile treatment additive	(G) Fluoroalkylacrylate copolymer
P–05–0506	04/19/05	07/17/05	Hi-Tech Color, Inc.	(G) Raw material of weatherstrip paints	(G) Polyether-carbonateurethane and polyurea copolymer
P–05–0507	04/20/05	07/18/05	CBI	(G) Paint additive	(G) 2-alkenoic, 2-alky-, polymer with alkyl 2-alkyl-2-alkenoate, alkenylbenzene, 2-hydroxyalkyl 2-alkyl-2-alkenoate and ..alpha.-(alkyl-1-oxo-2-alkenyl)-.omega.-(phosphonoxy)poly[oxy(alkyl-1,2-alkanediyl)], tert-alkyl 2-alkaneperoxoate-initiated
P–05–0508	04/20/05	07/18/05	CBI	(G) Pigment dispersant	(S) Neodecanoic acid, oxiranylmethyl ester, polymer with 1,4-cyclohexanedimethanol, 5-isocyanato-1-(isocyanatomethyl)-1,3,3-trimethylcyclohexane and methyloxirane polymer with oxirane 2-aminopropyl methyl ether
P–05–0509	04/21/05	07/19/05	Forbo Adhesives, LLC	(G) Liquid polyurethane adhesive	(G) Isocyanate functional urethane polymer
P–05–0510	04/21/05	07/19/05	CBI	(G) Foam additive	(G) Alkenoic acid, hydroxy, reaction products with alkane carboxylic acid, metal salts
P–05–0511	04/22/05	07/20/05	CBI	(G) Crosslinker	(G) Modified isophoronediamine compound
P–05–0512	04/22/05	07/20/05	CBI	(G) Polymeric additive used to improve separation of wax from partially refined feedstock	(G) Alkyl methacrylate copolymer
P–05–0513	04/22/05	07/20/05	CBI	(G) Lubricant additive	(G) Alkyl methacrylate esters telomers with alkylmethacrylamide, 1-dodecanethiol, tert-bu 2-ethylhexaneperoxoate-initiated
P–05–0514	04/22/05	07/20/05	CBI	(G) Lubricant additive	(G) Alkyl methacrylate esters telomers with 1-dodecanethiol, tert-bu 2-ethylhexaneperoxoate-initiated
P–05–0515	04/22/05	07/20/05	CBI	(G) Lubricant additive	(G) Alkyl methacrylate esters telomers with alkylmethacrylamide, 1-dodecanethiol, tert-bu 2-ethylhexaneperoxoate-initiated
P–05–0516	04/22/05	07/20/05	CBI	(G) Lubricant additive	(G) Alkyl methacrylate esters telomers with 1-dodecanethiol, tert-bu 2-ethylhexaneperoxoate-initiated
P–05–0517	04/22/05	07/20/05	CBI	(G) Lubricant additive	(G) Alkyl methacrylate esters telomers with alkylmethacrylamide, 1-dodecanethiol, tert-bu 2-ethylhexaneperoxoate-initiated
P–05–0518	04/22/05	07/20/05	CBI	(G) Lubricant additive	(G) Alkyl methacrylate esters telomers with alkylmethacrylamide, 1-dodecanethiol, tert-bu 2-ethylhexaneperoxoate-initiated
P–05–0519	04/25/05	07/23/05	Essential Industries	(S) Raw material for wood coatings	(G) Aliphatic polyurethane dispersion
P–05–0520	04/27/05	07/25/05	CBI	(S) Binder component of commercial paint formulation; primary resin of commercial paint formulation	(G) Polyurethane polymer
P–05–0521	04/27/05	07/25/05	Wacker Chemical Corporation	(S) Crosslinker for silane-terminated polymers; surface modifier	(S) Benzenamine, n-[(trimethoxysilyl)methyl]-
P–05–0522	04/27/05	07/25/05	Mitsubishi Gas Chemical America, Inc.	(S) Chemical intermediate for the production of pigments and colorants; chemical intermediate for other industrial materials	(S) [1,1′-biphenyl]-4-carboxaldehyde

In Table II of this unit, EPA provides the following information (to the extent that such information is not claimed as CBI) on the Notices of Commencement to manufacture received:

II. 18 NOTICES OF COMMENCEMENT FROM: 04/14/05 TO 04/27/05

Case No.	Received Date	Commencement Notice End Date	Chemical
P–03–0551	04/27/05	02/18/05	(G) Amine functional curing agent
P–03–0612	04/20/05	04/04/05	(G) Maleic acid copolymer, sodium salt
P–03–0772	04/20/05	03/28/05	(G) Phosphated polyalkoxylate
P–03–0807	04/22/05	03/17/05	(G) Semiconducting light emitting polyfluorene copolymer
P–04–0145	04/21/05	04/15/05	(G) Polyisocyanate
P–04–0538	04/18/05	04/01/05	(G) Substituted xanthene
P–04–0703	04/15/05	04/07/05	(G) Spiro[isobenzofuran-1(3h),9′-[9h]polyheterocycle]-3-one, 3′-[hexyl(2-methylphenyl)amino]-6′-[(2-methylphenyl)amino
P–04–0959	04/26/05	04/07/05	(G) Epoxide-amine adduct
P–05–0176	04/27/05	03/29/05	(G) Modified acrylic resin
P–05–0184	04/15/05	03/29/05	(G) Heteropolycyclic, 9-(2-carboxyphenyl)-3,6-bis[(2-methylphenyl)amino]-, chloride
P–05–0194	04/22/05	04/12/05	(G) Mixture of phenyl azo sulfonylphenyl copper amino sodium salt and phenyl azo sulfonylphenyl copper sodium salt
P–05–0219	04/25/05	04/13/05	(S) Xanthylium,3,6-bis(diethylamino)-9-(2-(methoxycarbonyl)phenyl)-molybdatesilicate
P–05–0227	04/20/05	04/17/05	(G) Alkoxylated aromatic amine
P–05–0238	04/27/05	04/14/05	(G) Polyurethane hydrogel
P–05–0240	04/26/05	04/19/05	(S) 1,3-propanediamine,n,n-dimethyl-,monobenzozoate
P–99–0483	04/22/05	03/22/05	(G) Alkyl borane

List of Subjects

Environmental protection, Chemicals, Premanufacturer notices.

Dated: May 6, 2005.

Vicki A. Simons,

Acting Director, Information Management Division, Office of Pollution Prevention and Toxics.

[FR Doc. 05–9478 Filed 5–12–05; 8:45 am]

BILLING CODE 6560–50–S

FEDERAL DEPOSIT INSURANCE CORPORATION

Agency Information Collection Activities: Submission for OMB Review; Comment Request

AGENCY: Federal Deposit Insurance Corporation (FDIC).

ACTION: Notice of information collections to be submitted to OMB for review and approval under the Paperwork Reduction Act of 1995.

SUMMARY: In accordance with requirements of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*), the FDIC hereby gives notice that it plans to submit to the Office of Management and Budget (OMB) a request for OMB review and approval of the information collection system described below.

DATES: Comments must be submitted on or before June 13, 2005.

ADDRESSES: Interested parties are invited to submit written comments to Gary A. Kuiper, Counsel, (202) 942–3824, Legal Division, Federal Deposit Insurance Corporation, 550 17th Street, NW., PA 1730–3000, Washington, DC 20429. All comments should refer to the OMB control number. 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. [FAX number (202) 898–3838].

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 10235, Washington, DC 20503.

FOR FURTHER INFORMATION CONTACT: Gary A. Kuiper, at the address identified above.

SUPPLEMENTARY INFORMATION: Proposal to renew the following currently approved collection of information:

Title: Flood Insurance.

OMB Number: 3064–0120.

Frequency of Response: On occasion.

Affected Public: Any depository institution that makes one or more loans to be secured by a building located on property in a special flood hazard area.

Estimated Number of Respondents/Recordkeepers: 5,272.

Estimated Number of Transactions: 180,000.

Estimated Reporting Hours: .05 hours × 180,000 = 9,000.

Estimated Recordkeeping Hours: 5,272 hours.

Estimated Total Annual Reporting and Recordkeeping Burden Hours: 5,272 + 9,000 = 14,272 hours

General Description of Collection: Each supervised lending institution is currently required to provide a notice of special flood hazards to each borrower with a loan secured by a building or mobile home located or to be located in an area identified by the Director of the Federal Emergency Management Administration as being subject to special flood hazards. The Riegle Community Development Act requires that each institution must also provide a copy of the notice to the servicer of the loan (if different from the originating lender).

Request for Comment

Comments are invited on: (a) Whether this collections 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 estimate 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. All comments will become a matter of public record.

Dated at Washington, DC, this 9th day of May, 2005.

Federal Deposit Insurance Corporation.

Robert E. Feldman,

Executive Secretary.

[FR Doc. 05–9572 Filed 5–12–05; 8:45 am]

BILLING CODE 6714–01–P

FEDERAL ELECTION COMMISSION

Sunshine Act Notices

DATE AND TIME: Tuesday, May 17, 2005, at 10 a.m.

PLACE: 999 E Street, NW., Washington, DC (ninth floor).

STATUS: These hearing will be open to the public.

MATTERS BEFORE THE COMMISSION: (1) Candidate Solicitation at State, District and Local Party Fundraising Events;

(2) Definition of ''Agent'' for BCRA Regulations on Non-Federal Funds or Soft Money and Coordinated and Independent Expenditures;

(3) Payroll Deductions by Member Corporations for Contributions to a Trade Association's Separate Segregated Fund.

PREVIOUSLY ANNOUNCED DATE AND TIME: Thursday, May 19, 2005. 10 a.m. meeting open to the public. This meeting was cancelled.

DATE AND TIME: Thursday, May 19, 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. 437g. 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.

FOR FURTHER INFORMATION CONTACT: Mr. Robert Biersack, Press Officer, Telephone; (202) 694–1220.

Mary W. Dove,

Secretary of the Commission.

[FR Doc. 05–9734 Filed 5–11–05; 2:34 pm]

BILLING CODE 6715–01–M

FEDERAL RESERVE SYSTEM

Formations of, Acquisitions by, and Mergers of Bank Holding Companies

The companies listed in this notice have applied to the Board for approval, pursuant to the Bank Holding Company Act of 1956 (12 U.S.C. 1841 *et seq.*) (BHC Act), Regulation Y (12 CFR Part 225), and all other applicable statutes and regulations to become a bank holding company and/or to acquire the assets or the ownership of, control of, or the power to vote shares of a bank or bank holding company and all of the banks and nonbanking companies owned by the bank holding company, including the companies listed below.

The applications listed below, as well as other related filings required by the Board, are available for immediate inspection at the Federal Reserve Bank indicated. The application also will be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing on the standards enumerated in the BHC Act (12 U.S.C. 1842(c)). If the proposal also involves the acquisition of a nonbanking company, the review also includes whether the acquisition of the nonbanking company complies with the standards in section 4 of the BHC Act (12 U.S.C. 1843). Unless otherwise noted, nonbanking activities will be conducted throughout the United States. Additional information on all bank holding companies may be obtained from the National Information Center Web site at *www.ffiec.gov/nic/.* Unless otherwise noted, comments regarding each of these applications must be received at the Reserve Bank indicated or the offices of the Board of Governors not later than June 7, 2005.

A. Federal Reserve Bank of Dallas (W. Arthur Tribble, Vice President) 2200 North Pearl Street, Dallas, Texas 75201–2272:

1. TCB Holding Company, The Woodlands, Texas; to become a bank holding company by acquiring 100 percent of the voting shares of Texas Community Bank, National Association, The Woodlands, Texas.

Board of Governors of the Federal Reserve System, May 9, 2005.

Robert deV. Frierson,

Deputy Secretary of the Board.

[FR Doc. 05–9546 Filed 5–12–05; 8:45 am]

BILLING CODE 6210–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

[60Day–05–0242x]

Proposed Data Collections Submitted for Public Comment and Recommendations

In compliance with the requirement of Section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995 for opportunity for public comment on proposed data collection projects, the Centers for Disease Control and Prevention (CDC) will publish periodic summaries of proposed projects. To request more information on the proposed projects or to obtain a copy of the data collection plans and instruments, call 404–371–5983 and send comments to Seleda Perryman, CDC Assistant Reports Clearance Officer, 1600 Clifton Road, MS–D74, Atlanta, GA 30333 or send an e-mail to *omb@cdc.gov*.

Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology. Written comments should be received within 60 days of this notice.

Proposed Project

Estimating the Cost of Sigmoidoscopy and Colonoscopy for Colorectal Cancer Screening in U.S. Healthcare Facilities—New—National Center for Chronic Disease Prevention and Health Promotion (NCCDPHP), Division of Cancer Prevention and Control (DCPC), Centers for Disease Control and Prevention (CDC).

Background and Brief Description

Colorectal cancer (CRC) is the second leading cause of cancer-related deaths in the United States. In 2005, it is estimated that approximately 56,300 Americans will die from CRC and about 145,300 new cases will be diagnosed. The risk of developing CRC increases with advancing age. More than 90% of newly diagnosed CRCs occur in persons 50 years of age and older. Several

scientific studies have demonstrated that regular screening for CRC reduces the incidence and mortality from this disease. Other studies have shown that regular screening for CRC is also cost-effective in terms of years of life saved.

Despite strong scientific evidence and evidence-based clinical guidelines recommending screening, current screening rates remain low. A recent CDC study reported that more than 40 million Americans who are 50 years of age or older and at average risk for CRC have not been screened in accordance with current guidelines. The study also reported that screening this population with current endoscopic (*i.e.*, flexible sigmoidoscopy and colonoscopy) capacity in the health care system could require as much as ten years to complete. In view of the current shortage in endoscopic capacity, an effective national effort to promote CRC screening could increase the demand for endoscopic procedures.

It has been reported that reimbursements for endoscopic procedures in publicly-funded programs may not be adequate to cover the costs of performing these procedures. This may be a disincentive for providers to perform endoscopy procedures. Currently, there is little information available about the actual costs of providing these procedures in different types of healthcare facilities in the United States.

The purpose of this project is to conduct a survey of a nationally representative sample of healthcare facilities in order to estimate the economic costs of providing colonoscopy and flexible sigmoidoscopy for CRC screening and follow-up services. The estimated procedure costs will be compared to the reimbursement rates for both screening procedures in order to determine whether the difference between payments to facilities and costs incurred is a potential barrier to expansion of CRC screening to uninsured or underinsured populations.

The study will also determine whether there are technical factors that enable some facilities to provide larger numbers of endoscopic procedures at lower average costs than other facilities, *i.e.*, whether economies of scale and/or economies of scope exist for certain types of facilities. Results of this study will be used to better define the economics of colorectal cancer screening. There is no cost to the respondents other than their time.

ESTIMATE OF ANNUALIZED BURDEN TABLE

Form type	Number of respondents	Number of responses/respondent	Avg. burden per response (in hrs.)	Total burden of response (in hrs)
Telephone script to identify the appropriate respondent	2,530	1	5/60	211
Survey of hospital-based outpatient departments	1,500	1	4.0	6,000
Survey of freestanding ambulatory surgery centers	800	1	6.0	4,800
Total				11,011

Dated: May 6, 2005.

Joan F. Karr,

Acting Reports Clearance Officer, Centers for Disease Control and Prevention.

[FR Doc. 05–9558 Filed 5–12–05; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

[60Day–05–05CD]

Proposed Data Collections Submitted for Public Comment and Recommendations

In compliance with the requirement of Section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995 for opportunity for public comment on proposed data collection projects, the Centers for Disease Control and Prevention (CDC) will publish periodic summaries of proposed projects. To request more information on the proposed projects or to obtain a copy of the data collection plans and instruments, call 404–371–5983 and send comments to Seleda Perryman, CDC Assistant Reports Clearance Officer, 1600 Clifton Road, MS–D74, Atlanta, GA 30333 or send an e-mail to *omb@cdc.gov.*

Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology. Written comments should be received within 60 days of this notice.

Proposed Project

Veterinary Student Survey—New—National Center for Infectious Diseases (NCID)—Centers for Disease Control and Prevention (CDC).

Background and Brief Description

The proposed survey asks veterinary students to describe their knowledge of various public health programs, their career interests post-graduation and how they arrived at such a decision, and their perception of the role veterinarians play in public health. The proposed study consists of an introductory letter and a self-administered, electronic questionnaire e-mailed to veterinary students in the United States. The Association of American Veterinary Medical Colleges (AAVMC) has agreed to collaborate on the survey and will provide a list of veterinary students from their membership mailing list. The study objectives are to describe current knowledge and attitudes of veterinary students regarding veterinary public health programs, and to determine their interests in a potential career in veterinary public health. There is no cost to respondents other than their time.

ESTIMATE OF ANNUALIZED BURDEN HOURS

Respondents	Number of respondents	Number of responses per respondent	Average burden / response (in hours)	Total burden hours
Written Surveys	5000	1	10/60	834
Total				834

Dated: April 6, 2005.

Joan F. Karr,

Acting Reports Clearance Officer, Centers for Disease Control and Prevention.

[FR Doc. 05–9560 Filed 5–12–05; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

[60Day–05–05BN]

Proposed Data Collections Submitted for Public Comment and Recommendations

In compliance with the requirement of Section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995 for opportunity for public comment on proposed data collection projects, the Centers for Disease Control and Prevention (CDC) will publish periodic summaries of proposed projects. To request more information on the proposed projects or to obtain a copy of the data collection plans and instruments, call 404–371–5983 and send comments to Seleda Perryman, CDC Assistant Reports Clearance Officer, 1600 Clifton Road, MS–D74, Atlanta, GA 30333 or send an e-mail to *omb@cdc.gov*.

Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology. Written comments should be received within 60 days of this notice.

Proposed Project

Web-based Reporting Systems for Tobacco Control: A Nationwide Assessment—New—The Office on Smoking and Health (OSH), National Center for Chronic Disease Prevention and Health Promotion (NCCDPHP), Centers for Disease Control and Prevention (CDC).

Background and Brief Description

Implementation of a Web-based reporting system assessment for the state health departments' tobacco control programs.

As state health departments strive to standardize data collections to better evaluate progress toward strategic goals and objectives, a movement to develop web-based reporting systems is sweeping the field of public health. In October of 2002, through a Prevention Research Center (PRC) grant, researchers from the University of Minnesota conducted a national assessment of tobacco control program monitoring practices among state health departments. Results indicated that all states monitor tobacco control program activities through either paper or computer-based systems. In 1998, three states had computerized systems operating, whereas in 2002, thirteen states had launched systems and twenty-two more were in the planning/development stage (Blaine & Petersen, presented at National Conference on Tobacco or Health, San Francisco, November 20, 2002). Clearly, there is a trend toward developing database systems to assess and to monitor state tobacco prevention and control programs.

However, recent loss of resources available to state tobacco control programs begs several questions: (1) How have tightened public health budgets affected the development of proposed and in-progress web-based monitoring systems? (2) What can we learn from states that have already implemented and upgraded their systems that can save time and money for states still in the development process? (3) How can we institute knowledge management systems that can facilitate horizontal information sharing? (4) Is there utility in creating a guidance document to better promote best practices in monitoring system development? (5) How can this information be used by the CDC to highlight the benefits to public health of state level computerized program reporting and monitoring systems?

Roundtable discussions facilitated by the Office on Smoking and Health with state tobacco control program staff have focused on standardized data collection for contract management and process evaluation purposes. Participants expressed frustration that states are often ''recreating the wheel,'' with each state developing a unique system without the benefit of learning from states with web-based systems already in production. These discussions motivated the CDC to explore more efficient means of sharing lessons learned about computerized reporting systems.

The proposed research will build on the findings of the previous study. Enhanced understanding of the proliferation, costs and benefits of these web-based reporting systems can (1) improve the capacity of the CDC to service state health departments' cooperative agreement technical assistance needs, (2) provide a template for the CDC as it considers how electronic monitoring systems could be expanded to other public health arenas besides tobacco control, and (3) save state health departments time and money by using the information gleaned from this research to create an accessible forum for knowledge sharing.

The proposed study has three separate methodological components: (1) A nationwide baseline survey, (2) a follow-up phone interview with early adopters, and (3) select case studies. This is a one time only research study. This tiered research approach will provide a systematic overview of web-based reporting systems ranging from the macro-level to the micro-level. Aside from the minimal time needed to participate in the interviews, there will be no cost to participants.

ESTIMATE OF ANNUALIZED BURDEN TABLE

Respondents	Number of respondents	Number of responses per respondent	Average burden per response (in hours)	Total burden (in hours)
States and DC baseline survey via phone interview	51	1	30/60	25.5
Early Adopters focused responses via phone interview	15	1	1.0	15.0
Case Studies 3 per state X 3 states via site visit	9	1	1.5	13.5
Totals				54

Dated: May 6, 2005.

Joan F. Karr,

Acting Reports Clearance Officer, Centers for Disease Control and Prevention.

[FR Doc. 05–9561 Filed 5–12–05; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

[30Day–05–04JU]

Proposed Data Collections Submitted for Public Comment and Recommendations

The Centers for Disease Control and Prevention (CDC) publishes a list of information collection requests under review by the Office of Management and Budget (OMB) in compliance with the Paperwork Reduction Act (44 U.S.C. Chapter 35). To request a copy of these requests, call the CDC Reports Clearance Officer at (404) 371–5974 or send an e-mail to *omb@cdc.gov*. Send written comments to CDC Desk Officer, Human Resources and Housing Branch, New Executive Office Building, Room 10235, Washington, DC 20503 or by fax to (202) 395–6974. Written comments should be received within 30 days of this notice.

Proposed Project

Factors Impacting Effective Removal of Arsenic by Household Water Purification Systems—New—National Center for Environmental Health (NCEH), Centers for Disease Control and Prevention (CDC).

Background and Brief Description

Epidemiologic evidence strongly links ingestion of water containing inorganic arsenic with an increase in bladder cancer and other cancers. In Maine, approximately 10% of private domestic wells have arsenic concentrations greater than Maine's health standard for water of 10 μg/L. In wells with high arsenic concentrations, ingestion of water can be the dominant source of arsenic exposure. The preferred method for treating domestic well water containing elevated levels of arsenic is point-of-use water-treatment devices.

The purpose of the proposed study is to evaluate how the efficacy of water-treatment devices is affected by user behaviors such as maintenance and selection of appropriate technologies and by variations in water chemistry. The requested three year clearance for this study will focus on a total of 100 households. Approximately 200 households will be recruited and screened to ascertain the 100 eligible households. Recruitment is limited to areas of Maine that have high concentrations of arsenic in groundwater.

The results will demonstrate how arsenic removal systems are working in the real world. The data will give insight into how homeowners are collecting, interpreting and utilizing information on water treatment in order to select an arsenic-removal system. The data will show how well the chosen systems are removing arsenic, and how well they are being maintained. The results will thus identify risk factors that contribute to a failing treatment system.

The study will have a cross-sectional component and a temporal component. For the cross-sectional component, total arsenic, inorganic arsenic species, and selected geochemical constituents will be quantified by the influent and effluent (flowing in and flowing out) of filtration devices treating these 100 domestic well-water supplies. The study team will administer questionnaires to each participating household to collect data on the type of treatment unit used, routine operation parameters, and suggested and actual maintenance schedules. For the temporal component of the study, the study team will test the influent and effluent of the treatment units of 30 participating households for total arsenic one time per year. The percentage of arsenic removed by the filter will be compared to the study criterion selected to indicate that a filter is failing. If the arsenic removal level indicates that a treatment unit meets the criterion for failure, treatment unit influent and effluent water will be analyzed for inorganic arsenic species and geochemical constituents to determine whether the chemistry of the water has changed sufficiently to explain the failure.

A follow-up questionnaire will be administered biannually and at the time of a system failure to determine when the unit was last maintained and if operation and maintenance have changed. CDC/NCEH will request a 3-year clearance. There is no cost to participants other than their time. The total annual burden hours are 56.

ESTIMATE OF ANNUALIZED BURDEN TABLE

Respondents	Number of respondents	Number of responses/ respondent	Avg. burden response (in hrs.)	Total burden hours
Initial recruiting postcard completion	67	1	5/60	6
Follow-up telephone call	34	1	10/60	6
Initial interview	34	1	30/60	17
Biannual follow-up interview	30	2	25/60	25
System failure follow-up interview	4	1	25/60	2
Total				56

Dated: May 6, 2005.

Joan F. Karr,

Acting Reports Clearance Officer, Centers for Disease Control and Prevention.

[FR Doc. 05–9562 Filed 5–12–05; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

[60Day–0621]

Proposed Data Collections Submitted for Public Comment and Recommendations

In compliance with the requirement of section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995 for opportunity for public comment on proposed data collection projects, the Centers for Disease Control and Prevention (CDC) will publish periodic summaries of proposed projects. To request more information on the proposed projects or to obtain a copy of the data collection plans and instruments, call 404–371–5983 and send comments to Seleda Perryman, CDC Assistant Reports Clearance Officer, 1600 Clifton Road, MS–D74, Atlanta, GA 30333 or send an e-mail to *omb@cdc.gov*.

Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology. Written comments should be received within 60 days of this notice.

Proposed Project

National Youth Tobacco Survey (OMB No.: 0920–0621)—Reinstatement with Change—National Center for Chronic Disease Prevention and Health Promotion (NCCDPHP), Centers for Disease Control and Prevention (CDC).

Background and Brief Description

The purpose of this request is to reinstate OMB clearance of the National Youth Tobacco Survey, a national school-based study to be conducted in 2006. NCCDPHP wants to continue a biennial survey among middle and senior high school students attending regular public, private, and Catholic schools in grades 6–12. This survey was previously funded by the American Legacy Foundation in 1999, 2000, and 2002. The survey was funded by CDC in 2004. The survey covers the following tobacco-related topics: the prevalence of use of cigarettes, smokeless tobacco, cigars, pipe, bidis, and kreteks; knowledge and attitudes; media and advertising; minors' access and enforcement; school curriculum; environmental tobacco smoke exposure; and cessation. Tobacco use, a major preventable cause of morbidity and mortality in the U.S., is one of the 28 focus areas in Healthy People 2010. Within the Healthy People 2010 focus area of tobacco use, the National Youth Tobacco Survey provides data relevant to 6 health objectives. The survey also provides data to monitor one of the 10 leading health indicators for Healthy People 2010 that addresses tobacco use. In addition, the National Youth Tobacco Survey can identify racial and ethnic disparities in tobacco-related topics listed above.

The National Youth Tobacco Survey is the most comprehensive source of nationally representative data regarding high school students and tobacco. Moreover, the National Youth Tobacco Survey is the only source of such national data for middle school students (grades 6–8). The data have significant implications for policy and program development for school health programs nationwide. There is no other cost to respondents other than their time.

ESTIMATE OF ANNUALIZED BURDEN HOURS

Respondents	Number of respondents	Number of responses per respondent	Average burden per response (in hours)	Total burden hours (in hours)
Students	24,500	1	45/60	18,375
School Administrator Arrangements	236	1	30/60	118
Total				18,493

Dated: May 6, 2005.

Joan F. Karr,

Acting Reports Clearance Officer, Centers for Disease Control and Prevention.

[FR Doc. 05–9563 Filed 5–12–05; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

[60Day–05–0680]

Proposed Data Collections Submitted for Public Comment and Recommendations

In compliance with the requirement of section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995 for opportunity for public comment on proposed data collection projects, the Centers for Disease Control and Prevention (CDC) will publish periodic summaries of proposed projects. To request more information on the proposed projects or to obtain a copy of the data collection plans and instruments, call 404–371–5983 and send comments to Seleda Perryman, CDC Assistant Reports Clearance Officer, 1600 Clifton Road, MS–D74, Atlanta, GA 30333 or send an e-mail to *omb@cdc.gov.*

Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the proposed collection of information; (c)

ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology. Written comments should be received within 60 days of this notice.

Proposed Project

Model Performance Evaluation Program (MPEP), Severe Acute Respiratory Syndrome (SARS) MPEP OMB No. 0920–0680—Extension—Division of Laboratory Systems, Center for Health Information and Services (CoCHIS), Centers for Disease Control and Prevention (CDC).

Background and Brief Description

To support our mission of improving public health and preventing disease through continuously improving laboratory practices, the Model Performance Evaluation Program (MPEP), Division of Laboratory Systems, Coordinating Center for Health Information and Services in collaboration with National Center for Infectious Disease, Centers for Disease Control and Prevention intends to provide a new SARS-associated Coronavirus testing performance evaluation program (SARS MPEP). This program will offer external performance evaluation (PE) for SARS antibody (Ab) testing and SARS Ribonucleic Acid (RNA) Reverse Transcriptase—Polymerase Chain Reaction (RT–PCR) testing. A SARS outbreak or epidemic could recur at any time. Therefore, it is imperative that the CDC ensure all state public health department laboratories, Laboratory Response Network laboratories and other laboratories designated by CDC remain proficient in performing SARS testing. For this reason, it is of critical public health importance, at this time, that the CDC develop and maintain a performance evaluation program for SARS. Participation in PE programs is expected to lead to improved SARS testing performance because participants have the opportunity to identify areas for improvement which will help to ensure accurate testing as a basis for development of SARS prevention and intervention strategies.

This external quality assessment program will be made available at *no cost* (for receipt of sample panels) to 54 state laboratories. This program will offer laboratories/testing sites an opportunity for:

(1) Assuring that the laboratories/testing sites are providing accurate tests through external quality assessment,

(2) Improving testing quality through self-evaluation in a nonregulatory environment,

(3) Testing well characterized samples from a source outside the test kit manufacturer,

(4) Discovering potential testing problems so that laboratories/testing sites can adjust procedures to eliminate them,

(5) Comparing individual laboratory/testing site results to others at state level, and

(6) Consulting with CDC staff to discuss testing issues.

Participants in the MPEP SARS will be required to submit results twice/year after testing mailed performance evaluation samples.

ESTIMATE OF ANNUALIZED BURDEN HOURS

Form name	Number of respondents	Frequency of responses	Average burden per response (in hours)	Total burden (in hours)
SARS Testing Results Booklet	54	2	10/60	18
Total				18

Dated: May 6, 2005.

Joan F. Karr,

Acting Reports Clearance Officer, Centers for Disease Control and Prevention.

[FR Doc. 05–9564 Filed 5–12–05; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

Disease, Disability, and Injury Prevention and Control Special Emphasis Panel (SEP): Preventing Maternal and Neonatal Bacterial Infections in Developing Settings with a High Prevalence of HIV: Assessment of the Disease Burden and Evaluation of an Affordable Intervention in Soweta, South Africa, Request for Application (RFA) #CI05–059

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 meeting:

Name: Disease, Disability, and Injury Prevention and Control Special Emphasis Panel (SEP): Preventing Maternal and Neonatal Bacterial Infections in Developing Settings with a High Prevalence of HIV: Assessment of the Disease Burden and Evaluation of an Affordable Intervention in Soweta, South Africa, Request for Application (RFA) #CI05–059.

Times and Dates: 9 a.m.-11 a.m., June 3, 2005 (Closed).

Place: Teleconference.

Status: Portions of the 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 Public Law 92–463.

Matters to be Discussed: The meeting will include the review, discussion, and evaluation of applications received in response to: Preventing Maternal and Neonatal Bacterial Infections in Developing Settings with a High Prevalence of HIV: Assessment of the Disease Burden and Evaluation of an Affordable Intervention in Soweta, South Africa, Request for Application (RFA) #CI05–059.

Contact Person for More Information: Trudy Messmer, Ph.D., Scientific Review Administrator, National Center for Infectious Diseases, CDC, 1600 Clifton Road NE., Mailstop C19, Atlanta, GA 30333, Telephone (404) 639–3770.

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: May 6, 2005.

Alvin Hall,

Director, Management Analysis and Services Office, Centers for Disease Control and Prevention.

[FR Doc. 05–9554 Filed 5–12–05; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

Statement of Organization, Functions, and Delegations of Authority

Part C (Centers for Disease Control and Prevention) of the Statement of Organization, Functions, and Delegations of Authority of the Department of Health and Human Services (45 FR 67772–76), dated October 14, 1980, and corrected at 45 FR 69296, October 20, 1980, as amended most recently at 69 FR 77756, dated December 28, 2004) is amended to reflect the establishment of the Office of the Chief Science Officer.

Section C–B, Organization and Functions, is hereby amended as follows:

Delete in its entirety the title and functional statement for the Office of Science Policy and Technology Transfer (CAE) and insert the following:

Office of the Chief Science Officer (CAS). The Chief Science Officer and staff provide CDC/ATSDR with scientific vision and leadership in science innovation, research, ethics, and science administration. Activities in support of the mission include: (1) Ensures stability and commitment to long-term scientific investments as the basis for achieving CDC's two overarching health protection goals; (2) provides coordination for the agency's public health research program, both for intramural and extramural research activities; (3) upholds scientific ideals, establishes an environment thriving with scientific excellence, innovation, integrity, learning and discovery, and timely dissemination and translation into practice of scientific information, innovations, and technology with the ultimate goal of improving public health; (4) facilitates developing strategic and trans-disciplinary approaches for long-term planning and evaluation of CDC's scientific enterprise and ensuring sustainability of CDC's scientific output, establishing and sustaining high-level national and global alliances and synergy, and a coordinated approach to providing scientific foundation for development of public health policies; (5) advises the CDC Director and Senior Staff on science matters and represents CDC in these areas to the Department, other agencies, and Congress; (6) develops and disseminates scientific policies for CDC/ATSDR; (7) maintains the integrity and productivity of CDC's scientists by resolving controversial scientific issues, supporting trailing and information exchange, and providing direction on matters of scientific integrity; (8) assures the protection of human subjects in public health research and participates in national and international initiatives in public health protection; (9) manages CDC's intellectual property (e.g., patents, trademarks, copyrights) and promotes the transfer of new technology from CDC research to the private sector to facilitate and enhance the development of diagnostic products, vaccines, and products to improve occupational safety; (10) manages the confidentiality function for sensitive research data; (11) facilitates the agency response to the Privacy Act, the Paperwork Reduction Act, HIPAA, and FERPA.

Revise the functional statement for the *Management Analysis and Services Office (CAJ6), Office of the Chief Operating Officer (CAJ),* by deleting item (1) and inserting the following: (1) Plans, coordinates, and provides CDC-wide management and information services in the following areas: policy development and consultation, studies and surveys, delegations of authorities, organizations and functions, records management, printing procurement and reproduction, and meeting management, forms design and management, publications distribution, mail services, public inquiries, information quality, and Federal advisory committee management.

Delete the items (7) and (8) of the functional statement for the *Management Analysis and Policy Branch (CAJ64)* and renumber the remaining items accordingly.

Dated: April 28, 2005.

William H. Gimson,

Chief Operating Officer, Centers for Disease Control and Prevention (CDC).

[FR Doc. 05–9539 Filed 5–12–05; 8:45 am]

BILLING CODE 4160–18–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Medicare & Medicaid Services

[Document Identifier: CMS–10130]

Emergency Clearance: Public Information Collection Requirements Submitted to the Office of Management and Budget (OMB)

AGENCY: Center for Medicare & Medicaid Services, HHS.

In compliance with the requirement of section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995, the Centers for Medicare & Medicaid Services (CMS), Department of Health and Human Services, submitted the following collection for emergency review and approval.

We requested an emergency review because the collection of this information is needed before the expiration of the normal time limits under OMB's regulations at 5 CFR part 1320. This is necessary to ensure compliance with provisions of Section 1011 of the Medicare Prescription Drug, Improvement, and Modernization Act of 2003 (MMA). We cannot reasonably comply with the normal clearance procedures because of the effective implementation date associated with this provision of MMA.

OMB evaluated the collection for necessity and utility of the proposed information collection for the proper performance of the agency's functions; the accuracy of the estimated burden; ways to enhance the quality, utility, and clarity of the information to be collected; and the use of automated collection techniques or other forms of information technology to minimize the information collection burden.

OMB approved the emergency review of the information collection referenced below on May 9, 2005. OMB approved CMS'' request for the information collection titled, ''Federal Funding of Emergency Health Services (Section 1011): Provider Payment Determination and Request for Section 1011 Hospital On-Call Payments to Physicians'' (OMB#:0938–NEW) for a 180-day approval period.

Background

Section 1011 provides $250 million per year for fiscal years (FY) 2005–2008 for payments to eligible providers for emergency health services provided to undocumented aliens and other specified aliens. Two-thirds of the funds will be divided among all 50 states and the District of Columbia based on their relative percentages of undocumented aliens. One-third will be divided among the six states with the largest number of undocumented alien apprehensions.

From the respective state allotments, payments will be made directly to hospitals, certain physicians, and ambulance providers for some or all of the costs of providing emergency health care required under section 1867 and related hospital inpatient, outpatient and ambulance services to eligible individuals. Eligible providers may include an Indian Health Service facility whether operated by the Indian Health Service or by an Indian tribe or tribal organization. A Medicare critical access hospital (CAH) is also a hospital under

the statutory definition. Payments under section 1011 may only be made to the extent that care was not otherwise reimbursed (through insurance or otherwise) for such services during that fiscal year.

Payments may be made for services furnished to certain individuals described in the statute as: (1) Undocumented aliens; (2) aliens who have been paroled into the United States at a United States port of entry for the purpose of receiving eligible services; and (3) Mexican citizens permitted to enter the United States for not more than 72 hours under the authority of a biometric machine readable border crossing identification card (also referred to as a ''laser visa'') issued in accordance with the requirements of regulations prescribed under a specific section of the Immigration and Nationality Act. **Note:** On August 13, 2004, the Department of Homeland Security, Bureau of Customs and Border Protection, published an interim final rule extending the time limit for border crossing card visitors from 72 hours to a period of 30 days.

Type of Information Collection Request: New collection.

Title of Information Collection: Federal Funding of Emergency Health Services (Section 1011): Provider Payment Determination and Hospital On-Call Payment Form and Related Instructions.

Use: The provider payment determination form will be used to determine whether a patient's health care provider is eligible to receive Federal payment under section 1011 of the Medicare Prescription Drug, Improvement, and Modernization Act of 2003; allow hospitals and other providers to make an affirmative determination regarding a patient's section 1011 eligibility; allow CMS to verify that the hospital, physician or provider of ambulance services has obtained the necessary documentation to ensure claim payment. Hospitals electing to receive payments under section 1011(c)(3)(C)(ii) will use the hospital on-call payment form to determine a their on-call costs.

Form Number: CMS–10130 (OMB#: 0938–0952).

Frequency: Other: as needed.

Affected Public: Business or other for-profit, Not-for-profit institutions, and State, Local or Tribal Govt.

Number of Respondents: 7,503,000.

Total Annual Responses: 7,512,000.

Total Annual Hours: 634,000.

Final Implementation Notice: Readers can find CMS final implementation notice for this program attached to this notice and at *http://www.cms.hhs.gov/providers/section1011.*

FOR FURTHER INFORMATION CONTACT: Jim Bossenmeyer, (410) 786–9317.

To obtain copies of the supporting statement for this information collection, CMS' final implementation approach, and any related forms for the proposed paperwork collections referenced above, access CMS' Web site address at *http://www.cms.hhs.gov/regulations/pra/,* or e-mail your request, including your address, phone number, OMB number, and CMS document identifier, to *Paperwork@cms.hhs.gov,* or call the Reports Clearance Office on (410) 786–1326.

Subject

Center for Medicare & Medicaid Services Final Implementation Notice: Federal Funding of Emergency Health Services Furnished to Undocumented Aliens: Federal Fiscal Years 2005 Through 2008.

This notice provides the Centers for Medicare & Medicaid Services (CMS) final implementation guidance with respect to section 1011, Federal Reimbursement of Emergency Health Services Furnished to Undocumented Aliens, of the Medicare Prescription Drug, Improvement and Modernization Act of 2003, Public Law 108–173, (December 8, 2003). This legislation is commonly referred to as the Medicare Modernization Act of 2003 (MMA).

The guidance provided below sets forth CMS' implementation approach, establishes the general framework and procedural rules for submitting an enrollment application and payment requests, establishes general statements of policy, and provides CMS' interpretation of section 1011.

Future Program Changes

Since section 1011 payments are authorized for 4 years, CMS will monitor its implementation approach in future years and, if necessary, make the necessary adjustments to improve the accuracy and timeliness of payments to providers, ensure patient access to emergency services, and reduce administrative costs for providers.

I. Background

Sections 1866(a)(1)(I), 1866(a)(1)(N), and 1867 of the Social Security Act (the Act) impose specific obligations on Medicare-participating hospitals that offer emergency services. These obligations concern individuals who come to a hospital emergency department and request examination or treatment for medical conditions, and apply to all of these individuals, regardless of whether or not they are beneficiaries of any program under the Act. Section 1867 of the Act sets forth requirements for medical screening examinations of medical conditions, as well as necessary stabilizing treatment or appropriate transfer. In addition, section 1867(h) of the Act specifically prohibits a delay in providing required screening or stabilization services in order to inquire about the individual's payment method or insurance status. Section 1867(d) of the Act provides for the imposition of civil monetary penalties on hospitals responsible for negligently violating a requirement of that section, through actions such as the following: (a) Negligently failing to appropriately screen an individual seeking medical care; (b) negligently failing to provide stabilizing treatment to an individual with an emergency medical condition; or (c) negligently transferring an individual in an inappropriate manner. (Section 1867(e)(4) of the Act defines ''transfer'' to include both transfers to other health care facilities and cases in which the individual is released from the care of the hospital without being moved to another health care facility.)

These provisions, taken together, are frequently referred to as the Emergency Medical Treatment and Labor Act (EMTALA), also known as the patient antidumping statute. EMTALA was passed in 1986 as part of the Consolidated Omnibus Budget Reconciliation Act of 1985 (COBRA). Congress enacted these antidumping provisions in the Social Security Act because of its concern with an increasing number of reports that hospital emergency rooms were refusing to accept or treat individuals with emergency conditions if the individuals did not have insurance.

Section 1011 Legislative Summary

Section 1011 provides $250 million per year for fiscal years (FY) 2005–2008 for payments to eligible providers for emergency health services provided to undocumented aliens and other specified aliens. Two-thirds of the funds will be divided among all 50 states and the District of Columbia based on their relative percentages of undocumented aliens. One-third will be divided among the six states with the largest number of undocumented alien apprehensions.

From the respective state allotments, payments will be made directly to hospitals, certain physicians, and ambulance providers for some or all of the costs of providing emergency health care required under section 1867 and related hospital inpatient, outpatient and ambulance services to eligible individuals. Eligible providers may

include an Indian Health Service facility whether operated by the Indian Health Service or by an Indian tribe or tribal organization. A Medicare critical access hospital (CAH) is also a hospital under the statutory definition. Payments under section 1011 may only be made to the extent that care was not otherwise reimbursed (through insurance or otherwise) for such services during that fiscal year.

Payments may be made only for services furnished to certain individuals described in the statute as: (1) Undocumented aliens; (2) aliens who have been paroled into the United States at a United States port of entry for the purpose of receiving eligible services; and (3) Mexican citizens permitted to enter the United States for not more than 72 hours under the authority of a biometric machine readable border crossing identification card (also referred to as a ''laser visa'') issued in accordance with the requirements of regulations prescribed under a specific section of the Immigration and Nationality Act. **Note:** On August 13, 2004, the Department of Homeland Security, Bureau of Customs and Border Protection, published an interim final rule extending the time limit for border crossing card visitors from 72 hours to a period of 30 days.

II. Provisions of CMS Final Implementation Guidance

This paper is divided into the following sections.

Section	Section title
III	Determination of Annual State Allotments for FY 2005—FY 2008.
IV	Eligible Providers.
V	Eligible Aliens.
VI	Covered Services.
VII	Enrollment Application Process.
VIII	Reimbursement from Third-Party Payers and Patients.
IX	Patient Eligibility Determination.
X	Payment Methodology.
XI	Distribution of State Funding to Providers.
XII	Submission of Payment Requests.
XIII	Determination of Payment Amounts.
XIV	Pro-Rata Reduction.
XV	Quarterly Payments.
XVI	Appeals and Claim Adjustments.
XVII	Compliance Reviews.
XVIII	Overpayments.
XIX	Annual Reconciliation Process.
XX	Unused State Funding.

III. Determination of Annual State Allotments for FFY 2005—FY 2008

As mentioned above, section 1011 provides $250 million per year for FY 2005–2008 for payments to eligible providers for certain emergency health services furnished to undocumented and certain other aliens.

This paper provides Federal fiscal year (FFY) 2005 state allotments that are available for distribution to eligible providers within each state and the District of Columbia that furnish emergency eligible services to eligible individuals. In addition, this paper provides the FFY 2005 state allotments that are available to the six States with the highest number of undocumented alien apprehensions for such fiscal year. This paper also describes the methodology used to determine each State's allotment.

Determination of State Allocation Based on Undocumented Aliens Percentage

The statute dictates that two-thirds of the total yearly appropriation, or $167 million, is to be proportionally divided among all 50 states and the District of Columbia. The amount of the state's allotment is to be based on the ''the percentage of undocumented aliens residing in the State as compared to the total number of such aliens residing in all States, as determined by the Statistics Division of the Immigration and Naturalization Service, as of January 2003, based on the 2000 decennial census,'' (emphasis added) (MMA Section 1011(b)(1)(B)(ii)).

Because the statutory language requires the allocation calculation to be made by comparing a percentage to a national number, we would not be able to calculate the state allotments if the statutory provision is interpreted literally. In order to produce a mathematically meaningful result that would enable us to implement this subparagraph, and be consistent with the language of the committee report on section 1011, we have determined the ''percentage'' in section 1011(b)(1)(B)(ii) by comparing the number of undocumented aliens in the state to the total of undocumented aliens in all states and the District of Columbia. Using information from the Department of Homeland Security (DHS) Office of Immigration Statistics, we have calculated the allotments for each state and the District of Columbia by multiplying the total appropriation ($167 million) by the proportion generated by dividing the number of undocumented aliens who reside in each state by the total number of undocumented aliens in all states (see attached chart). Because the statute bases the allocation of the $167 million on the proportion of undocumented aliens at one given time, these allocations will be the same for each state for each fiscal year (FY 2005–FY 2008).

As of January 2003, DHS estimated that each of the following four states had fewer than 1,000 undocumented aliens residing in the state: Maine, Montana, North Dakota, and Vermont. From discussions with DHS, we did not believe it was appropriate to assume that there were zero undocumented aliens residing within these states simply because DHS estimates are rounded to the thousand. Thus, for purposes of implementing Section 1011, we have adopted a position that 500 undocumented aliens reside in each of these four states.

Allocation Based on Undocumented Alien Apprehensions (Distributing $83 million)

The remaining one-third of the total appropriation, or $83 million, is divided among the six states with the highest number of undocumented alien apprehensions for each fiscal year. The statute requires that the data to be used for determining the ''highest number of undocumented aliens apprehensions for

a fiscal year shall be based on the apprehensions for the 4-consecutive-quarters ending before the beginning of the fiscal year for which information is available for undocumented aliens in such states, as reported by the Department of Homeland Security.'' Since section 1011(b)(2)(C) requires that we use data from the four consecutive quarters ending before the beginning of the fiscal year, we are adopting a position to identify the six states based on data available prior to the fiscal year when the funding is available. The last available four fiscal quarters ending before the beginning of FFY 2005 (which begins October 1, 2004) would be from July 1, 2003 through June 30, 2004. However, due to changes in the way the Department of Homeland Security collects alien apprehension data, there is not complete data available for that period of 4-consecutive quarters. As a result, for FY 2005 allocations we will identify the six states to receive portions of the $83 million based on the highest number of undocumented alien apprehensions for the time period from April 1, 2003 to March 31, 2004. For future fiscal year allocations, we plan to use the 4-consecutive quarters for which information is available, which should be July 1–June 30.

Our analysis, using apprehension data from DHS from April 1, 2003 to March 31, 2004, indicates that the six states with the highest number of undocumented alien apprehensions were Arizona, California, Florida, New Mexico, New York, and Texas.

Once the six states have been identified, the statute directs us to allocate money to those states in the following manner:

Determination of Allotments

The amount of the allotment for each State for a fiscal year shall be equal to the product of—

(i) The total amount available for allotments under this paragraph for the fiscal year; and

(ii) The percentage of undocumented alien apprehensions in the State in that fiscal year as compared to the total of such apprehensions for all such States for the preceding fiscal year.

Again, the mathematical formula in statutory language is problematic. Therefore, we have determined a calculation for the statutory usage of ''percentage'' by comparing the number of alien apprehensions in the state to the total number of alien apprehensions in all states and the District of Columbia. Moreover, the statute directs us to determine the percentage based on the number of alien apprehensions in the current year as compared to the total number of apprehensions in the previous fiscal year. Taking a literal interpretation of the statute would be problematic in that if the total number of apprehensions in the current year were to increase, then the six states' proportion of the previous year's total would exceed 100 percent of the money available.

For example, assume that in 2004 (previous FY) State A had 10 apprehensions, and State B had 30 apprehensions—for a total of 40 apprehensions in the previous fiscal year. In FY 2005, State A might have 20 apprehensions and State B might have 30 apprehensions, for a total of 50 apprehensions in the current fiscal year. If we followed the exact statutory language, State A would receive 50 percent of the allocation (20 apprehensions in current FY/40 total apprehensions in previous fiscal year), and State B would receive 75 percent (30/40). Using these proportions would result in allocating 125 percent of the $83 million specified in law, a result that would be legally prohibited. Alternatively, if the total number of apprehensions in the current year were to decrease, then the six states' proportion of the previous year's total could be less than 100 percent of the available funds, again making it impossible to allocate the funds as provided for by the statute.

Additionally, a literal interpretation of the statute would delay implementation inappropriately in that it would require us to wait for data on the number of undocumented alien apprehensions to be made available for the current year. With the inherent time lag necessary for DHS to collect and compile the data, FY 2005 data would not be available until November 2005. Not knowing final allotments until after the end of the fiscal year could impose a burden on providers if payments had to be reconciled after the end of the year.

Given the ambiguity in the statutory language, we believe that the current year used to identify the six states with the highest number of undocumented alien apprehensions is actually a time prior to the start of the current fiscal year. We believe it was the legislative intent to calculate the state proportions based on apprehension data from the same time period that is prior to the start of the current fiscal year. Thus, in consideration of the need for symmetry between the numerator and the denominator, we plan to use the same time period that is used for identifying the six states as for determining the proportions (April 1, 2003 to March 31, 2004. Thus, we plan to determine the FY 2005 allotments to the six states based on the proportion of undocumented alien apprehensions in a given state for the period of April 1, 2003–March 31, 2004, compared to the total of such apprehensions for all six states for the period of April 1, 2003–March 31, 2004.

For purposes of determining the allocation for the six states in subsequent fiscal years, we will use the period of July 1–June 30 of the previous year (*i.e.*, FY 2006 will be based on the number of apprehensions for July 1, 2004–June 30, 2005.)

Final FY 2005 State Allocations

Attachment 1 contains the final state funding allocations for FY 2005. The state specific allocation of the $167 million is based on already available data required to calculate the funding amounts and remain unchanged for each fiscal year (FY 2005–FY 2008). The six state allocations of the $83 million may change on yearly basis, so the allocations may change in FY 2006–FY 2008. Updated allotments for the $83 million for FY 2006–2008 will be determined before the start of each fiscal year.

Public Comments

In response to several comments that suggested that state funding allocations be redistributed from one jurisdiction (*i.e.*, State or the District of Columbia) to another jurisdiction, CMS is adopting a position that section 1011(b) of the MMA establishes a funding allocation for each jurisdiction identified in (e)(6) and that the funding allocation is not subject to revision by CMS. Moreover, we believe that the statutory language contained in section 1011(e)(6) of the MMA precludes payment for services furnished in Guam, Puerto Rico, and other U.S. Territories. Therefore, we are unable to adopt the recommendation to redistribute state allocations established by section 1011.

IV. Eligible Providers

For the purposes of this provision, a hospital, physician, or provider of ambulance services (including an Indian Health Service (IHS) facility whether operated by the IHS or by an Indian tribal or tribal organization) are considered eligible providers.

''Hospital'' is defined at section 1861(e) of the Social Security Act (42 U.S.C. 1395x(e)). The term ''Hospital'' generally includes all Medicare participating hospitals, except that such term shall include a critical access hospital (as defined in section 1861(mm)(1) of such Act (42 U.S.C.

1395x(r)). While the definition of hospital under § 1011(e)(3) cross-refers to § 1861(e) of the Social Security Act, and does not expressly limit coverage to hospitals with a Medicare participation agreement under § 1866, ''eligible services'' are defined in § 1011(e)(2) as meaning, in pertinent part, ''health care services *required* by the application of section 1867 of the Social Security Act * * *'' Because section 1867 establishes legal obligations only for hospitals participating in the Medicare program, therefore, only Medicare participating hospitals can furnish ''services required'' by section 1867. Thus, we are adopting a position that only Medicare participating hospitals can apply to receive funds under section 1011.

''Physician'' is defined at section 1861(r) of the Act (42 U.S.C. 1395x(r). The term ''Physician'' includes doctor of medicine (MD), doctor of osteopathy, and within certain statutory restrictions on the scope of services they may provide, doctors of podiatric medicine, doctors of optometry, chiropractors, or doctors of dental surgery.

While section 1011 does not define a ''provider of ambulance services,'' we are adopting a position that a state-licensed ''provider of ambulance services'' for covered emergency transportation services is eligible for payment for covered transports to a hospital emergency department or from one hospital to another.

''Indian Tribe'' or ''Tribal organization'' are described in section 4 of the Indian Health Care Improvement Act (25 U.S.C. 1603).

Public Comments

Several commenters recommended that Federally Qualified Health Centers (FQHCs) and mid-level practitioners, including nurse practitioners, physician assistants, and clinical nurse specialists, be allowed to seek section 1011 payment. Since section 1011 clearly specifies that only physicians, as defined in 1861(r) of the Act (42 U.S.C. 1395x(r), are eligible to bill for emergency services furnished to individuals identified in (c)(5), mid-level practitioners, including nurse practitioners, clinical nurse specialists, and physician assistants, are not eligible to receive payments under section 1011 for the emergency services provided. Moreover, we believe that the statutory language contained in section 1011(e)(4) of the MMA excludes FQHCs from receiving payment for section 1011 emergency services, unless the FQHC meets the definition of a hospital in 1861(e) of the Social Security Act (42 U.S.C. 1395x(e)).

V. Eligible Aliens

As specified in (c)(5) of section 1011of the MMA, aliens are defined as:

• Undocumented Aliens (Section 1011 does not define the term ''undocumented alien.'' For the purposes of implementing this section of MMA, the term ''undocumented alien'' refers to a person who enters the United States without legal permission or who fails to leave when his or her permission to remain in the United States expires); or

• Aliens who have been paroled into the United States at a United States port of entry for the purpose of receiving eligible services (In general, parole authority allows the Department of Homeland Security to respond to individual cases that present problems for which no remedies are available elsewhere in the Immigration and Nationality Act. Parole is an extraordinary measure sparingly used to bring otherwise inadmissible aliens into the United States for a temporary period of time due to a very compelling emergency. The prototype case arises in an emergency situation. For example, the sudden evacuation of U.S. citizens from dangerous circumstances abroad often includes household members who are not citizens or permanent resident aliens, and these persons may be paroled. When aliens are brought to the United States to be prosecuted or to assist in the prosecution of others, they are paroled.); or

• Mexican citizens permitted to enter the United States for not more than 72 hours under the authority of a biometric machine readable border crossing identification card (also referred to as a ''laser visa'') issued in accordance with the requirements of regulations prescribed under section 101(a)(6) of the Immigration and Nationality Act (8 U.S.C. 1011(a)(6)).

On August 13, 2004, the Department of Homeland Security, Bureau of Customs and Border Protection, published an interim rule with request for comments (69 Fed Reg. 50051) expanding the time restriction on border crossing cards used by Mexicans to enter the United States for temporary visits. The new rule extends the time limit for border crossing card visitors from 72 hours to a period of 30 days. Previously, border-crossing cardholders could visit the United States for 72 hours within a border zone of 25 miles along the border in Texas, New Mexico, and California and 75 miles of the border in Arizona. The geographic limitations remain unchanged.

Public Comments

One commenter recommended that an eligible provider be allowed to claim section 1011 payments for foreign nationals possessing a non-immigrant visa. Since the statutory language does not permit payment for foreign nationals and other immigrants not identified in section 1011(c)(5) of MMA, we are not adopting this recommendation.

VI. Covered Services

Paragraph (c)(1) of section 1011 requires the Secretary to make payments, from the allotments described earlier in that provision, for eligible services to undocumented aliens. ''Eligible services'' are defined in paragraph (e)(2) as ''health care services required by the application of section 1867 [EMTALA] * * * and related hospital inpatient and outpatient services and ambulance services (as defined by the Secretary).'' For hospital and ambulance services, the authority to pay for ''related'' services, as well as for those the hospital is required to provide under EMTALA, is clear. For physician services, we believe that the statutory language also should be read to provide for payment for ''related'' physician services.

Under the Medicare Act, inpatient hospital services are paid under Part A while the associated physician services are paid under part B. Thus, normally EMTALA services give rise to separate claims under part A and part B. Section 1011, however, is not codified in the Medicare Act and, therefore, we are not required to follow those billing conventions. Moreover, Congress seems to have intended to permit simultaneous payment for both hospital and physician services furnished at the same time by giving the hospital the option to elect to receive payment for the associated physician services, see section 1011(c)(3)(C)(i). Because section 1011 includes payment for both related inpatient and outpatient services, we believe that in the context of this new program the statute can be reasonably interpreted to include the associated physician services at the hospital that are related to EMTALA.

Section 1867(e) of the Social Security Act defines the term ''emergency medical condition'' as a medical condition manifesting itself by acute symptoms of sufficient severity (including severe pain) such that the absence of immediate medical attention could reasonably be expected to result in placing the health of the individual (or, with respect to pregnant women, the health of the woman or her unborn child) in serious jeopardy, serious

impairment to bodily functions, or serious dysfunction of any bodily organ or part; or with respect to a pregnant woman who is having contractions that there is inadequate time to effect a safe transfer to another hospital before delivery, or that transfer may pose a threat to the health or safety of the woman or unborn child.

Initial Proposal

Initially, we proposed that section 1011 coverage would end when a patient was discharged from the hospital. While this approach would impose the least amount of burden on hospitals since no splitting of costs/charges or other information would be needed to determine payments during a stay, we now believe that this approach is overly expansive and may not fully comport with the intent of Congress to limit the coverage criteria. Thus, by adopting our final implementation approach that permits payment for services furnished until the patient is stabilized, we believe that we are focusing payment on EMTALA and the most closely related EMTALA services. The primary point of the EMTALA services is to stabilize the patient in an emergency rather than to cure the underlying illness or injury.

Other Options Considered

We considered several other options in our initial proposal. We also considered limiting ''related services'' by the hospital to services furnished within a specific time frame after stabilization or inpatient admission. For example, coverage of outpatient hospital services at the hospital to which the patient initially presents could be limited to services that are furnished on the date on which the patient is stabilized, and inpatient services coverage could be limited to services furnished on the calendar day immediately following the date of a good faith admission to stabilize the patient's emergency medical condition, or on the next calendar day. Coverage of inpatient and outpatient hospital services of specialty hospitals could be limited to services furnished on the calendar day immediately following the date of admission as a result of an appropriate transfer required by EMTALA, or on the following calendar day. In adopting a position that covers services provided through stabilization, we believe, in general, the most intensive procedures or services required for an emergency patient would be those furnished during the earliest part of a stay. In some cases, however, stabilization may take longer, so we are adopting a final approach that will permit payments beyond a fixed time period in some circumstances. We believe this more flexible approach will more accurately reflect the services that hospitals and physicians furnish to patients prior to stabilization.

Finally, we considered an approach under which coverage for the hospital, which first treats the individual, would end when that hospital admits an unstable individual for inpatient treatment. We recognize that such an approach would allow us to identify and pay for the services required by EMTALA, and would help hospitals and other providers clearly identify the point at which coverage terminates. However, this option would not fully implement the statute since it would not provide payment for EMTALA-related services, as required under section (e)(2) of section 1011. Therefore, we do not believe this approach can be adopted.

Public Comments

Several commenters recommended that we limit inpatient coverage to a defined period of time after an inpatient admission. Specifically, these commenters recommended that CMS more closely tie section 1011 coverage to patient stabilization. In addition, these commenters asserted that extending inpatient coverage through discharge would accelerate the depletion of the program's limited financial resources, could encourage fraud and abuse, and may result in the hospitals providing services unrelated to the emergency condition for which the patient was admitted. We appreciate these comments and agree that providing coverage through stabilization is consistent with Congressional intent.

Final Implementation Approach

For *hospital services,* we are adopting a position that payment will be made for covered services that would begin when the hospital's EMTALA obligation begins. Typically this is when the individual arrives at the hospital emergency department and requests examination or treatment for a medical condition or if the individual comes to an area of the hospital other than the dedicated emergency department for an emergency medical condition. For specialty hospitals receiving appropriate transfers under EMTALA (section 1867(g) of the Act), coverage will begin when the individual arrives at the specialty hospital.

For hospital services, we are also adopting a position that section 1011 coverage continues until the individual is stabilized, notwithstanding any inpatient admission. (In connection with this option, we note that under current EMTALA regulations, the obligation of the hospital which first treats the individual ends when the individual is either stabilized, appropriately transferred to another facility, or admitted in good faith as an inpatient for stabilizing treatment). For a specialty hospital receiving an appropriate transfer, coverage also will continue until the individual is stabilized. For an inpatient of either hospital, this could necessitate a stabilization determination in the middle of the patient's stay, and charges/costs or other information (such as diagnostic or procedural information) needed to determine payments would have to be divided between both portions of the entire stay, to assure that the bill submitted for section 1011 includes only covered services.

To be considered stable, a patient's emergency medical condition must be resolved, even though the underlying medical condition may persist. For example, an individual presents to a hospital complaining of chest tightness, wheezing, and shortness of breath and has a medical history of asthma. A physician completes a medical screening examination and diagnoses the individual as having an asthma attack which is an emergency medical condition (EMC). Stabilizing treatment is provided (medication and oxygen) to alleviate the acute respiratory symptoms. In this scenario the EMC was resolved, but the underlying medical condition of asthma still exists. After stabilizing the patient, the hospital no longer has an EMTALA obligation. The physician may discharge the patient home, admit him/her to the hospital, or transfer (the ''appropriate transfer'' requirement under EMTALA does not apply to this situation since the patient has been stabilized) the patient to another hospital depending on his/her needs or request.

In general, we believe that most patients are stabilized within 2 calendar days. We believe that EMTALA-related services are all those medically necessary inpatient services that occur prior to stabilization. (For example, a patient that is admitted after midnight on May 10th would most likely be stabilized before midnight on May 11th.) In conjunction with our adopted payment methodology, we are adopting a position to review inpatient admissions that go beyond 2 calendar days. As a matter of enforcement discretion when conducting reviews of claims, we will not review the stabilization determination for those claims for which stabilization occurs on the first or second day. Hospitals need not document when stabilization

occurred in these cases. We may review cases where stabilization is determined to have occurred on the third or later day of the admission. In the event we review the claim, we would expect the medical record to completely document the reasons for the stabilization determination. If a determination were not properly documented, we would deem stabilization to have occurred on the second day of the stay. Accordingly, hospitals would need to determine how many days an individual was in the hospital before stabilization occurred. The hospital would then receive a per-diem rate for that individual for each day of the stay, not to exceed the full DRG payment. The per diem rate is calculated by dividing the full DRG payment by the geometric mean length of stay for the DRG. However, it is worth noting that the per diem rate is still subject to the pro-rata reduction discussed in section XV.

While this approach may impose additional administrative burdens on hospitals, we believe that this coverage approach is more consistent with Congressional intent of limiting the duration of covered services to stabilization. In adopting this approach, we believe that we will reduce the potential of the pro-rata reduction discussed in section XV. Further, we believe that limiting coverage through stabilization, rather than through discharge, will prevent hospitals from seeking 1011 funds for services unrelated to the emergency medical condition.

For *physician services,* we are adopting a position to cover all medically necessary and appropriate services which physicians furnish to a hospital inpatient or outpatient who receives emergency services required by section 1867 (EMTALA) or ''related'' inpatient or outpatient services, as defined above; that is, through stabilization. Our reasons for planning to adopt that coverage option for hospital services are explained further above. As noted above, ''physician'' is defined at section 1861(r).

We are adopting a position that follow-up care provided by a physician to an individual who is no longer receiving hospital services covered under this section would not be covered. Non-coverage of physician services would extend to services which might be furnished when the patient is neither a hospital inpatient nor outpatient, even if the services are needed to treat the same illness or injury that caused the EMTALA provision to apply. For example, if an individual were treated as an outpatient in a hospital emergency department for a severe cut and required minor surgery to close the wound, thus stabilizing his or her medical condition, both the hospital and physician services in that setting would be covered. However, subsequent physician office visits provided after stabilization would not be covered, even if the visits were for the purpose of removing stitches or providing other post-surgical care for the injury that caused the original emergency department visit.

For *ambulance services,* we are adopting a position that covers all medically necessary air and/or ground ambulance transportation of a patient to the first hospital at which he or she is seen for an emergency medical condition. In addition, we will cover any medically necessary air/and or ground ambulance transportation of a patient that is necessary to effect an appropriate transfer under EMTALA. We are adopting a position that we will not cover the transportation costs associated with transporting patients once emergency care is provided. Although air and/or ground ambulance providers are not themselves subject to EMTALA under section 1867, such transport services, when medically necessary, are ''related'' to services that a hospital is mandated under EMTALA to provide.

VII. Enrollment Application Process

Section 1011(c)(3)(C) of the MMA states that the Secretary shall provide for the election by a hospital to either receive payments to the hospital for—

(i) Hospital and physician services; or

(ii) Hospital services and a portion of the on-call payments made by the hospital to physicians.

To implement this provision of the statute, CMS is adopting a position that each provider electing to receive section 1011 payments must submit a paper enrollment application and an electronic enrollment application prior to submitting a payment request.

While completing the enrollment application increases the paperwork burden for some providers, we believe that this process is essential to issuing electronic payments to providers and ensuring payments are made only to qualified providers. Moreover, this application will be a measure to ensure that inappropriate or fraudulent payments are not made as required by section 1011(d)(1)(B). Specifically, this application will:

- Identify a provider's potential interest in seeking payment under section 1011, but will not require the provider to seek payment;
- Allow hospitals to make a payment election, as required by section 1011(c)(3)(C);
- Allow CMS' designated contractor to obtain necessary financial information to effectuate payments and issue the appropriate tax information;
- Establish the state of service for each provider. This will assist CMS in making provider payments from the appropriate state allocation;
- Allow CMS to verify whether the hospital, physician or provider of ambulance services is currently enrolled as a Medicare provider;
- Advise hospitals to notify physicians of its election under (c)(3)(C) of section 1011;
- Advise hospitals electing hospital and physician payments to provide reimbursement to physicians in a prompt manner;
- Inform hospitals of the statutory provisions that prohibit a hospital electing to receive both hospital and physician payments from charging an administrative or other fee to physicians for the purpose of transferring reimbursement to physicians (see section 1011(c)(3)(D));
- Acknowledge the provider's obligation to repay any assessed overpayment within 30 days of notification by CMS; and,
- Inform a provider about applicable Federal laws relating to submission of false claims.

Accordingly, we are adopting a position that an abbreviated enrollment application must be submitted electronically via a secure Web site established by our designated contractor and that an original copy of the enrollment application must be submitted to CMS' designated contractor for verification purposes.

On May 9, 2005, the OMB approved the provider enrollment information collection instrument and related instructions. The provider enrollment application can be found at *http://www.cms.hhs.gov/providers/section1011.*

Enrollment Process and Application for Medicare Participating Providers

Any hospital, including those operated by the Indian Health Service and Indian tribes and tribal organizations, enrolled in the Medicare program and seeking payment must submit an enrollment application to participate in the section 1011 program.

Further, as stated above in section IV of this paper, because section 1867 of the Social Security Act establishes legal obligations only for hospitals participating in the Medicare program, only Medicare participating hospitals

can furnish ''services required'' by section 1867, we are adopting the position that only Medicare participating hospitals can apply to receive funds under section 1011.

Hospitals' Election

We are adopting a position that hospitals electing to receive payment for both hospital and physician services under (c)(3)(C)(i) will *not* be allowed to submit claims from certain physicians while allowing other physicians to bill separately. Accordingly, hospitals electing to receive payments under (c)(3)(C)(i) must receive payment for all physicians employed by or contracted with the hospital.

Submission of Enrollment Application for Medicare Participating Providers

Medicare providers are required to submit an abbreviated enrollment application and an electronic section 1011 enrollment application. Once the section 1011 web-based enrollment process is established, Medicare providers will be notified. Once established, Medicare providers may submit their electronic enrollment application at any time, but at least 30 days prior to submitting a claim. Since Medicare participating providers already have electronic data interchange agreements (EDI) with their existing carrier or fiscal intermediary, we are adopting a policy that no additional agreement be signed. If the provider does not have an EDI agreement, the provider will need to complete an EDI agreement. Finally, we are adopting a position that a provider would be eligible for payment if the designated contractor approves an abbreviated enrollment application in advance of quarterly claims processing activities.

Enrollment Process and Application for Non-Medicare Participating Providers

We are adopting a position that a physician or provider of ambulance services not currently enrolled in the Medicare program submit a completed Medicare enrollment application (*i.e.,* a CMS–855I for physicians or a CMS–855B of a provider of ambulance services) and sign an EDI agreement prior to submitting a section 1011 abbreviated enrollment application and electronic section 1011 enrollment application. If the provider does not have an EDI agreement, the provider will need to complete an EDI agreement.

The designated contractor will review and approve/deny the Medicare enrollment application prior to reviewing the section 1011 abbreviated enrollment application request. **Note:** A physician or provider of ambulance services need not enroll in the Medicare program in order to receive section 1011 payment. However, we will use the Medicare enrollment application and the abbreviated enrollment application to ensure that inappropriate, excessive or fraudulent payments are not made from state allotments.

The purpose of collecting this information is to determine or verify the eligibility of individuals and organizations to participate in the section 1011 program. This information will also be used to ensure that no payments are made to a physician or provider of ambulance services who is excluded from participating in Federal or State health care program.

Change in Banking and Financial Information

To ensure that payments are issued in a timely manner and in an effort to reduce the administrative burden both for provider submitting reimbursement requests and for CMS, we are adopting a position that participating section 1011 providers notify CMS' designated contractor in writing regarding any change in its bank routing or financial information. We believe that this approach will ensure the efficient and effective administration of the statute.

VIII. Reimbursement From Third-Party Payers and Patients

Paragraph (c)(1) of section 1011 requires the Secretary to directly pay providers for the provision of eligible services to aliens to the extent that the eligible provider was not otherwise reimbursed (through insurance or otherwise) for such services during that fiscal year.

Accordingly, we are adopting a position that each provider seek reimbursement from all available funding sources, including, if applicable, Federal (*e.g.,* Department of Homeland Security), State (*e.g.,* Medicaid or State Children's Health Insurance Program), third-party payers (*e.g.,* private insurers or health maintenance organizations), or direct payments from a patient, prior to requesting a section 1011 payment. We believe that this is consistent with the statutory intent of this provision and will limit reimbursement to only those instances where no other reimbursement is likely to be received.

Use of Existing Practices and Procedures To Identify Reimbursement Sources

We are adopting a position that hospitals and other providers use their existing practices and procedures to identify and request reimbursement from all available funding sources prior to requesting a section 1011 payment.

Impact of Medicaid Payments

Consistent with 42 CFR 447.15, Medicaid payments will be considered payment in full and providers are only allowed to submit a request for section 1011 reimbursement for the deductible, coinsurance or co-payment not paid by the individual. 42 CFR 447.15 states, ''A state plan must provide that the Medicaid agency must limit participating in the Medicaid program to providers who accept, as payment in full, the amounts paid by the agency plus any deductible, coinsurance or co-payment required by the plan to be paid by the individual. However, the provider may not deny services to any eligible individual on account of the individual's inability to pay the cost-sharing amount imposed by the plan in accordance with 431.55(g) or 447.53. The previous sentence does not apply to an individual who is able to pay. An individual's inability to pay does not eliminate his or her liability for the cost sharing charge.''

Impact of Department of Homeland Security Payments

Consistent with U.S. Code Title 18, Part III, Chapter 301, Section 4006, we are adopting a position that payments made by the Department of Homeland Security are deemed to be full and final payment.

Impact of Workers Compensation Payments

Subject to limitations imposed by state law, we are adopting a position that providers may balance bill a patient after receiving a worker's compensation payment or determining that a workers' compensation payment may be made on behalf of the patient. In addition, subject to limitations imposed by state law, we are adopting a position that allows a provider to bill section 1011 for unpaid workers' compensation co-payments and deductibles.

Impact of Payments From a Patient

To the extent that there is no third-party payer and an eligible patient self-pays for his or her care, CMS is adopting a position that a provider be allowed to ''balance bill'' section 1011 in the aforementioned situation for claims that are not fully paid by the patient. In addition, a provider may balance bill the patient for the appropriate costs after a section 1011 payment has been made.

Impact of Grants and Gifts

We are adopting a position that state and local indigent or charity care programs or state funded subsidies are not to be considered in determining whether a third-party payment is applicable.

Impact of Section 1011 Payments on the Medicare Cost Report

We are adopting a position that hospitals should not report section 1011 payments on their Medicare cost report.

Receipt of Third-Party or Patient Payments After Section 1011 Reimbursement Is Received

We are adopting a position that if a hospital or other provider receives a payment from a third-party payer subsequent to a section 1011 payment that the provider notify the CMS' designated contractor. An overpayment may occur if a provider receives payments in excess of the approved payment amount. In some cases, a provider may receive a combination of third-party payment and section 1011 payment that exceed the approved payment amount.

IX. Patient Eligibility Determination

Section 1867 of the Social Security Act (EMTALA) requires a hospital that provides emergency services to medically screen all persons who come to the hospital seeking emergency care to determine whether an emergency medical condition exists. If the hospital determines that a person has an emergency medical condition, the hospital must provide treatment necessary to stabilize that person or arrange for an appropriate transfer to another facility.

Section 1867 precludes a participating hospital from inquiring about an individual's method of payment or insurance status before a medical screening examination. For purposes of payment under section 1011, hospitals and other providers are required to collect and maintain additional information regarding a patient's eligibility.

After a hospital initiates the medical screening for an emergency medical condition and stabilization efforts have been initiated, hospital staff routinely begins a financial screening process to determine how an individual will pay for his or her health care. In many cases, the financial liability associated with an individual's care is borne by a third-party payer, including federal, state, or private insurance. In some cases, a patient is neither insured nor financially able to pay for his or her care. If a patient has no other insurance and is unable to pay for treatment, many hospitals will attempt to enroll the patient in Medicaid.

In general, section 1903(v)(1) of the Social Security Act limits Medicaid eligibility to aliens who meet certain immigration status requirements. However, all aliens (including undocumented aliens) are eligible for treatment of an emergency medical condition, provided that they meet all other Medicaid eligibility requirements. In other words, all aliens are eligible for emergency Medicaid coverage only if, except for immigration status, they meet Medicaid eligibility criteria applicable to citizens. For citizens and non-citizens to qualify, they must belong to a Medicaid-eligible ''category'' such as children under 19 years of age, parents with children under 19, or pregnant women—and meet income and state residency requirements.

We believe that hospital eligibility specialists are sufficiently knowledgeable to avoid asking patients to complete a Medicaid application when the individual has provided information that would deem the patient ''categorically ineligible'' for Medicaid benefits. Patients generally considered ''categorically ineligible'' include non-disabled adults and adults without minor children. Moreover, while undocumented aliens have little or no incentive to provide information regarding their citizenship status, it should be noted that categorically eligible immigrants have a strong incentive to demonstrate that they qualify to receive Medicaid.

Government Accountability Office Findings

In May 2004, the Government Accountability Office (GAO) issued a report titled, ''Undocumented Aliens: Questions Persist about Their Impact on Hospitals' Uncompensated Care Costs.'' In this report (GAO–04–472), the GAO attempted to examine the relationship between uncompensated care and undocumented aliens by surveying hospitals, but because of a low response rate to key survey questions and challenges in estimating the proportion of hospital care provided to undocumented aliens, GAO could not determine the effect of undocumented aliens on hospitals' uncompensated care costs.

The GAO also found that, ''Determining the number of undocumented aliens treated at a hospital is challenging because hospitals generally do not collect information on patients' immigration status and because undocumented aliens are reluctant to identify themselves.'' Further, the GAO concludes that, ''The lack of reliable data on this patient population and the lack of proven methods to estimate their numbers make it difficult to determine the extent to which hospitals treat undocumented aliens and the costs of their care.'' Finally, the GAO recommended that, ''the Secretary develop reporting criteria for providers to use in claiming these funds and periodically test the validity of the data supporting the claims.''

Initial Proposal

Initially, we proposed that a patient specific approach that required hospitals and other providers to request direct eligibility information from patients. In response to the public concerns regarding the negative public health consequences of asking for this information, we have decided not to ask hospitals and other providers to ask a patient if he or she is a citizen of the United States.

Other Options Considered

We considered two other provider eligibility documentation options. We considered establishing a hospital's alien patient workload by taking the ratio of number of emergency Medicaid eligible patients to the number of full-scope of Medicaid eligible patients served by a provider and apply that ratio to the provider's overall uncompensated care costs. While we considered this option, we do not favor this approach because these options do not adequately document the eligibility status of aliens described in paragraph (c)(5) of section 1011. In the case of establishing a statistically based determination, we do not believe the data would yield a valid proxy or survey for the services provided to aliens defined in (c)(5). Moreover, we do not believe that any proxy methodology mentioned to date demonstrates a high correlation to providing emergency services for undocumented and other specified aliens.

Final Implementation Approach

In considering how providers will identify and document patient eligibility for the purposes of receiving payment under this section, CMS believes that documentation standards should: (1) Not impose requirements on providers that are inconsistent with EMTALA, (2) minimize the cost and reporting and record-keeping requirements, and (3) not compromise public health by discouraging undocumented aliens from seeking necessary treatment.

Since section 1011 payments are authorized only for the three categories of non-citizens specified in (c)(5) of section 1011, it is important to establish a process that helps to ensure that hospitals and other providers will receive payments only for those three categories of individuals. Accordingly, we are adopting an indirect patient-based documentation approach. Using this approach, providers would request information about a patient's eligibility prior to discharge, but after the patient is identified as self-pay and not Medicaid eligible. *Note:* Under EMTALA, a participating hospital may not delay a medical screening examination or treatment in order to inquire about the individual's method of payment or insurance status. We also would not allow a delay in the medical screening examination because of inquiries about patient eligibility.

In documenting eligibility, a provider may use a Medicaid enrollment application or another existing information collection instrument. In documenting the eligibility of a minor child, the provider must determine if Medicaid or the State Children's Health Insurance Program would be available for the child's treatment. As an alternative to using the Medicaid enrollment application process or another established information collection instrument, a provider could use the information collection instrument that we have designed to obtain the necessary information regarding a patient's eligibility. In the event that a state's Medicaid enrollment application or another existing information collection instrument does not contain the information included in the newly designed information collection instrument, we would ask providers to supplement their existing collection instrument to include any additional information requested in the approved collection instrument.

On May 9, 2005, the OMB approved the provider payment determination information collection instrument and related instructions. The provider payment determination form can be found at *http://www.cms.hhs.gov/providers/section1011.*

In adopting this approach, we have designed the information collection instrument to minimize its intrusiveness and therefore to minimize the extent to which it discourages persons from seeking needed emergency services. Similarly, we believe the final design minimizes the administrative burden on providers as much as is feasible while still providing CMS with information needed for accurate section 1011 reimbursement of services. While we are not requiring that providers use the information collection instrument designed by CMS, we are adopting a position that would require that providers collect and maintain the same information contained in the provider payment determination information collection instrument. This can be accomplished in a number of ways—a provider may collect and maintain any additional information needed to support a patient eligibility determination by supplementing their existing collection instruments or a provider may use the provider payment determination information collection instrument as the basis of its eligibility determination. In either case, a provider must collect and maintain all of the information contained in the approved information collection.

Provider associations and patient advocacy organizations raised a number of concerns regarding CMS' proposed implementation approach of asking patients to directly respond to the questions regarding their eligibility status. To mitigate these concerns and the potential negative health consequences of patients not seeking emergency care when it is needed, we are adopting an indirect measure to determine patient eligibility status. By establishing an indirect measure of patient eligibility, we believe that providers will be able to make an affirmative determination regarding a patient's eligibility without directly asking the patient about his or her eligibility status.

We believe that asking a patient to state that he or she is an undocumented alien in an emergency room setting may deter some patients from seeking needed care. Moreover, if providers were required to request a Social Security number or other independently verifiable information from a patient, providers would need a mechanism to verify the authenticity of the information submitted.

Given the numerous concerns raised about CMS' proposed patient-specific documentation approach, we believe that providers are more likely to receive accurate answers to the indirect questions, thus increasing the accuracy of patient eligibility determinations. We believe that revising our patient-specific eligibility documentation approach will limit the number of incorrect payment determinations made by hospital staff and other providers. Finally, we believe that adopting an approach based on indirect questions offers several significant advantages over the proposed implementation approach, including improving section 1011 payment accuracy, simplifying the patient eligibility information collection requirements for providers, and reducing provider associations' and patient advocacy organizations' concerns about potential adverse public health effects.

Finally, it is important to emphasize that emergency treatment should not be delayed to gather information contained on CMS' information collection instrument or any other existing collection instrument used by a provider to document a patient's eligibility. Moreover, if a provider decides to collect and maintain information regarding the name and badge number of a Federal or State Officer/Agent who brings a patient to the emergency department, that information should be gathered in a way that does not delay emergency medical treatment.

Completing the Provider Payment Determination

In determining a patient's eligibility status, a provider is responsible for completing and signing the provider payment determination and obtaining the documents to affirmatively determine patient eligibility. If a patient refuses to or is unable to provide the proof of eligibility, then the provider should not submit an individual claim or bill for the services rendered (*see* section XIII, Determination of Payment Amounts, Determination of Payment for Undocumented Uncompensated Care, for additional information regarding payments to providers for undocumented uncompensated care).

Protected Information

The sole purpose for requesting information contained on the Provider Payment Determination form is to obtain the information necessary to determine provider payment. Since section 1011 payments are only available to certain providers who furnish emergency and related services to patients identified in section (c)(5), we are adopting a position that providers initially determine whether payment is applicable for the services rendered to an individual patient.

The Health Insurance Portability and Accountability Act of 1996 (HIPAA) Privacy Rule directs ''covered entities,'' which includes providers that electronically transmit health information in connection with covered transactions, to protect certain personal health information of individuals, including undocumented aliens. The Privacy Rule identifies and explains permitted and required uses and disclosures of the information. Among its provisions, it allows covered entities

to use and disclose to other covered entities protected health information for payment purposes, under specified conditions. Payment is defined to include coverage or eligibility determination activities related to the individual to whom health care is provided.

Protecting Patient Information—Use of Existing Provider Practices and Procedures

We are adopting a position that when responding to these information requests, covered providers, including covered hospitals, follow the HIPAA Privacy Rule requirements relating to uses and disclosures for payment purposes and, as applicable, their own privacy practices. If complying with these requests constitutes a material change to a covered provider's privacy practices, that provider must also revise and distribute its privacy practices notice according to 45 CFR 164.520.

Protecting a Patient's Civil Rights

Hospitals and other providers should not assume that an individual is an undocumented alien based on a patients' ethnicity and their inability to pay for emergency services. Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d *et seq.,* prohibits discrimination on the basis of race, color, or national origin in any program or activity, whether operated by a public or private entity, that receives federal funds or other federal financial assistance. Thus, in operating or participating in a federally assisted program, a provider should not, on the basis of race, color or national origin, differentiate among persons in the types of program services, aids or benefits it provides or the manner in which it provides them. For example, providers should treat all similarly situated individuals in the same manner, and should not single out individuals who look or sound foreign for closer scrutiny or require them to provide additional documentation of patient eligibility. Accordingly, hospital and other provider personnel may not selectively screen individuals regarding their eligibility status, on the basis of race, color, or national origin.

As a reminder, we encourage hospitals and other providers to review their existing Title VI policies and practices to ensure that all patient rights are protected.

Attestation and Maintenance of Eligibility Information

We are adopting a position that providers make a good faith effort to obtain correct eligibility information and attest to the fact that the information was correct to the best of their knowledge and belief. Since section 1011 funds are limited and section 1011 funding is available for only the individuals identified in paragraph (c)(5), we are adopting a position that providers attest that information contained in the information collection instrument is correct to the best of their knowledge and belief.

Consistent with EMTALA regulations, under this statute, the provider will be required to document the patient's file regarding the patient's eligibility when the patient is a member of a group for which payment under section 1011 is possible. While we expect that hospital staff and other providers will routinely collect and maintain patient eligibility information when it is determined that a section 1011 payment may be applicable, we are adopting a position that hospitals and other providers are not required to maintain patient eligibility information for individuals where a section 1011 payment is not possible.

We are adopting a position that providers maintain patient eligibility information and that patient eligibility information will *not* routinely be submitted to CMS. While some individuals have suggested that patient eligibility information be sent to one central location, we do not believe that collecting this information is necessary given the payment methodology we are adopting. In addition, we are concerned about the paperwork burden and administrative expense associated with sending patient eligibility data to CMS on a regular basis.

As noted above, while hospitals and other providers will be required to collect information regarding individuals' eligibility status in order to assure that section 1011 funds are being spent appropriately, we are adopting a position that providers are not required to submit this information to CMS as part of routine claims processing. However, providers are required to maintain this patient eligibility information for purposes of audit or compliance review. Moreover, since hospitals are in the best position to request information regarding a patient's eligibility status after meeting EMTALA requirements, we would require that hospitals maintain eligibility information for patients for whom section 1011 payment would be sought and that hospitals would make this information available to physicians and ambulance providers. Thus, the hospital eligibility determination would also apply to ''related'' ambulance and physician services as well.

If a hospital chooses not to participate in the section 1011 program or does not collect the patient eligibility information, a physician or ambulance provider is required to collect and maintain patient-specific eligibility information before billing the section 1011 program.

In conclusion, we believe that documentation requirements described in this approach will further our efforts to ensure that we reimburse providers only for the care associated with aliens described in paragraph (c)(5).

X. Payment Methodology

Paragraph (c)(4) requires that we make payments to eligible providers for the costs incurred in providing eligible services to aliens as described in paragraph (c)(5). In this section, we describe how we intend to reimburse eligible providers for providing emergency services to undocumented aliens and certain other aliens.

Section 1011 establishes a broad framework governing payment for the eligible services furnished to eligible individuals. All payments must be taken from a particular state's allotment, thus, there is a finite amount of money that can be paid in any particular state or the District of Columbia for a fiscal year. In addition, the amount paid to a provider cannot exceed the costs incurred (section 1011(c)(2)(A)(i)), but the payment could be less than the provider's costs based on a methodology established by the Secretary, see section 1011(c)(2)(A)(ii). The statute also requires the Secretary to make a pro-rata reduction (*see* section XIV, Pro-Rata Reduction) of previous payments if the amount of funds allocated to a State is ''insufficient to ensure that each eligible provider receives the amount that is calculated under [§ 1011(c)(2)(A)].'' Thus, each ''eligible provider'' would receive some payment for furnishing ''eligible services'' but the precise amount of the final payment is uncertain. Moreover, the amount of the interim payment may vary by service, the number of eligible providers, the type of eligible provider, the location of the provider, or where the service is furnished. The Secretary is required to make quarterly payments under section 1011(c)(3)(D).

Within this broad framework, the statute gives the Secretary discretion to determine a payment methodology (section 1011(c)(2)(A)(ii)) and contained specific provisions that would permit the Secretary to make payments on the basis of advance estimates of expenditures with subsequent adjustments for any overpayments or underpayments. Section 1011(d)(2). The

statute also requires the Secretary to adopt measures that will prevent inappropriate, excessive, or fraudulent payments.

While the statute would allow CMS to design a prospective payment approach for section 1011, we are not implementing this approach. We have no provider specific data that we can use to estimate the cost of services currently provided to eligible aliens. Accordingly, we are adopting a retrospective payment approach. We believe that this is the only practical methodology that we can adopt that would ensure that interim payments would not exceed the available state allotment and that we would not need to make significant adjustments to those payments. In the future, if we determine that prospective payments can be made effectively and with a minimum number of overpayments, we will consider revising our payment methodology.

Given that CMS is establishing a retrospective payment methodology, another issue that must be resolved to implement section 1011 is the question of what type of retrospective payment methodology should CMS use in paying providers for care provided to undocumented aliens and certain other aliens.

Other Options Considered

We previously considered establishing a service-based payment methodology with aggregate quarterly summaries. Under this option, CMS would have required each provider to submit one aggregate quarterly report of all of its charges for all covered section 1011 services. Payment would be determined based on the information included in these quarterly summaries. This approach would not require providers to submit individual bills or claims for payment on a service-by-service basis, as they currently do under Medicare. Providers would have been required to maintain documentation sufficient to allow information from the quarterly report to be traced back to the individual patient services, thus permitting an audit of their claims.

In general, we do not believe that this approach would provide the level of detail about services that is available through a claim-by-claim service-based payment approach. In addition, this approach limits CMS' ability to ensure that inappropriate, excessive or fraudulent payments are not made. Finally, this approach would still require that providers maintain claim-specific payment information (*i.e.*, service-by-service or stay-by-stay) for each service provided, although it would not be submitted to CMS.

We also considered establishing a payment methodology that utilized broad payment categories. Several interested parties have suggested that CMS establish five or six broad payment categories, such as:

—Ambulance Service
—Physician Only Emergency Department Service
—Emergency Department—Visit Only (hospital and a portion of on-call payments)
—Emergency Department—Visit Only (hospital and physician services)
—Emergency Department with Inpatient Admission
—Emergency Department with Inpatient Admission and subsequent Surgery

While this approach would simplify payment methodology for CMS, we believe that establishing a payment methodology consisting of broad payment categories would require burdensome and costly billing system modifications for most providers. In addition, this approach does not allow a provider to be paid based on the costs incurred for each specific service. Since this approach would utilize an average payment amount for a particular service category (*e.g.*, physician only emergency department service), it would result in overpaying some providers for particular services.

Finally, we considered establishing a payment methodology based on a statistical proxy. To simplify the payment process and minimize documentation requirements, several interested parties have suggested that CMS establish a proxy methodology (such as determining hospital payments for undocumented alien services based on total ER visits, or on a percentage of Medicaid payments the hospital receives.) While this approach would allow CMS to distribute payments prospectively, it: (1) Does not allow a provider to demonstrate the actual cost incurred for rendering EMTALA-related services, (2) does not link payment to a specific patient, and (3) may overstate the amount of payments to hospitals.

While we believe that a proxy payment methodology represents an alternative to individual or aggregate claim submissions, we do not believe that a proxy methodology can be validated on a claim specific basis. In addition, CMS could only validate the proxy measures, not the actual services provided. In general, we believe that any proxy measure will benefit some providers while disadvantaging other providers. Specifically, we believe that a proxy measure could benefit large hospital systems with complex computer systems and disadvantage smaller hospitals, rural hospitals, and Indian Health Service facilities that may be unable to provide the necessary information to receive an appropriate payment from a single proxy methodology.

Finally, we are unable to establish a proxy measure that would provide fair payments to physicians and ambulance providers. We believe that physicians and ambulance providers would be disadvantaged if we adopted this type of payment methodology. We detail the payment methodologies we will use in section XIII of this paper.

Final Implementation Approach—Payment Methodology

We are adopting a bill-specific payment methodology. CMS will require providers to submit bills or claims for payment on a service-by-service or per discharge basis, much as they currently do under Medicare and other insurance programs. Payment will be determined based on the information included in these claims. We believe that this system establishes an efficient payment process for providers. In establishing our payment methodology, we are generally using Medicare payment rules to calculate the payment amount for hospital services up to the point of stabilization, physician, and ambulance services under section (c)(2)(ii). Indian Health Service facilities and Tribal organizations would also be required to submit valid claim submissions and the payment amount under section (c)(2)(ii) would be determined based on the same methodology use by Medicare to pay those facilities.

This approach would establish a fair and consistent approach to provider reimbursement for the costs each provider incurs for treating and stabilizing undocumented and certain other aliens. All payment requests would be aggregated (by CMS during claims processing) at the state level. Each provider within a state would receive a payment equal to the lesser of its costs, the Medicare reimbursement rate or, if provider payments exceed the state allotment, a proportional payment of the Medicare reimbursement rate. Thus, if a pro-rata reduction were applicable, then CMS would apply a common discounting factor to each Medicare based payment rate in order to adjust provider payments to the state allocation amount. We believe this method is the most accurate method for determining payments based on the actual services provided to undocumented aliens.

Using this payment determination approach would allow CMS to gather

specific information about the types of services provided to undocumented aliens. Furthermore, the level of detail about services that is available through a claim-by-claim service-based payment approach will help CMS ensure that inappropriate, excessive or fraudulent payments are not made.

XI. Distribution of State Funding to Providers

In our initial proposal, we considered establishing a single provider funding pool in each state.

Public Comments

Several commenters recommended that we distribute funding according to specific funding allocations for each provider type. One commenter recommended that we use the national or state Medicaid payment data to establish distinct funding pools for each provider. Another commenter recommended that state allocation be distributed according to a defined methodology. Using the commenter's methodology, hospitals and physicians would each receive 49 percent of the state allocation with ambulance providers receiving the remaining 2 percent of the state allocation.

While we appreciate and understand the rationale for establishing distinct funding pools, we do not favor this approach because it unnecessarily limits provider payment in advance of receiving provider payment request. In addition, we believe that this approach would increase the administrative complexity and costs associated with administering these funds.

Final Implementation Approach—Creation of State Funding Pool

As we have stated above, state allotments are based on the statutory formula. Using the final state allotments, we are adopting a policy that establishes a single provider funding pool in each state and the District of Columbia. This approach would establish a single payment allocation per state and each provider would receive a payment from the state allocation. We believe that this approach would maximize provider payment, establish payments to providers within a state that reflect each provider's prorated share of the state allocation based on the costs each provider incurred in each quarter, and simplify the administration of this section of MMA.

XII. Submission of Payment Request

CMS requires that providers requesting reimbursement for aliens described in paragraph (c)(5) of section 1011 submit claims within 180 days of the close of the Federal fiscal quarter. Thus, it is important to note that claims will not be paid on a first come, first paid basis. Because of the statutory mandate that the Secretary issue payments on a quarterly basis and the necessity for finality in the claims process, claims not submitted within a timely manner will be denied.

Providers should submit individual claim submissions for services rendered on or after May 10, 2005. This approach provides for appropriate payment to providers of health care services required by the application of section 1867 and related hospital and outpatient services and ambulance services for individuals identified in (c)(5) of section 1011.

Basic Requirements for All Section 1011 Claims

We are adopting a position that section 1011 claims meet the following requirements:

1. We are adopting a position that a claim must be filed electronically with CMS' designated contractor in a form prescribed by CMS in accordance with CMS' Medicare processing instructions. For the purposes of section 1011, CMS will require that a hospital submit an electronic claim that complies with the X12N 837 version 410A1 institutional claim implementation guide (the electronic equivalent of the UB–92) and that physicians and non-hospital ambulance providers submit an electronic claim that complies with the X12N 837 version 410A1 professional claim implementation guide (the electronic equivalent of the CMS–1500).

We are adopting a position that hospitals electing to receive payments for hospital and physician services under (c)(3)(C)(i) of section 1011 must submit separate bills for hospital and physician services.

2. We are adopting a position that a claim must have a date of service on or after May 10, 2005. For the purpose of section 1011 payment, services rendered prior to May 10, 2005 or initiated on or before May 9, 2005 are not eligible for payment.

3. We are adopting a position that providers must file an electronic claim within 180 days of the end of the federal fiscal quarter in which the service was provided. Accordingly, if services are rendered on May 12, 2005, a provider must submit a payment request no later than 180 days from the end of that fiscal quarter (*i.e.*, June 30, 2005) in order to receive payment. Failure to submit a payment request within the prescribed time frames will result in a payment denial. This requirement is necessary given that section (c)(3)(D) of section 1011 requires that the Secretary make quarterly payments to eligible providers.

4. We are adopting a position that a hospital's request for on-call payment must have a date of service on or after May 10, 2005. For the purpose of section 1011 payment, hospital on-call payments made by the hospital for physician services on or before May 9, 2005 are not eligible for payment.

Submission of Medical and Other Documentation

Unless specifically requested, CMS is adopting a position that hospitals and other providers maintain, but not submit, medical and/or patient eligibility information for payment purposes. CMS' designated contractor may review claims documentation prior to making a section 1011 payment. Moreover, the compliance review contractor may review claims documentation during the compliance review process to determine the accuracy of payments.

Designated Claims Processing Contractor

CMS will designate a single contractor for the purposes of enrolling providers, receiving claims, calculating provider payment amounts, and effectuating payments. We believe that a single claims processing contractor will facilitate the effective administration of this section of MMA. We expect to award the contract for the designated contractor shortly.

If a provider submits a section 1011 claim to an existing Medicare carrier or fiscal intermediary other than the designated section 1011 contractor, the Medicare carrier or fiscal intermediary receiving the section 1011 claim submission will return the claim to the provider. Since section 1011 claims are not Medicare claims and will not contain a valid Health Insurance Claim Number, only the designated contractor will be able to process these claims to payment.

Designated Compliance Contractor(s)

CMS is a adopting a position that a compliance contractor will review medical and non-medical documentation. The compliance contractor may conduct pre-payment or post-payment claim reviews, identify and assess overpayments, if necessary, and ensure compliance with the provisions outlined in this notice.

XIII. Determination of Payment Amounts

As stated above in section X, Payment Methodology, we generally use

Medicare payment rules to calculate the payment amount for hospital, physician, and ambulance services under section (c)(2)(ii). Indian Health Service facilities and Tribal organizations would also be required to submit valid claim submissions and the payment amount under section (c)(2)(ii) would be paid based on current Medicare payment rules.

Specifically, section (c)(2)(A) requires that CMS paid at the lesser of:

(i) The amount that the provider demonstrates was incurred for the provision of such services; or

(ii) Amounts determined under a methodology established by the Secretary.

The Secretary's method for estimating payments will consist of determining what the appropriate Medicare payment amount would be if the patient whose services are covered under section 1011 were a Medicare beneficiary, that is to say:

- Payment rules using the transfer payment policy under the Inpatient Prospective Payment System (IPPS) for acute care hospitals, specifically payments will be calculated as if the patient were transferred on the day of stabilization or the appropriate excluded payment system for inpatient hospital services (including pre-admission bundling and all other payment rules.) In this way, payments will more appropriately track resource use regardless of the time it takes to stabilize a patient;
- Payment rules using the transfer payment policy under the IPPS for long term care hospitals (LTCHs), which are acute care hospitals, because we are considering only the time until stabilization, which will generally be significantly shorter than the long stays usually associated with LTCHs;
- Payment rules using the inpatient psychiatric hospital PPS for inpatient psychiatric hospitals transitioning to the inpatient psychiatric hospital PPS to calculate what Medicare would have paid on a per diem basis for the days up to and including the date of stabilization;
- Payment rules using the transfer payment policy under the inpatient rehabilitation facility prospective payment system;
- The interim payment on the bill for inpatient services provided by critical access hospitals (a per diem amount for routine services and a percentage of billed charges for ancillaries); and,
- The TEFRA per discharge limit for children's and cancer hospitals excluded from the IPPS.
- Payment rules under the Outpatient Prospective Payment System (OPPS) for hospital outpatient department EMTALA and EMTALA-related services not associated with an inpatient admission.
- Payment rules under the physician fee schedule for Medicare participating physicians (that is, service level billing using appropriate CPT/HCPCS codes that we would then convert to claimed payment amounts using the Physician Fee Schedule (PFS) payment rules appropriate for the services billed). Similarly, we are adopting a position to pay physicians not enrolled in Medicare the PFS payment amount.
- Payment rules under the ambulance fee schedule for ambulance trips that would be separately payable under the Medicare program if the patient were a Medicare beneficiary. Consistent with Medicare policy, the point of pickup determines the basis for payment under the fee schedule and the point of pickup is reported by its five-digit zip code. Thus, the point of pickup zip code determines both the level of payment under fee schedule and applicable geographic practice costs index (GPCI). If a second ambulance transport is required for a subsequent transport, then the zip code of the point of pickup of the second or subsequent transport determines both the applicable GPCI for such leg and whether a rural adjustment applies to such leg.

We believe that this approach is consistent with (c)(2)(A) of section 1011.

Determination of Hospital On-Call Payments

CMS has determined that hospitals electing to receive payments under section (c)(3)(C)(ii) will receive a percentage of the on-call payments made by the hospital to physicians. Hospitals electing to receive payments under section (c)(3)(C)(ii) will be required to submit a payment request to claim on-call costs.

CMS requires that hospitals must file the hospital on-call information collection instrument within 180 days of the end of the federal fiscal quarter to claim payment. Failure to submit the hospital on-call information collection instrument within the prescribed time frames will result in the payment denial for on-call costs. This requirement is necessary given that section (c)(3)(D) of section 1011 requires that the Secretary make quarterly payments to eligible providers.

On May 9, 2005, the OMB approved the Request for Section 1011 Hospital On-Call Payments to Physicians information collection instrument and related instructions. The hospital on-call payment form can be found at *http://www.cms.hhs.gov/providers/section1011*.

Determination of Payments for Undocumented Uncompensated Care

Hospitals that are unable to make an affirmative decision regarding a patient's eligibility may *not* receive the full amount of their uncompensated care for individuals identified in (c)(5) of section 1011. Since we recognize that some patients may refuse to provide hospital staff or other providers with the necessary information to make an affirmative section 1011 eligibility determination, we have adopted an approach which would allow hospitals and physicians to receive a fraction of the outpatient emergency department care costs for individuals who refuse to provide information regarding their eligibility or provide the necessary billing information (e.g., valid address) that prevents the hospital from collecting payment from the patient.

Because we presume that one in every 10 people that a hospital would treat, who would otherwise be an alien described under section 1011(c)(5), will refuse or be unable to furnish the required eligibility information, we are going to create an additional payment to providers who furnish services (based on appropriate funding methodology discussed above) in the amount of 10 percent of the total approved outpatient services furnished in a quarter, subject to the pro-rata reduction. This increase in payment is intended to provide compensation to hospitals and physicians for services rendered in an outpatient setting for those patients who refuse to or unable to provide an affirmative demonstration of their eligibility status. We are also adopting a position that ambulance provider approved claims will be increased by 10 percent for those patients who refuse to or unable to provide an affirmative demonstration of their eligibility status.

XIV. Pro-Rata Reduction

Paragraph (c)(2)(B) of section 1011 states that if the amount of funds allocated to a state for a fiscal year is insufficient to ensure that each eligible provider in that state receives the amount of payment calculated, the Secretary shall reduce that amount of payment with respect to each eligible provider to ensure that no more than the amount allocated to the State for that fiscal year is paid to such eligible providers.

Based on the statutory language, we believe that when the total value of all payment requests exceeds the total amount available for a specified state allotment that we must recalculate the

approved provider reimbursement amount so that each eligible provider will receive some payment for furnishing eligible service and that the sum of all provider payments within a state does not exceed the available state allotment. For example, if CMS' designated contractor calculates that provider payments for a given quarter within a state are $40 million, but the state quarterly allotment is set at $5 million, then each provider would receive 12.5 percent of their approved payment amount.

Since we are unable to predict the number of claim submissions or the value of approved claims for a given state for a particular quarter or fiscal year, we are unable to determine whether the pro-rata reduction would be applicable for a given quarter or state until we receive actual claim submissions. It is also important to note that the pro-rata reduction will vary from quarter to quarter and from state to state.

XV. Quarterly Payments

CMS is adopting a quarterly proportional payment approach. Under this approach, CMS would make proportional provider payments on a quarterly basis but would not attempt to adjust provider payments within a state on an annual basis. In determining the quarterly state funding allotment, the annual state allotment will be divided by four and distributed on a quarterly basis. In selecting this approach, we believe that providers would like to receive the maximum payment available within the shortest time period.

Paragraph (c)(3)(D) of section 1011 requires the Secretary to make quarterly payments to eligible providers. For the purposes of implementing this section, we are adopting a position to begin to make quarterly payments beginning two to three months after the claims filing deadline. Providers will receive quarterly payments approximately every three months thereafter.

Implementation Approach for FY 2005

For services rendered in FY 2005, CMS is adopting a policy to issue two proportional, rather than four, payments for the third and fourth quarters of FY 2005. Because we believe emergency services will in general be provided throughout the year, and because we believe the pro-rata reduction will likely be applied, we believe that basing FY 2005 payments on the last 2 quarters will still accurately reflect providers' costs of treating eligible patients.

Because these instructions regarding information collection were not available to eligible providers in advance of April 1, we will adjust claims for the third quarter of fiscal year 2005 (April 1, 2005–June 30, 2005) by developing for each hospital, physician and ambulance provider or supplier an average claimed amount per day for the period for which the instructions were available, and then multiplying that by the number of days in the quarter. In this way, we will adjust the claimed amount to cover the services of the entire quarter, rather than only the period for which the instructions are available.

For example, if CMS published this notice on May 9, and a provider submitted approved claims totaling $50,000 for services provided from May 10–June 30, a period of 52 days, the average daily claimed amount for the period would be ($50,000 / 52 days) = $961.54 per day. Because there are 91 days in the quarter, the claimed amount for the entire quarter would then be calculated as ($961.54 per day × 91 days), or $87,500.14.

Implementation Approach for FY 2006 and Beyond

In FY 2006 and beyond, CMS will issue four proportional payments.

XVI. Appeals and Claim Adjustments

While we are not adopting a formal appeals process, we believe that providers should have an avenue to address payment disputes. Accordingly, we are adopting an informal appeals process to resolve payment disputes. In order to ensure timely and accurate payments to all providers, an informal appeals process will allow providers an opportunity to seek clarification of payment decisions while significantly reducing the time that it takes to resolve payment disputes.

Since it is essential that we ensure administrative finality, we believe that this approach is consistent with section (c)(2)(B) of section 1011. Moreover, given the expected level of reimbursement for these payments, it does not seem cost effective for providers or CMS to establish a formal appeals process.

The designated contractor will provide additional information regarding the informal appeals process during the claiming process.

Claims Adjustments

To simplify the administration of this provision, we are adopting the position that providers are not allowed to submit a claim adjustment.

XVII. Compliance Reviews

Paragraph (d)(1) of section 1011 provides that the Secretary establish measures to ensure that inappropriate, excessive, or fraudulent payments are not made from the state allotments, including a certification by eligible providers of the veracity of the payment request.

To ensure that claim submissions are supported by clinical and non-clinical documentation, we are adopting a position of compliance reviews. These reviews may be based on, among other things, identified aberrancies and claims volume.

XVIII. Overpayments

We are adopting a position that each provider participating in the section 1011 project agree to repay any assessed overpayment. To simplify the administration of this program, CMS is adopting a position to withhold any identified provider overpayments from the next quarterly section 1011 payment. CMS will notify the provider and withhold payment from the quarterly payment until the overpayment is repaid.

In the event that a provider does not have a sufficient balance in the next quarterly payment to repay the overpayment in full, then CMS will then notify the provider that the provider has 30 days to repay the overpayment without accrual of interest. Upon notification that an overpayment exists, the provider that fails to repay the overpayment within 30 days will accrue and be responsible for any interest determined to be applicable. Moreover, we are adopting a position to refer unpaid overpayments to an appropriate debt collection agency or the Department of Treasury consistent with the requirements of the Debt Collection Improvement Act.

XIX. Annual Reconciliation Process

We are adopting a position to conduct a reconciliation process for each state annually. It is during this process that we will calculate and disburse, subject to the state maximum, any remaining provider payments for the prior fiscal year. It is during this reconciliation process that any overpayments, whether withheld or refunded by a provider, will be redistributed. Thus, we are adopting a position that all overpayment will be redistributed during the annual reconciliation process. In the event that overpayments are assessed during a compliance review process, but repaid subsequent to the annual reconciliation process, we will redistribute these funds during a future annual reconciliation process.

XX. Unused State Funding

In our initial proposal, we stated that any unobligated state funds would not be available for redistribution to another state and that any unobligated state funds still remaining after the annual reconciliation process is complete for a given fiscal year will be returned to the U.S. Treasury.

Public Comments

A number of commenters stated that unused state allocations should be reallocated to other states or rolled over to the state allocation for the next year. While we do not have the authority to reallocate unused state allocations from one state to another, we agree with the commenters recommendation that we roll over unused state funding from one fiscal year to the next. Thus, if State A has an allocation of $1 million in FY 2005, but providers in State A are paid $750,000 in FY 2005, the remaining $250,000 will be added to the available state funding allotment in FY 2006.

Final Implementation Approach

Congress expressly states that the appropriation shall remain available until expended. In doing so, Congress has removed all statutory time limits as to when the funds may be obligated and expended. In essence, the funds remain available for obligation for authorized purposes until fully obligated within the purposes and limitations attributable to that appropriation.

We believe that the statute clearly indicates that the purpose of the appropriation is to make payments to providers within a state subject to the amounts available under the allotment made to the state. Once appropriated, the funds become available until expended, with no fiscal year limitations on their availability for expenditure. In the event that all of the funds allotted to a state in a fiscal year are not used to make payments to providers in that state, we are adopting a position that these unexpended funds continue to remain available for provider payments within that state in subsequent fiscal years.

There is no indication in the language of the law that state allotments could be redistributed to another states or that the funds could be returned to CMS for other uses. Thus, CMS is adopting a position that a state allocation cannot be redistributed from one jurisdiction (state or the District of Columbia) to another jurisdiction.

Dated: May 9, 2005.

Michelle Shortt,

Acting Director, Regulations Development Group, Office of Strategic Operations and Regulatory Affairs.

BILLING CODE 4120–03–P

Attachment 1

Final FY 2005 State Allocations for Section 1011 of the Medicare Modernization Act

Federal Reimbursement of Emergency Health Services Furnished to Undocumented Aliens

State	Estimated Unauthorized Resident Population: January 2000 (thousands) /1	State Allocations Based on the Percentage of Undocumented Aliens	Number of Apprehensions by State from April 2003- March 2004 /2	FY 2005 State Allocation Based on the Number of Alien Apprehensions	Final FY 2005 State Allocation (Total)
Alabama	24	$572,326	642		**$572,326**
Alaska	5	$119,235	325		**$119,235**
Arizona	283	$6,748,679	491,242	$38,230,527	**$44,979,206**
Arkansas	27	$643,867	901		**$643,867**
California	2,209	$52,677,852	232,991	$18,132,343	**$70,810,196**
Colorado	144	$3,433,957	6,718		**$3,433,957**
Connecticut	39	$930,030	497		**$930,030**
Delaware	10	$238,469	-		**$238,469**
District of Columbia	7	$166,928	1,243		**$166,928**
Florida	337	$8,036,413	8,315	$647,108	**$8,683,521**
Georgia	228	$5,437,098	1,577		**$5,437,098**
Hawaii	2	$47,694	517		**$47,694**
Idaho	19	$453,092	1,138		**$453,092**
Illinois	432	$10,301,871	2,565		**$10,301,871**
Indiana	45	$1,073,112	513		**$1,073,112**
Iowa	24	$572,326	1,124		**$572,326**
Kansas	47	$1,120,805	-		**$1,120,805**
Kentucky	15	$357,704	646		**$357,704**
Louisiana	5	$119,235	3,758		**$119,235**
Maine*	0.5	$11,923	339		**$11,923**
Maryland	56	$1,335,428	865		**$1,335,428**
Massachusetts	87	$2,074,682	1,195		**$2,074,682**
Michigan	70	$1,669,285	3,104		**$1,669,285**
Minnesota	60	$1,430,815	1,925		**$1,430,815**
Mississippi	8	$190,775	638		**$190,775**
Missouri	22	$524,632	4,115		**$524,632**
Montana*	0.5	$11,923	1,000		**$11,923**
Nebraska	24	$572,326	1,326		**$572,326**
Nevada	101	$2,408,539	744		**$2,408,539**
New Hampshire	2	$47,694	440		**$47,694**
New Jersey	221	$5,270,170	1,898		**$5,270,170**
New Mexico	39	$930,030	53,620	$4,172,935	**$5,102,965**
New York	489	$11,661,145	7,623	$593,254	**$12,254,399**
North Carolina	206	$4,912,466	1,007		**$4,912,466**
North Dakota*	0.5	$11,923	672		**$11,923**
Ohio	40	$953,877	1,210		**$953,877**
Oklahoma	46	$1,096,958	831		**$1,096,958**
Oregon	90	$2,146,223	2,038		**$2,146,223**
Pennsylvania	49	$1,168,499	2,857		**$1,168,499**
Rhode Island	16	$381,551	812		**$381,551**
South Carolina	36	$858,489	355		**$858,489**
South Dakota	2	$47,694	363		**$47,694**
Tennessee	46	$1,096,958	1,250		**$1,096,958**
Texas	1,041	$24,824,647	272,715	$21,223,833	**$46,048,479**
Utah	65	$1,550,050	2,012		**$1,550,050**
Vermont*	0.5	$11,923	1,375		**$11,923**
Virginia	103	$2,456,233	392		**$2,456,233**
Washington	136	$3,243,181	4,249		**$3,243,181**
West Virginia	1	$23,847	120		**$23,847**
Wisconsin	41	$977,724	468		**$977,724**
Wyoming	2	$47,694	-		**$47,694**
Total	**7,003**	**$167,000,000**		**$83,000,000**	**$250,000,000**

Source /1: Statistics Division of the Immigration and Naturalization Service.

Source /2: Department of Homeland Security.

* States that had less than 1,000 estimated aliens received values of .5 (500 illegal aliens)

[FR Doc. 05–9470 Filed 5–9–05; 1 pm]
BILLING CODE 4120–03–C

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

[USCG–2005–21169]

Oil Spill Response Plans: Dispersant Capabilities

AGENCY: Coast Guard, DHS.

ACTION: Notice of availability.

SUMMARY: The Coast Guard announces the availability of an Internet Web site that provides information on dispersant pre-approval requirements throughout the United States and its territories. The Web site contains information of interest to owners and operators of oil tankers and facilities required to have an oil spill response plan. The Web site, which consists of a chart and map with informational pop-ups, is available to the general public through the Coast Guard's Web site.

FOR FURTHER INFORMATION CONTACT: If you have questions regarding the dispersant pre-approval requirements or accessing the Web site, call the Office of Response, LCDR Mark Cunningham, telephone 202–267–2877.

SUPPLEMENTARY INFORMATION: Under 33 CFR 154.1045(i) and 33 CFR 155.1050(j), the owners or operators of vessels and facilities that operate in areas with year-round pre-approval for the use of dispersants may request a credit for up to 25 percent of the on-water recovery capability necessary to meet the requirements of 33 CFR parts 154 and 155. The dispersant pre-approval requirements, which are located in Regional and Area Contingency Plans, detail the specific criteria that must be met for dispersant use to occur in a given area. The criteria are determined by the Area Committee with the assistance of the Coast Guard, the Environmental Protection Agency, and the State. The Coast Guard Office of Response maintains the following Web site to aid in planning efforts concerning adequacy of dispersant capabilities: *http://www.uscg.mil/vrp/maps/dispmap.shtml*.

Dated: May 5, 2005.

Howard L. Hime,

Acting Director of Standards, Marine Safety, Security and Environmental Protection, U.S. Coast Guard.

[FR Doc. 05–9529 Filed 5–12–05; 8:45 am]
BILLING CODE 4910–15–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[FEMA–3209–EM]

Maine; Amendment No. 1 to Notice of an Emergency Declaration

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

ACTION: Notice.

SUMMARY: This notice amends the notice of an emergency declaration for the State of Maine (FEMA–3209–EM), dated April 1, 2005, and related determinations.

DATES: *Effective Date:* May 3, 2005.

FOR FURTHER INFORMATION CONTACT: Magda Ruiz, Recovery Division, Federal Emergency Management Agency, Washington, DC 20472, (202) 646–2705.

SUPPLEMENTARY INFORMATION: The notice of an emergency declaration for the State of Maine is hereby amended to include the following area among those areas determined to have been adversely affected by the catastrophe declared an emergency by the President in his declaration of April 1, 2005:

Franklin County for emergency protective measures (Category B) under the Public Assistance program for a period of 72 hours.

(Catalog of Federal Domestic Assistance No. 97.036, Disaster Assistance.)

Michael D. Brown,

Under Secretary, Emergency Preparedness and Response, Department of Homeland Security.

[FR Doc. 05–9555 Filed 5–12–05; 8:45 am]
BILLING CODE 9110–10–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[FEMA–3211–EM]

New Hampshire; Emergency and Related Determinations

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

ACTION: Notice.

SUMMARY: This is a notice of the Presidential declaration of an emergency for the State of New Hampshire (FEMA–3211-EM), dated April 28, 2005, and related determinations.

DATES: *Effective Date:* April 28, 2005.

FOR FURTHER INFORMATION CONTACT: Magda Ruiz, Recovery Division, Federal Emergency Management Agency, Washington, DC 20472, (202) 646–2705.

SUPPLEMENTARY INFORMATION: Notice is hereby given that, in a letter dated April 28, 2005, the President declared an emergency declaration under the authority of the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. 5121–5206 (the Stafford Act), as follows:

I have determined that the impact in certain areas of the State of New Hampshire, resulting from the record snow on March 11–12, 2005, is of sufficient severity and magnitude to warrant an emergency declaration under the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. 5121–5206 (the Stafford Act). Therefore, I declare that such an emergency exists in the State of New Hampshire.

In order to provide Federal assistance, you are hereby authorized to allocate from funds available for these purposes, such amounts as you find necessary for Federal disaster assistance and administrative expenses.

You are authorized to provide emergency protective measures under the Public Assistance program to save lives, protect public health and safety, and property. Other forms of assistance under Title V of the Stafford Act may be added at a later date, as you deem appropriate. You are further authorized to provide this emergency assistance in the affected areas for a period of 48 hours. You may extend the period of assistance, as warranted. This assistance excludes regular time costs for sub-grantees' regular employees. Assistance under this emergency is authorized at 75 percent Federal funding for eligible costs.

Further, you are authorized to make changes to this declaration to the extent allowable under the Stafford Act.

The Federal Emergency Management Agency (FEMA) hereby gives notice that pursuant to the authority vested in the Under Secretary for Emergency Preparedness and Response, Department of Homeland Security, under Executive Order 12148, as amended, James N. Russo, of FEMA is appointed to act as the Federal Coordinating Officer for this declared emergency.

I do hereby determine the following areas of the State of New Hampshire to have been affected adversely by this declared emergency:

Carroll, Cheshire, Hillsborough, Rockingham, and Sullivan Counties for emergency protective measures (Category B) under the Public Assistance program for a period of 48 hours.

(Catalog of Federal Domestic Assistance No. 97.036, Disaster Assistance.)

Michael D. Brown,

Under Secretary, Emergency Preparedness and Response, Department of Homeland Security.

[FR Doc. 05–9556 Filed 5–12–05; 8:45 am]

BILLING CODE 9110–10–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–4980–N–19]

Federal Property Suitable as Facilities To Assist the Homeless

AGENCY: Office of the Assistant Secretary for Community Planning and Development, HUD.

ACTION: Notice.

SUMMARY: This Notice identifies unutilized, underutilized, excess, and surplus Federal property reviewed by HUD for suitability for possible use to assist the homeless.

DATES: *Effective Date:* May 13, 2005.

FOR FURTHER INFORMATION CONTACT: Kathy Ezzell, Department of Housing and Urban Development, Room 7262, 451 Seventh Street SW., Washington, DC 20410; telephone (202) 708–1234; TTY number for the hearing- and speech-impaired (202) 708–2565, (these telephone numbers are not toll-free), or call the toll-free Title V information line at 1–800–927–7588.

SUPPLEMENTARY INFORMATION: In accordance with the December 12, 1988 court order in *National Coalition for the Homeless* v. *Veterans Administration,* No. 88–2503–OG (D.D.C.), HUD publishes a Notice, on a weekly basis, identifying unutilized, underutilized, excess and surplus Federal buildings and real property that HUD has reviewed for suitability for use to assist the homeless. Today's Notice is for the purpose of announcing that no additional properties have been determined suitable or unsuitable this week.

Dated: May 5, 2005.

Mark R. Johnston,

Director, Office of Special Needs Assistance Programs.

[FR Doc. 05–9336 Filed 5–12–05; 8:45 am]

BILLING CODE 4210–29–M

DEPARTMENT OF THE INTERIOR

Bureau of Indian Affairs

Notice of Determination

AGENCY: Bureau of Indian Affairs, Interior.

ACTION: Notice of Final Agency Determination to take land into trust under 25 CFR Part 151.

SUMMARY: The Associate Deputy Secretary made a final agency determination to acquire approximately 147 acres of land into trust for the Match-E-Be-Nash-E-Wish Band (Gun Lake Tribe) of Pottawatomi Indians of Michigan on April 18, 2005. This notice is published in the exercise of authority delegated by the Secretary of the Interior to the Principal Deputy Assistant Secretary—Indian Affair by 209 Department Manual 8.1.

FOR FURTHER INFORMATION CONTACT: George T. Skibine, Director, Office of Indian Gaming Management, Office of Deputy Assistant Secretary—Policy and Economic Development, Washington, DC 20240, (202) 219–4066.

SUPPLEMENTARY INFORMATION: This notice is published to comply with the requirements of 25 CFR Part 151.12(b) that notice is given to the public of the Secretary's decision to acquire land in trust at least 30 days prior to signatory acceptance of the land into trust. The purpose of the 30-day waiting period in 25 CFR 151.12(b) is to afford interested parties the opportunity to seek judicial review of the final administrative decisions to take land in trust for Indian tribes and individual Indians before transfer of title to the property occurs. On April 18, 2005, the Associate Deputy Secretary decided to accept approximately 147 acres of land into trust for the Match-E-Be-Nash-E-Wish Band (Gun Lake Tribe) of Pottawatomi Indians of Michigan under the authority of the Indian Reorganization Act of 1934, 24 U.S.C. 465. We have determined that the Gun Lake Tribe's request would meet the requirements of IGRA exception 25 U.S.C. 2791(b)(1)(B)(ii), from the general prohibition on gaming on after acquired lands contained in 25 U.S.C. 2719(a). The land is located in Wayland Township, Allegan County, Michigan and will be used for the purpose of construction and operation of a gaming facility.

There are two parcels of land equaling 147.48 acres for the Gun Lake Band of Pottawatomi Indians and they are described as follows:

Parcel 1 is located in the Township of Wayland, County of Allegan in the State of Michigan, and is described as follows:

That part of the Northwest ¼ of Section 19, Township 3 North, Range 11 West, Wayland Township, Allegan County Michigan, described as: Beginning at a point on the East-West ¼ line of said Section which is North 86 degrees, 57 minutes, 24 seconds East, 481.98 feet from the West line of said Section, said point being on the Easterly line of Highway US–131 on ramp; thence North 17 degrees, 29 minutes, 59 seconds West, 862.94 feet along said Easterly line; thence North 02 degrees, 23 minutes, 15 seconds West, 1806.10 feet along the Easterly line of Highway US–131, Easterly said line being 125 feet Easterly of, measured at right angles to, and parallel with the survey line of said Highway US–131; thence North 87 degrees, 07 minutes, 54 seconds East, 2.470.95 feet along the North line of said Section; thence South 03 degrees, 27 minutes, 58 seconds East, 1,448.14 feet along the Westerly right-of-way line of the Conrail Railroad (being 50.00 feet Westerly of, measured at right angle to, and parallel with the North-South ¼ line of said Section) to a point which is North 03 degrees, 27 minutes, 58 seconds West, 1,186,00 feet from the East-West ¼ line of said Section; thence South 86 degrees, 57 minutes, 24 seconds East, 430.00 feet; thence South 86 degrees, 57 minutes, 24 seconds West, 194.00; thence South 03 degrees, 27 minutes, 58 seconds East, 431.00 feet; thence North 86 degrees, 57 minutes, 24 seconds East, 240.00 feet; thence South 03 degrees, 27 minutes, 58 seconds East; 325.00 feet; thence South 86 degrees, 57 minutes, 24 seconds West, 1415.62 feet along the East-West ¼ lines of said Section to the point of beginning.

P.P. #03–24–019–026–30

Parcel 2 is located in the Township of Wayland, County of Allegan, in the State of Michigan and is described as follows:

That part of the Northwest ¼ of Section 19, Township 3 North, Range 11 West, Wayland Township, Allegan County, Michigan, described as: Commencing at the West ¼ corner of said Section; thence North 86 degrees, 57 minutes, 24 seconds East, 1,897.00 feet along the East-West ¼ line to a point which is South 86 degrees, 57 minutes, 24 seconds West, 930.00 feet from the center of Section, said point also being the point of beginning of this description; thence continuing North 86 degrees, 57 minutes, 24 seconds East, 682.00 feet along said ¼ line; thence North 03 degrees, 27 minutes, 58 seconds West, 330.00 feet parallel with the North-South ¼ line; thence North 86 degrees, 57 minutes, 24 seconds East, 198.00 feet; thence North 03 degrees, 27 minutes, 58 seconds West 856.00 feet along the Westerly right of way line of the Conrail Railroad (being 50.00 feet Westerly of, measured at right angles to, and parallel with, the North-South ¼ line of said Section); thence South 86 degrees, 57 minutes, 24 seconds West, 926.00 feet; thence South 03 degrees, 27 minutes, 58 seconds East, 430 feet, thence South 86

degrees, 57 minutes, 24 seconds West, 194.00 feet; thence South 03 degrees, 27 minutes, 58 seconds East, 431.00 feet; thence North 86 degrees, 57 minutes, 24 seconds East, 240.00 feet; thence South 03 degrees, 27 minutes, 58 seconds East, 325.00 feet to the point of beginning.

Parcel Identification No(s). 03–24–019–026–20

Commonly Known As: 1123 129th Avenue, Bradley, Michigan.

Dated: May 2, 2005.

Michael D. Olsen,

Acting Principal Deputy Assistant Secretary—Indian Affairs.

[FR Doc. 05–9605 Filed 5–12–05; 8:45 am]

BILLING CODE 4310–4N–P

DEPARTMENT OF THE INTERIOR

National Park Service

Minor Boundary Revision At Virgin Islands National Park

AGENCY: National Park Service, Interior.

ACTION: Announcement of park boundary revision.

SUMMARY: Notice is given that the boundary of the Virgin Islands National Park has been revised pursuant to the Acts as specified below, to encompass lands depicted on Drawing 161/92,009A, Segment 07, Virgin Islands National Park, revised March 30, 2004, prepared by the National Park Service. The revision to the boundary includes tract 07–123, as depicted on the map.

FOR FURTHER INFORMATION CONTACT: Superintendent, Virgin Islands National Park, 1300 Cruz Bay Creek, St. John, Virgin Islands 00830.

SUPPLEMENTARY INFORMATION: The Act of August 2, 1956 (70 Stat. 940) authorized the establishment of the Virgin Islands National Park. Sections 7(c)(i) and 7(c)(ii) of the Land and Water Conservation Fund Act, as amended by the Act of June 10, 1977 (Pub. L. 95–42, 91 Stat. 210), and the Act of March 10, 1980 (Pub. L. 103–333, 110 Stat. 4194) further authorized the Secretary of Interior to make minor revisions in the boundaries whenever the Secretary determines that it is necessary for the preservation, protection, interpretation or management of an area.

The map is on file and available for inspection in the Land Resources Program Center, Southeast Regional Office, 100 Alabama Street, SW., Atlanta, Georgia 30303, and in the Offices of the National Park Service, Department of the Interior, Washington DC 20013–7127.

Dated: March 23, 2005.

Patricia A. Hooks,

Regional Director, Southeast Region.

[FR Doc. 05–9566 Filed 5–12–05; 8:45 am]

BILLING CODE 4312–52–P

DEPARTMENT OF THE INTERIOR

National Park Service

Burr Trail Modifications, Draft Environmental Impact Statement, Capitol Reef National Park, Utah

AGENCY: National Park Service, Department of the Interior.

ACTION: Notice of availability of the Draft Environmental Impact Statement for Burr Trail Modifications, Capitol Reef National Park.

SUMMARY: Pursuant to the National Environmental Policy Act of 1969, 42 U.S.C. 4332(C), the National Park Service announces the availability of a Draft Environmental Impact Statement (DEIS) for Burr Trail Modifications for Capitol Reef National Park, Utah.

DATES: The DEIS will remain available for public review for sixty days July 12, 2005 from the date that the Environmental Protection Agency publishes the Notice of Availability of this Draft Environmental Impact Statement. No public meetings are scheduled.

ADDRESSES: Copies of the DEIS are available from Al Hendricks, Superintendent, Capitol Reef National Park, HC 70, Box 15, Torrey, Utah 84775, (435) 425–3791. Public reading copies of the DEIS will be available for review at the following locations:

Office of the Superintendent, Capitol Reef National Park, Park Headquarters, Jct. Hwy 24 & Scenic Drive, Torrey, Utah 84775; Telephone: (435) 425–3791.

Planning and Environmental Quality, Intermountain Support Office—Denver National Park Service, 12795 W. Alameda Parkway, Lakewood, CO 80228; Telephone: (303) 969–2851.

Office of Public Affairs, National Park Service, Department of Interior, 18th and C Streets NW., Washington, DC 20240; Telephone: (202) 208–6843.

FOR FURTHER INFORMATION CONTACT: Contact Al Hendricks, Superintendent, Capitol Reef National Park, at the above address and telephone number.

SUPPLEMENTARY INFORMATION: The National Park Service has prepared this draft environmental impact statement with three cooperating agencies: the State of Utah, Garfield County, Utah, and the Federal Highway Administration. The proposed action is the product of the environmental compliance process that was needed to fulfill the May 30, 2001, settlement agreement that established a mutually agreeable procedure among the National Park Service, the State of Utah, and Garfield County, Utah to address road modifications that Garfield County would like to make to the Burr Trail.

This draft environmental impact statement evaluates four alternatives. Three of these involve road modifications that stabilize parts of the road surface using gravel base material (some with geotextile fabric), install or improve drainage facilities at creek crossings, modify the road at mile point 0.65 to accommodate two-way traffic, and install slope protection along portions of the northern bank of Sandy Creek. The fourth alternative, the No Action Alternative, describes continuation of current conditions. This was the baseline condition against which the other alternatives were compared. Environmental consequences of the actions were evaluated to determine their potential effects to air quality; geologic features and landforms; biological soil crusts and soils; vegetation; wildlife; surface water, hydrology, and floodplains; natural soundscapes; ethnographic and ethnographic landscape resources; public health and safety; visitor use and experience; socioeconomics; park operations; Garfield County road maintenance operations; and sustainability and long-term management.

Comments: If you wish to comment, you may submit your comments by any one of several methods. You may mail comments to Superintendent, Capitol Reef National Park, HC 70, Box 15, Torrey, Utah 84775. You may also comment via the Internet to *care_planning@nps.gov*. Please submit Internet comments as an ASCII file avoiding the use of special characters and any form of encryption. Please also include ''Attn: Burr Trail DEIS'' and your name and return address in your Internet message. If you do not receive a confirmation that we have received your Internet message, contact Sharon Gurr, Capitol Reef National Park, HC 70, Box 15, Torrey, Utah 84775; (435) 425–3791 extension 101. Finally, you may hand-deliver comments to Office of the Superintendent, Capitol Reef National Park, Park Headquarters, Jct. Hwy 24 & Scenic Drive, Torrey, Utah 84775. 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 record, which we will honor to the extent allowable by law. There also may be circumstances in which we would withhold from the 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. 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.

Dated: March 24, 2005.

Stephen P. Martin,

Director, Intermountain Region, , National Park Service.

[FR Doc. 05–9565 Filed 5–12–05; 8:45 am]

BILLING CODE 4312–DL–P

DEPARTMENT OF THE INTERIOR

National Park Service

Environmental Statements; Notice of Intent: Virginia Key Beach Park, FL

AGENCY: National Park Service, Interior.

ACTION: Notice of Intent to prepare a Draft Environmental Impact Statement (EIS) on the Special Resource Study for Virginia Key Beach Park, Biscayne Bay, Florida.

SUMMARY: Pursuant to section 102(2)(C) of the National Environmental Policy Act of 1969, National Park Service (NPS) policy in Director's Order Number 2 (Park Planning) and Director's Order Number 12 (Conservation Planning, Environmental Impact Analysis, and Decision-making), the NPS will prepare an EIS for the Special Resource Study (SRS) for Virginia Key Beach Park. The authority for publishing this notice is contained in 40 CFR 1506.6.

The NPS will conduct public scoping meetings in the local area to receive input from interested parties on issues, concerns and suggestions believed to be relevant to the management of Virginia Key Beach Park and its potential inclusion as a unit of the National Park System. Of particular interest to the NPS are suggestions and ideas for managing cultural and natural resources, interpretation, and the visitor experience at Virginia Key Beach Park. The DEIS will formulate and evaluate environmental impacts associated with various types and levels of visitor use and resources management at the site.

DATES: The dates and times of the public scoping meetings will be published in local newspapers and on the SRS Web site for Virginia Key Beach Park. These dates and times may also be obtained by contacting the NPS Southeast Regional Office, Division of Planning and Compliance. Scoping suggestions will be accepted throughout the planning process but are urged to be submitted prior to July 1, 2005. The NPS anticipates that the Draft EIS will be available for public review by July 2006.

ADDRESSES: The locations of the public scoping meetings will be published in local newspapers and on the NPS Southeast Region planning Web site at *http://www.nps.gov/sero/planning/vakey_srs/vakey_info.htm.* These locations may also be obtained by contacting the NPS Southeast Regional Office, Division of Planning and Compliance.

Suggestions and ideas should be submitted in writing to the following address: Planning Team Leader, Virginia Key Beach Park Special Resource Study, NPS Southeast Regional Office, Division of Planning and Compliance, 100 Alabama Street, SW., 6th Floor, 1924 Building, Atlanta, Georgia 30303.

FOR FURTHER INFORMATION CONTACT: Amy Wirsching, Planning Team Leader, Virginia Key Beach Park Special Resource Study, (404) 562–3124, extension 607.

SUPPLEMENTARY INFORMATION: Issues currently being considered for the SRS/EIS include a determination of Virginia Key Beach Park's national significance and an assessment of the site's suitability and feasibility as a potential addition to the National Park System. The Draft EIS will identify cultural and natural resources of Virginia Key Beach Park and evaluate a range of potential management options that might adequately protect these resources.

Our practice is to make comments, including names and addresses of respondents, available for public review during regular business hours. If you wish for us to withhold your name and/or address, you must state this prominently at the beginning of your comment. The NPS will honor such requests to the extent allowed by applicable law. 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.

The responsible official for this EIS is Patricia A. Hooks, Regional Director, Southeast Region, National Park Service, 100 Alabama Street SW., 1924 Building, Atlanta, Georgia 30303.

Dated: March 21, 2005.

Patricia A. Hooks,

Regional Director, Southeast Region.

[FR Doc. 05–9569 Filed 5–12–05; 8:45 am]

BILLING CODE 4312–52–P

DEPARTMENT OF THE INTERIOR

National Park Service

Meetings: National Park Subsistence Resource Commission

AGENCY: National Park Service, Interior.

ACTION: Announcement of the National Park Subsistence Resource Commission (SRC) meetings.

SUMMARY: The National Park Service (NPS) announces the SRC meeting schedule for the following NPS areas within the Alaska Region: Denali National Park, Gates of the Arctic National Park, and Wrangell-St. Elias National Park. The purpose of each meeting is to develop and continue work on subsistence hunting program recommendations and other related subsistence management issues. Each meeting is open to the public and will have time allocated for public testimony. The public is welcomed to present written or oral comments to the SRC.

The NPS SRC program is authorized under Title VIII, Section 808, of the Alaska National Interest Lands Conservation Act, Public Law 96–487, to operate in accordance with the provisions of the Federal Advisory Committee Act. Draft meeting minutes will be available for public inspection approximately six weeks after each meeting.

DATES: The meeting times and locations are:

1. Gates of the Arctic National Park SRC, Tuesday, May 17, 2005, from 10 a.m. to 5 p.m., Wednesday, May 18, 2005, from 9:30 a.m. to 5 p.m., and Thursday, May 19, 2005, from 9:30 a.m. to 5 p.m. at the National Park Service Coldfoot Visitor's Center, Telephone: (907) 678–2004.

FOR FURTHER INFORMATION CONTACT: Gates of the Arctic National Park and Preserve, Dave Mills, Superintendent, at Telephone (907) 457–5752 or, Fred Andersen, Subsistence Manager, at (907) 455–0621. Address: 201 First Ave., Fairbanks, AK, 99701.

2. Denali National Park SRC, Friday, August 12, 2005, from 9:30 a.m. to approximately 5 p.m. at the Nord Haven Motel at Mile 249 on the Parks Highway in Healy, AK. Telephone: (907) 683–4500.

FOR FURTHER INFORMATION CONTACT: Denali National Park and Preserve, Hollis Twitchell, Subsistence Manager, P.O. Box 9, Denali Park, AK 99755. Telephone: (907) 455–0673 or (907) 683–9544.

3. Wrangell-St. Elias National Park SRC, Thursday, September 22, 2005, and Friday, September 23, 2005, from 9:30 a.m. to 5 p.m. in Tok, Alaska, at a meeting location to be announced by the Superintendent Wrangell-St. Elias National Park and Preserve.

FOR FURTHER INFORMATION CONTACT: Wrangell-St. Elias National Park and Preserve, Barbara Cellarius, Subsistence Manager/Cultural Anthropologist, P.O. Box 439, Copper Center, AK 99573. Telephone: (907) 822–7236.

SUPPLEMENTARY INFORMATION: SRC meeting locations and dates may need to be changed based on weather or local circumstances. Notice of each meeting will be published in local newspapers and announced on local radio stations prior to the meeting dates. The agendas for each meeting include the following:

1. Call to order (SRC Chair).
2. SRC Roll Call and Confirmation of Quorum.
3. SRC Chair and Superintendent's Welcome and Introductions.
4. Review and Approve Agenda.
5. Review and adopt minutes from last meeting.
6. Review Commission Purpose, SRC Membership.
7. Commission Member Reports.
8. Superintendent and NPS Staff Reports.
9. Federal Subsistence Board Update: Wildlife and Fisheries Proposals and Actions.
10. New Business.
11. Agency and Public Comments.
12. SRC Work Session. Prepare correspondence and hunting program recommendations.
13. Set time and place of next SRC meeting.
14. Adjournment.

Vic Knox,

Deputy Regional Director, Alaska Region.

[FR Doc. 05–9567 Filed 5–12–05; 8:45 am]

BILLING CODE 4310–HT–P

DEPARTMENT OF THE INTERIOR

National Park Service

Notice of Realty Action Proposed Exchange of Interest in Federally-Owned Lands for Privately-Owned Lands Both Within Warren County, VA

AGENCY: National Park Service, Interior.

ACTION: Notice of Realty Action for Proposed Land Exchange.

SUMMARY: The following described interests in federally-owned lands which were acquired by the National Park Service has been determined to be suitable for disposal by exchange. The authority for this exchange is Section 5(b) of the Land and Water Conservation Fund Act Amendments in Public Law 90–401, approved July 15, 1968, and Section 7(f) of the National Trails System Act, Public Law 90–543, as amended.

DATES: Comments on this proposed land exchange will be accepted through June 27, 2005.

ADDRESSES: Detailed information concerning this exchange including precise legal descriptions, Land Protection Plan, environmental analysis, and cultural reports, and Finding of No Significant Impact are available at the National Trails Land Resources Program Center, 1314 Edwin Miller Boulevard, P.O. Box 908, Martinsburg, West Virginia 25402. Comments may also be mailed to this address.

FOR FURTHER INFORMATION CONTACT: Judy L. Brumback, Chief, Acquisition Division, National Park Service, National Trails Land Resources Program Center, P.O. Box 908, Martinsburg, West Virginia 25402–0908. Phone: (304) 263–4943.

SUPPLEMENTARY INFORMATION: The selected interest in Federal land is within the boundaries of the Appalachian National Scenic Trail. The land has been surveyed for cultural resources and endangered and threatened species. These reports are available upon request.

The National Park Service will modify the restrictions that were placed on property described as Tract 420–41, as contained in the Quitclaim Deed from the United States of America to Raymond W. Behrens, recorded in Book 344, Page 499. This property is now owned by David A. Andrukonis, et ux. The modified restrictions to be granted to David A. Andrukonis, et ux., will be described as Tract 420–61. In exchange for the modified restrictions, David A. Andrukonis, et ux., will convey to the United States of America the deeded access road and any other rights they may have in Tract 420–25. The release of these rights by David A. Andrukonis, et ux., will be described as Tract 420–60.

Conveyance of the interest in land by the United States of America will be done by a Quitclaim Deed and will include easements terms outlining the modification of the terms.

In exchange for the interest described in previous paragraph, the United States of America will acquire the deeded access and any other rights in Tract 420–60. The Appalachian Trail footpath is located on this property. Acquisition of access and other rights owned by David A. Andrukonis, et ux., will provide additional protection for the footpath by protecting the resources.

This interest in land will be administered by the National Park Service as a part of the Appalachian National Scenic Trail upon completion of the exchange. This exchange of interests will provide permanent protection for the Appalachian Trail.

The interest to be acquired by the United States of America is described as follows: Tract 420–60, consisting of access and any other rights David A. Andrukonis, et ux., had in and over Tract 420–25.

Conveyance of the access and any other rights to the United States will be done by a General Warranty Deed.

The value of the interests to be exchanged was determined by a current fair market value appraisal. The parties have agreed to an equal value exchange.

Interested parties may submit written comments to the address listed in the **ADDRESSES** paragraph. Adverse comments will be evaluated and this action may be modified or vacated accordingly. In the absence of any action to modify or vacate, this realty action will become the final determination of the Department of Interior.

Pamela Underhill,

Park Manager, Appalachian National Scenic Trail.

[FR Doc. 05–9568 Filed 5–12–05; 8:45 am]

BILLING CODE 4312–52–P

INTERNATIONAL TRADE COMMISSION

[Investigation Nos. 701–TA–388–391 and 731–TA–816–821 (Review)]

Cut-to-Length Carbon-Quality Steel Plate From France, Indonesia, India, Italy, Japan, and Korea

AGENCY: United States International Trade Commission.

ACTION: Scheduling of full five-year reviews concerning the countervailing duty orders on cut-to-length carbon-quality steel plate from India, Indonesia, Italy, and Korea and the antidumping duty orders on cut-to-length carbon-quality steel plate from France, India, Indonesia, Italy, Japan, and Korea.

SUMMARY: The Commission hereby gives notice of the scheduling of full reviews pursuant to section 751(c)(5) of the Tariff Act of 1930 (19 U.S.C. 1675(c)(5))

(the Act) to determine whether revocation of the countervailing duty orders on cut-to-length carbon-quality steel plate from India, Indonesia, Italy, and Korea and the antidumping duty orders on cut-to-length carbon-quality steel plate from France, India, Indonesia, Italy, Japan, and Korea would be likely to lead to continuation or recurrence of material injury within a reasonably foreseeable time. For further information concerning the conduct of these reviews and rules of general application, consult the Commission's Rules of Practice and Procedure, part 201, subparts A through E (19 CFR part 201), and part 207, subparts A, D, E, and F (19 CFR part 207).

EFFECTIVE DATE: May 4, 2005

FOR FURTHER INFORMATION CONTACT: Michael Szustakowski (202–205–3188), Office of Investigations, U.S. International Trade Commission, 500 E Street, SW., Washington, DC 20436. Hearing-impaired persons can obtain information on this matter by contacting the Commission's TDD terminal on 202–205–1810. Persons with mobility impairments who will need special assistance in gaining access to the Commission should contact the Office of the Secretary at 202–205–2000. General information concerning the Commission may also be obtained by accessing its Internet server (*http://www.usitc.gov*). The public record for these reviews may be viewed on the Commission's electronic docket (EDIS) at *http://edis.usitc.gov*.

SUPPLEMENTARY INFORMATION:

Background.—On April 8, 2005, the Commission determined that responses to its notice of institution of the subject five-year reviews were such that full reviews pursuant to section 751(c)(5) of the Act should proceed (70 FR 20173, April 18, 2005). A record of the Commissioners' votes, the Commission's statement on adequacy, and any individual Commissioner's statements are available from the Office of the Secretary and at the Commission's Web site.

Participation in the reviews and public service list.—Persons, including industrial users of the subject merchandise and, if the merchandise is sold at the retail level, representative consumer organizations, wishing to participate in these reviews as parties must file an entry of appearance with the Secretary to the Commission, as provided in section 201.11 of the Commission's rules, by 45 days after publication of this notice. A party that filed a notice of appearance following publication of the Commission's notice of institution of the reviews need not file an additional notice of appearance. The Secretary will maintain a public service list containing the names and addresses of all persons, or their representatives, who are parties to the reviews.

Limited disclosure of business proprietary information (BPI) under an administrative protective order (APO) and BPI service list.—Pursuant to section 207.7(a) of the Commission's rules, the Secretary will make BPI gathered in these reviews available to authorized applicants under the APO issued in the reviews, provided that the application is made by 45 days after publication of this notice. Authorized applicants must represent interested parties, as defined by 19 U.S.C. 1677(9), who are parties to the reviews. A party granted access to BPI following publication of the Commission's notice of institution of the reviews need not reapply for such access. A separate service list will be maintained by the Secretary for those parties authorized to receive BPI under the APO.

Staff report.—The prehearing staff report in the reviews will be placed in the nonpublic record on September 7, 2005, and a public version will be issued thereafter, pursuant to section 207.64 of the Commission's rules.

Hearing.—The Commission will hold a hearing in connection with the reviews beginning at 9:30 a.m. on September 27, 2005, at the U.S. International Trade Commission Building. Requests to appear at the hearing should be filed in writing with the Secretary to the Commission on or before September 16, 2005. A nonparty who has testimony that may aid the Commission's deliberations may request permission to present a short statement at the hearing. All parties and nonparties desiring to appear at the hearing and make oral presentations should attend a prehearing conference to be held at 9:30 a.m. on September 21, 2005, at the U.S. International Trade Commission Building. Oral testimony and written materials to be submitted at the public hearing are governed by sections 201.6(b)(2), 201.13(f), 207.24, and 207.66 of the Commission's rules. Parties must submit any request to present a portion of their hearing testimony *in camera* no later than 7 days prior to the date of the hearing.

Written submissions.—Each party to the reviews may submit a prehearing brief to the Commission. Prehearing briefs must conform with the provisions of section 207.65 of the Commission's rules; the deadline for filing is September 16, 2005. Parties may also file written testimony in connection with their presentation at the hearing, as provided in section 207.24 of the Commission's rules, and posthearing briefs, which must conform with the provisions of section 207.67 of the Commission's rules. The deadline for filing posthearing briefs is October 6, 2005; witness testimony must be filed no later than three days before the hearing. In addition, any person who has not entered an appearance as a party to the reviews may submit a written statement of information pertinent to the subject of the reviews on or before October 6, 2005. On October 28, 2005, the Commission will make available to parties all information on which they have not had an opportunity to comment. Parties may submit final comments on this information on or before November 1, 2005, but such final comments must not contain new factual information and must otherwise comply with section 207.68 of the Commission's rules. All written submissions must conform with the provisions of section 201.8 of the Commission's rules; any submissions that contain BPI must also conform with the requirements of sections 201.6, 207.3, and 207.7 of the Commission's rules. The Commission's rules do not authorize filing of submissions with the Secretary by facsimile or electronic means, except to the extent permitted by section 201.8 of the Commission's rules, as amended, 67 FR 68036 (November 8, 2002).[1]

Additional written submissions to the Commission, including requests pursuant to section 201.12 of the Commission's rules, shall not be accepted unless good cause is shown for accepting such submissions, or unless the submission is pursuant to a specific request by a Commissioner or Commission staff.

In accordance with sections 201.16(c) and 207.3 of the Commission's rules, each document filed by a party to the reviews must be served on all other parties to the reviews (as identified by either the public or BPI service list), and a certificate of service must be timely filed. The Secretary will not accept a document for filing without a certificate of service.

Authority: These reviews are being conducted under authority of title VII of the Tariff Act of 1930; this notice is published pursuant to section 207.62 of the Commission's rules.

By order of the Commission.

[1] Even where electronic filing of a document is permitted, certain documents must also be filed in paper form, as specified in II (C) of the Commission's Handbook on Electronic Filing Procedures, 67 FR 68173 (November 8, 2002).

Issued: May 10, 2005.

Marilyn R. Abbott,

Secretary to the Commission.

[FR Doc. 05–9573 Filed 5–12–05; 8:45 am]

BILLING CODE 7020–02–P

INTERNATIONAL TRADE COMMISSION

[Inv. No. 337–TA–539]

In the Matter of Certain Tadalafil or Any Salt or Solvate Thereof, and Products Containing Same; Notice of Investigation

AGENCY: U.S. International Trade Commission.

ACTION: Institution of investigation pursuant to 19 U.S.C. 1337.

SUMMARY: Notice is hereby given that a complaint was filed with the U.S. International Trade Commission on April 8, 2005, under section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. 1337, on behalf of Lilly ICOS LLC of Wilmington, Delaware. A letter supplementing the complaint was filed on April 27, 2005. The complaint, as supplemented, alleges violations of section 337 in the importation into the United States, the sale for importation, and the sale within the United States after importation of certain tadalafil or any salt or solvate thereof, and products containing same, by reason of infringement of claims 1–4, 6–8, and 12–13 of U.S. Patent No. 5,859,006. The complaint further alleges that there exists an industry in the United States as required by subsection (a)(2) of section 337.

The complainant requests that the Commission institute an investigation and, after the investigation, issue a permanent general exclusion order and permanent cease and desist orders.

ADDRESSES: The complaint and supplemental letter, except for any confidential information contained therein, are available for inspection during official business hours (8:45 a.m. to 5:15 p.m.) in the Office of the Secretary, U.S. International Trade Commission, 500 E Street, SW., Room 112, Washington, DC 20436, telephone 202–205–2000. Hearing impaired individuals are advised that information on this matter can be obtained by contacting the Commission's TDD terminal on 202–205–1810. Persons with mobility impairments who will need special assistance in gaining access to the Commission should contact the Office of the Secretary at 202–205–2000. General information concerning the Commission may also be obtained by accessing its Internet server at *http://www.usitc.gov.* The public record for this investigation may be viewed on the Commission's electronic docket (EDIS) at *http://edis.usitc.gov.*

FOR FURTHER INFORMATION CONTACT: Jay H. Reiziss, Esq., Office of Unfair Import Investigations, U.S. International Trade Commission, telephone 202–205–2579.

Authority: The authority for institution of this investigation is contained in section 337 of the Tariff Act of 1930, as amended, and in section 210.10 of the Commission's Rules of Practice and Procedure, 19 CFR 210.10 (2004).

Scope of Investigation: Having considered the complaint, the U.S. International Trade Commission, on May 9, 2005, *Ordered that*—

(1) Pursuant to subsection (b) of section 337 of the Tariff Act of 1930, as amended, an investigation be instituted to determine whether there is a violation of subsection (a)(1)(B) of section 337 in the importation into the United States, the sale for importation, or the sale within the United States after importation of certain tadalafil or any salt or solvate thereof, or products containing same, by reason of infringement of one or more of claims 1–4, 6–8, and 12–13 of U.S. Patent No. 5,859,006, and whether an industry in the United States exists as required by subsection (a)(2) of section 337.

(2) For the purpose of the investigation so instituted, the following are hereby named as parties upon which this notice of investigation shall be served:

(a) The complainant is—

Lilly ICOS LLC, 1209 Orange Street, Wilmington, DE 19801.

(b) The respondents are the following companies alleged to be in violation of section 337 and upon which the complaint is to be served:

Pharmacy4u.us, Attn: Dave Fox, 166 W. 44th Street, New York, NY 10282, Santovittorio Holdings Ltd, d/b/a Inhousepharmacy.co.uk.

Apartado 6–6305 El Dorado, El Dorado, Panama, Expressgeneric, 722 8th Cross, 11th Main H.A.L. 2nd Stage, Bangalore, Karnataka 560008 IN.

India, Stop4rx, Box 1246 Port-au-Prince, Port-au-Prince, FE 123182, Haiti.

Cutprice Pills, c/o Domains By Proxy, Inc., 15111 N. Hayden Road, Suite 160, PMB353, Scottsdale, AZ 85260.

Allpills.us, Attn: Gerard Gibson, Madisson 12, Beverly Hills, CA 90210.

Generic Cialis Pharmacy, Del Parque Central 200 N, Managua, Nicaragua, Rx Mex-Com, S.A. de C.V., Avenida Lazaro Cardenas #4207, Colonia Las Brisas, Monterrey 64780, Mexico.

Budget Medicines Pty Ltd., 2 Brierwood Place, French's Forest, Sydney, 2068, Australia.

www.nudewfds.info, 838 Camp Street, Apartment C, New Orleans, LA 70130.

(c) Jay H. Reiziss, Esq., Office of Unfair Import Investigations, U.S. International Trade Commission, 500 E Street, SW., Suite 401, Washington, DC 20436, who shall be the Commission investigative attorney, party to this investigation; and

(3) For the investigation so instituted, the Honorable Charles E. Bullock is designated as the presiding administrative law judge.

Responses to the complaint and the notice of investigation must be submitted by the named respondents in accordance with section 210.13 of the Commission's Rules of Practice and Procedure, 19 CFR 210.13. Pursuant to 19 CFR 201.16(d) and 210.13(a), such responses will be considered by the Commission if received no later than 20 days after the date of service by the Commission of the complaint and the notice of investigation. Extensions of time for submitting a response to the complaint will not be granted unless good cause therefor is shown.

Failure of a respondent to file a timely response to each allegation in the complaint and in this notice may be deemed to constitute a waiver of the right to appear and contest the allegations of the complaint and to authorize the administrative law judge and the Commission, without further notice to the respondent, to find the facts to be as alleged in the complaint and this notice and to enter both an initial determination and a final determination containing such findings, and may result in the issuance of a limited exclusion order or a cease and desist order or both directed against such respondent.

By order of the Commission.

Issued: May 9, 2005.

Marilyn R. Abbott,

Secretary to the Commission.

[FR Doc. 05–9574 Filed 5–12–05; 8:45 am]

BILLING CODE 7020–02–P

DEPARTMENT OF LABOR

Employee Benefits Security Administration

[Application No. D–11249, et al.]

Proposed Exemptions; BNP Paribas S.A., (BNP Paribas) and Its French Affiliates (the French Affiliates)

AGENCY: Employee Benefits Security Administration, Labor.

ACTION: Notice of proposed exemptions.

SUMMARY: This document contains notices of pendency before the Department of Labor (the Department) of proposed exemptions from certain of the prohibited transaction restrictions of the Employee Retirement Income Security Act of 1974 (the Act) and/or the Internal Revenue Code of 1986 (the Code).

Written Comments and Hearing Requests

All interested persons are invited to submit written comments or requests for a hearing on the pending exemptions, unless otherwise stated in the Notice of Proposed Exemption, within 45 days from the date of publication of this **Federal Register** Notice. Comments and requests for a hearing should state: (1) The name, address, and telephone number of the person making the comment or request, and (2) the nature of the person's interest in the exemption and the manner in which the person would be adversely affected by the exemption. A request for a hearing must also state the issues to be addressed and include a general description of the evidence to be presented at the hearing.

ADDRESSES: All written comments and requests for a hearing (at least three copies) should be sent to the Employee Benefits Security Administration (EBSA), Office of Exemption Determinations, Room N–5649, U.S. Department of Labor, 200 Constitution Avenue, NW., Washington, DC 20210. Attention: Application No. ___, stated in each Notice of Proposed Exemption. Interested persons are also invited to submit comments and/or hearing requests to EBSA via e-mail or FAX. Any such comments or requests should be sent either by e-mail to: *''moffitt.betty@dol.gov'',* or by FAX to (202) 219–0204 by the end of the scheduled comment period. The applications for exemption and the comments received will be available for public inspection in the Public Documents Room of the Employee Benefits Security Administration, U.S. Department of Labor, Room N–1513, 200 Constitution Avenue, NW., Washington, DC 20210.

Notice to Interested Persons

Notice of the proposed exemptions will be provided to all interested persons in the manner agreed upon by the applicant and the Department within 15 days of the date of publication in the **Federal Register**. Such notice shall include a copy of the notice of proposed exemption as published in the **Federal Register** and shall inform interested persons of their right to comment and to request a hearing (where appropriate).

SUPPLEMENTARY INFORMATION: The proposed exemptions were requested in applications filed pursuant to section 408(a) of the Act and/or section 4975(c)(2) of the Code, and in accordance with procedures set forth in 29 CFR part 2570, subpart B (55 FR 32836, 32847, August 10, 1990). Effective December 31, 1978, section 102 of Reorganization Plan No. 4 of 1978, 5 U.S.C. App. 1 (1996), transferred the authority of the Secretary of the Treasury to issue exemptions of the type requested to the Secretary of Labor. Therefore, these notices of proposed exemption are issued solely by the Department.

The applications contain representations with regard to the proposed exemptions which are summarized below. Interested persons are referred to the applications on file with the Department for a complete statement of the facts and representations.

BNP Paribas S.A., (BNP Paribas) and Its French Affiliates (the French Affiliates) Located in Paris, France

[Application No. D–11249]

Proposed Exemption

The Department is considering granting an exemption under the authority of section 408(a) of the Act and section 4975(c)(2) of the Code and in accordance with the procedures set forth in 29 CFR Part 2570, subpart B (55 FR 32836, 32847, August 10,1990).[1]

Section I. Covered Transactions

A. If the exemption is granted, the restrictions of section 406(a)(1)(A) through (D) of the Act and the sanctions resulting from the application of section 4975 of the Code, by reason of section 4975(c)(1)(A) through (D) of the Code, shall not apply to any purchase or sale of a security between BNP Paribas, a bank established under the laws of France and any French Affiliate or branch of BNP Paribas which is a bank regulated by the Commission Bancaire (CB) or a broker-dealer holding a securities dealers license issued by the Comité des Etablissements de Crédit et des Enterprises d'Investissement (CECEI) or registered with the Autorité des Marchés Financiers (AMF) (each, a BNP Entity), and employee benefit plans (the Plans) with respect to which the BNP Entity is a party in interest, including options written by a Plan or the BNP Entity, provided that the following conditions and the General Conditions of Section II, are satisfied:

(1) The BNP Entity customarily purchases and sells securities for its own account in the ordinary course of its business as a bank or broker-dealer, as the case may be;

(2) The terms of any transaction are at least as favorable to the Plan as those which the Plan could obtain in a comparable arm's length transaction with an unrelated party; and

(3) Neither the BNP Entity nor any of its affiliates has discretionary authority or control with respect to the investment of the Plan assets involved in the transaction, or renders investment advice (within the meaning of 29 CFR 2510.3–21(c)) with respect to those assets, and the BNP Entity is a party in interest or disqualified person with respect to the Plan assets involved in the transaction solely by reason of section 3(14)(B) of the Act or section 4975(e)(2)(B) of the Code, or by reason of a relationship to a person described in such sections. For purposes of this paragraph, the BNP Entity shall not be deemed to be a fiduciary with respect to Plan assets solely by reason of providing securities custodial services for a Plan.

B. If the exemption is granted, the restrictions of sections 406(a)(1)(A) through (D) and 406(b)(2) of the Act and the sanctions resulting from the application of section 4975 of the Code, by reason of section 4975(c)(1)(A) through (D) of the Code, shall not apply to any extension of credit to a Plan by a BNP Entity to permit the settlement of securities transactions, regardless of whether they are effected on an agency or a principal basis, or in connection with the writing of options contracts, provided that the following conditions and the General Conditions of Section II, are satisfied:

(1) The BNP Entity is not a fiduciary with respect to the Plan assets involved in the transaction, unless no interest or other consideration is received by the BNP Entity or any of its affiliates in connection with such extension of credit; and

(2) Any extension of credit would be lawful under the Securities Exchange Act of 1934, as amended (the 1934 Act), and any rules or regulations thereunder, if the 1934 Act, rules or regulations were applicable and is lawful under applicable foreign law.

C. If the exemption is granted, the restrictions of sections 406(a)(1)(A) through (D) of the Act and the sanctions resulting from the application of section 4975 of the Code, by reason of section 4975(c)(1)(A) through (D) of the Code,

[1] For purposes of this proposed exemption, references to provisions of Title I of the Act, unless otherwise specified, refer also to the corresponding provisions of the Code.

shall not apply to the lending of securities that are assets of a Plan to a BNP Entity, provided that the following conditions and the General Conditions of Section II are satisfied:

(1) Neither the BNP Entity nor any of its affiliates has discretionary authority or control with respect to the investment of Plan assets involved in the transaction, or renders investment advice (within the meaning of 29 CFR 2510.3–21(c)) with respect to those assets;

(2) The Plan receives from the BNP Entity, either by physical delivery or by book entry in a securities depository located in the U.S., by the close of business on the day on which the securities lent are delivered to the BNP Entity, collateral consisting of U.S. currency, securities issued or guaranteed by the U.S. Government or its agencies or instrumentalities, or irrevocable U.S. bank letters of credit issued by persons other than the BNP Entity (or any of its affiliates), or any combination thereof having, as of the close of business on the preceding business day, a market value (or, in the case of letters of credit, a stated amount) equal to not less than 100 percent of the then market value of the securities lent. All collateral shall be held in U.S. dollars, or dollar denominated securities or bank letters of credit and shall be held in physical or book entry form in the United States.

(3) The loan is made pursuant to a written loan agreement (the Loan Agreement), which may be in the form of a master agreement covering a series of securities lending transactions, and which contains terms at least as favorable to the Plan as those the Plan could obtain in an arm's length transaction with an unrelated party;

(4) In return for lending securities, the Plan either (a) receives a reasonable fee which is related to the value of the borrowed securities and the duration of the loan, or (b) has the opportunity to derive compensation through the investment of cash collateral. In the latter case, the Plan may pay a loan rebate or similar fee to the BNP Entity, if such fee is not greater than the Plan would pay an unrelated party in a comparable arm's length transaction with an unrelated party;

(5) The Plan receives at least the equivalent of all distributions made to holders of the borrowed securities during the term of the loan, including, but not limited to, cash dividends, interest payments, shares of stock as a result of stock splits and rights to purchase additional securities that the Plan would have received (net of tax withholdings) had it remained the record owner of such securities. Where dividends and other distributions on foreign securities payable to a lending Plan are subject to foreign tax withholdings, the BNP Entity will put the Plan back in at least as good a position as it would have been in had it not lent the securities;

(6) If the market value of the collateral as of the close of trading on a business day falls below 100% of the market value of the borrowed securities as of the close of trading on that day, the BNP Entity delivers additional collateral, by the close of business on the following business day, to bring the level of the collateral back to at least 100% of the market value of all the borrowed securities as of such preceding day. Notwithstanding the foregoing, part of the collateral may be returned to the BNP Entity if the market value of the collateral exceeds 100% of the market value of the borrowed securities, as long as the market value of the remaining collateral equals at least 100% of the market value of the borrowed securities;

(7) Prior to entering into a Loan Agreement, the BNP Entity furnishes to the independent Plan fiduciary, who is making decisions on behalf of the Plan with respect to the lending of securities: (a) The most recent available audited and unaudited statements of its financial condition, (b) the most recent available unaudited statement of its financial condition (if more recent than the audited statement), and (c) a representation by the BNP Entity that, as of each time it borrows securities, there has been no material adverse change in its financial condition since the date of the most recently furnished financial statement that has not been disclosed to the Plan fiduciary. Such representation may be made by the BNP Entity's agreeing that each loan of securities shall constitute a representation that there has been no such material adverse change;

(8) The Loan Agreement and/or any securities loan outstanding may be terminated by the Plan at any time, whereupon the BNP Entity delivers certificates for securities identical to the borrowed securities (or the equivalent thereof in the event of reorganization, recapitalization or merger of the issuer of the borrowed securities) to the Plan within (a) the customary delivery period for such securities, (b) five business days, or (c) the time negotiated for such delivery by the Plan and the BNP Entity, whichever is lesser, or, alternatively, such period as permitted by Prohibited Transaction Class Exemption (PTCE) 81–6 (46 FR 7527, January 23, 1981, as amended at 52 FR 18754, May 19, 1987), as it may be amended or superseded; [2]

(9) In the event that the loan is terminated and the BNP Entity fails to return the borrowed securities or the equivalent thereof within the time described in paragraph (8) above, then the Plan may purchase securities identical to the borrowed securities (or their equivalent as described above) and may apply the collateral to the payment of the purchase price, any other obligations of the BNP Entity under the Loan Agreement, and any expenses associated with the sale and/or purchase. The BNP Entity is obligated to pay to the Plan the amount of any remaining obligations and expenses not covered by the collateral (the value of which shall be determined as of the date the borrowed securities should have been returned to the Plan), plus interest at a reasonable rate, as determined in accordance with an independent market source. If replacement securities are not available, the BNP Entity will pay the Plan an amount equal to (a) the value of the securities as of the date such securities should have been returned to the Plan, plus (b) all the accrued financial benefits derived from the beneficial ownership of such borrowed securities as of such date, plus (c) interest at a reasonable rate determined in accordance with an independent market source from such date to the date of payment. The amounts paid shall be reduced by the amount or value of the collateral determined as of the date the borrowed securities should have been returned to the Plan. The BNP entity is obligated to pay, under the terms of the Loan Agreement, and does pay, to the Plan, the amount of any remaining obligations and expenses not covered by the collateral, plus interest at a reasonable rate. Notwithstanding the foregoing, the BNP Entity may, in the event it fails to return borrowed securities as described above, replace non-cash collateral with an amount of cash not less than the then current market value of the collateral, provided that such replacement is approved by the independent Plan fiduciary; and

(10) The independent Plan fiduciary maintains the situs of the Loan Agreement in accordance with the indicia of ownership requirements under section 404(b) of the Act and the

[2] PTCE 81–6 provides an exemption under certain conditions from section 406(a)(1)(A) through (D) of the Act and the corresponding provisions of section 4975(c) of the Code for the lending of securities that are assets of an employee benefit plan to a U.S. broker-dealer registered under the 1934 Act (or exempted from registration under the 1934 Act as a dealer in exempt Government securities, as defined therein).

regulations promulgated under 29 CFR 2550.404(b)–1. However, the BNP Entity shall not be subject to the civil penalty, which may be assessed under section 502(i) of the Act, or to the taxes imposed by section 4975(a) and (b) of the Code, if the independent Plan fiduciary fails to comply with the requirements of 29 CFR 2550.404(b)–1.

If the BNP Entity fails to comply with any condition of this exemption in the course of engaging in a securities lending transaction, the Plan fiduciary which caused the Plan to engage in such transaction shall not be deemed to have caused the Plan to engage in a transaction prohibited by section 406(a)(1)(A) through (D) of the Act solely by reason of the failure on the part of the BNP Entity to comply with the conditions of the exemption.

Section II. General Conditions

A. The BNP Entity is a registered broker-dealer or bank subject to regulation by a governmental agency, as described in Section III.B, and is in compliance with all applicable rules and regulations thereof in connection with any transactions covered by this exemption.

B. The BNP Entity, in connection with any transactions covered by this exemption, is in compliance with all requirements of Rule 15a–6 of the 1934 Act, and Securities and Exchange Commission (SEC) interpretations thereof, providing foreign affiliates a limited exemption from U.S. broker-dealers registration requirements (17 CFR 240.15a–6).

C. Prior to the transaction, the BNP Entity enters into a written agreement with the Plan in which the BNP Entity consents to the jurisdiction of the courts of the United States for any civil action or proceeding brought in respect of the subject transactions.

D. Each BNP Entity located in the United States is fully responsible for any judgment rendered by a United States court against BNP Paribas, and the U.S. assets of BNP Paribas, including those of any BNP Entities located in the U.S., are subject to the enforcement of any such judgment.

E. The BNP Entity maintains, or causes to be maintained, within the United States for a period of six years from the date of the covered transactions, such records as are necessary to enable the persons described in paragraph F. of this Section II to determine whether the conditions of this exemption have been met, except that:

(1) If the records necessary to enable the persons described in paragraph F. to determine whether the conditions of the exemption have been met are lost or destroyed prior to the end of such year period, due to circumstances beyond the control of the BNP Entity, then no prohibited transaction will be considered to have occurred solely on the basis of the unavailability of those records; and

(2) No party in interest, other than the BNP Entity and its affiliates, shall be subject to the civil penalty that may be assessed under section 502(i) of the Act or to the taxes imposed by section 4975(a) and (b) of the Code if the records are not maintained or are not available for examination as required by paragraph F. of this Section II.

F. Notwithstanding the provisions of subsections (a)(2) and (b) of section 504 of the Act, the BNP Entity makes the records referred to above in paragraph E. of this Section II, unconditionally available for examination during normal business hours at their customary location to the following persons or an authorized representative thereof:

(1) The Department, the Internal Revenue Service or the SEC;

(2) Any fiduciary of a participating Plan;

(3) Any contributing employer to a Plan;

(4) Any employee organization any of whose members are covered by a Plan; and

(5) Any participant or beneficiary of a Plan.

However, none of the persons described above in paragraphs (2)–(5) of this paragraph F. shall be authorized to examine trade secrets of the BNP Entity, or any commercial or financial information which is privileged or confidential.

G. Prior to any Plan's approval of any transaction with a BNP Entity, the Plan is provided with copies of the proposed and final exemption with respect to the exemptive relief granted herein.

Section III. Definitions

For purposes of this proposed exemption,

A. The term ''affiliate'' of another person shall include:

(1) Any person directly or indirectly, through one or more intermediaries, controlling, controlled by, or under common control with such other person;

(2) Any officer, director, or partner, employee or relative (as defined in section 3(15) of the Act) of such other person; and

(3) Any corporation, partnership or other entity of which such other person is an officer, director or partner. (For purposes of this definition, the term ''control'' means the power to exercise a controlling influence over the management or policies of a person other than an individual.)

B. The term ''BNP Entity'' shall mean BNP Paribas or any branch or affiliate thereof that is a broker-dealer or bank subject to regulation by the (1) *CB or* (2) AMF.

C. The term ''security'' shall include equities, fixed income securities, options on equity and on fixed income securities, government obligations, and any other instrument that constitutes a security under U.S. securities laws. The term ''security'' does not include swap agreements or other notional principal contracts.

Summary of Facts and Representations

1. BNP Paribas, which maintains its principal offices in Paris, France, is a publicly-held French bank that operates primarily in France. BNP Paribas has additional activities in major banking and securities markets worldwide. Through its branch offices and affiliates, BNP Paribas provides a full line of depository, lending and investment services to a broad base of clients and is engaged in a wide range of banking, financial and related activities. As of December 31, 2004, BNP Paribas had consolidated assets of Euro 905.9 billion ($1.231 trillion) and stockholders equity of Euro 30.2 billion ($41.02 billion). As of close of business on March 29, 2005, BNP Paribas had a market capitalization of over Euro 49 billion (over $63 billion). The banking activities of BNP Paribas and its French Affiliates are regulated by CB. The securities activities of BNP Paribas are regulated by the AMF.

As of December 31, 2004, BNP Paribas reported that its presence in the United States (excluding Banc West Corporation and its subsidiaries) was valued in excess of $185 billion. Because it is a single legal entity acting through various branches and other subsidiaries in various locations, including the United States, BNP Paribas states that each U.S.-based BNP Entity would be fully responsible for any judgment rendered by a U.S. court against BNP Paribas, and the U.S. assets of BNP Paribas, including those of any BNP Entities, located in the U.S., would likely be subject to the enforcement of any such judgment.[3]

[3] Alternatively, BNP Paribas has advised that if a judgment by a U.S. court is rendered against a French Affiliate, the judgment would be enforceable in France if the suing party has obtained an exequatur (enforcement order) from a French court. Before it issues an exequatur, the French court must determine that the judgment of the U.S. court has satisfied the following requirements: (a) The court must have subject-matter and personal jurisdiction

2. BNP Paribas seeks prospective exemptive relief from the Department to permit certain principal transactions, extensions of credit, and securities borrowing transactions between employee benefit plans subject to the Act and BNP Paribas acting through its French Affiliates and French branches. The proposed exemption would solely cover transactions affected by BNP Paribas and its French Affiliates that are located in France and regulated by the CB or AMF. Aside from BNP Paribas, such French Affiliates currently include BNP Paribas Arbitrage of Paris, France which is regulated by the Autorité de Marchés Financiers of France.

BNP Paribas requests an individual exemption on behalf of itself, its French Affiliates, and others, which may in the future, be subject to governmental regulation in France, to engage with Plans in the securities transactions described herein because such entities may be parties in interest with respect to the Plans under the Act, by virtue of being fiduciaries (for assets of the Plans other than those involved in the transactions) or service providers to such Plans, or by virtue of their relationships to such fiduciaries or service providers.

3. BNP Paribas is subject to regulations established by the CB and the AMF governing minimum capitalization, reporting requirements, periodic examinations, client money and safe custody rules and books and records requirements with respect to client accounts. These regulations and the regulations established by the SEC share a common objective of protecting investors through regulation of the securities industry. The regulations of the CB and the AMF require BNP Paribas to maintain a positive tangible net worth and be able to meet its obligations as they may fall due. These rules establish comprehensive financial resource and reporting and disclosure requirements regarding capital adequacy. In addition, the regulations impose requirements with respect to risk management, internal controls and transaction reporting and record keeping and require such records to be produced at the request of the CB and the AMF. Finally, these regulations impose potential fines and penalties, which establish a comprehensive disciplinary framework.

4. In addition to the requirements and protections imposed under the regulations of the CB and the AMF, BNP Paribas will comply with all applicable provisions of Rule 15a–6 of the 1934 Act, as amended. In lieu of registration with the SEC, Rule 15a–6 provides an exemption from SEC broker-dealer registration for a foreign broker-dealer that induces or attempts to induce the purchase or sale of any security (including over-the-counter equity and debt options) by a ''U.S. institutional investor'' or a ''major U.S. institutional investor,'' provided that the foreign broker-dealer, among other things, enters into these transactions through a U.S. registered broker or dealer intermediary.

The term ''U.S. institutional investor'', as defined in Rule 15a–6(b)(7), includes an employee benefit plan within the meaning of the Act if:

(a) The investment decision is made by a plan fiduciary, as defined in section 3(21) of the Act, which is either a bank, savings and loan association, insurance company or registered investment adviser, or

(b) The employee benefit plan has total assets in excess of $5 million, or

(c) The employee benefit plan is a self-directed plan with investment decisions made solely by persons that are ''accredited investors,'' as defined in Rule 501(a)(1) of Regulation D of the Securities Act of 1933, as amended.

The term ''major U.S. institutional investor'' is defined in Rule 15a–6(b)(4), as any entity that owns or controls (or, in the case of an investment adviser, has under management) in excess of $100 million aggregate financial assets.[4] BNP Paribas represents that the intermediation of the U.S. registered broker or dealer imposes upon the foreign broker-dealer the requirement that the securities transaction be effected in accordance with a number of U.S. securities laws and regulations applicable to U.S. registered broker-dealers.

5. BNP Paribas represents that under Rule 15a–6 of the 1934 Act, a foreign broker-dealer that induces or attempts to induce the purchase or sale of any security by a U.S. institutional or major institutional investor in accordance with Rule 15a–6 must, among other things:

(a) Provide written consent to service of process for any civil action brought by, or proceeding before the SEC or self-regulatory organization;

(b) Provide the SEC with any information or documents within its possession, custody or control, any testimony of any such foreign associated persons, and any assistance in taking the evidence of other persons, wherever located, that the SEC requests and that relates to transactions effected pursuant to the Rule;

(c) Rely on the U.S. registered broker or dealer through which the principal transactions with the U.S. institutional and major institutional investors are effected to (among other things):

(1) Effect the transactions, other than negotiating their terms;

(2) Approve foreign associated personnel that contact U.S. investors to verify that such individuals are not subject to a ''statutory disqualification'', as defined in Section 3(a)(39) of the 1934 Act or the non-U.S. equivalent of such disqualification (*e.g.*, expulsion or suspension by a securities regulator).

(*3*) Issue all required confirmations and statements;

(*4*) As between the foreign broker-dealer and the U.S. registered broker or dealer, extend or arrange for the extension of credit in connection with the transactions;

(*5*) Maintain required books and records relating to the transactions, including those required by Rules 17a–3 (Records to be Made by Certain Exchange Members) and 17a–4 (Records to be Preserved by Certain Exchange Members, Brokers and Dealers) of the 1934 Act; [5]

(6) Receive, deliver, and safeguard funds and securities in connection with the transactions on behalf of the U.S. institutional investor or major U.S. institutional investor in compliance with Rule 15c3–3 (Customer Protection—Reserves and Custody of Securities) of the 1934 Act; [6] and

(*7*) Participate in all oral communications (*e.g.*, telephone calls), subject to certain exceptions, between the foreign associated person and the U.S. institutional investor (not the major

over the litigation; (b) the court proceedings must have been properly followed (*i.e.,* the proceedings must have conformed to basic French legal notions of fundamental fairness and due process): (c) The court must have used the correct choice of law; (d) enforcement of the judgment must be consistent with French law; and (e) the substance of the judgment must not be directly contrary to French law. According to BNP Paribas, judgments from U.S. courts typically satisfy these five requirements and French courts rarely have refused to grant exequaturs to enforce U.S. judgments.

[4] Note that a SEC No-Action Letter has expanded the categories of entities that qualify as ''major U.S. institutional investors.'' See SEC No-Action Letter issued to Cleary, Gottlieb, Steen & Hamilton on April 9, 1997 (the April 9, 1997 No-Action Letter).

[5] BNP Paribas represents that all such requirements relating to recordkeeping of principal transactions would be applicable to any BNP Entity in a transaction that would be covered by this proposed exemption.

[6] Under certain circumstances described in the April 9, 1997 Letter, (*e.g.*, clearance and settlement transactions), there may be direct transfers of funds and securities between a Plan and a BNP Entity. Please note that in such situations (as in other situations covered by Rule 15a–6), the U.S. broker-dealer will not be acting as a principal with respect to any duties it is required to undertake pursuant to Rule 15a–6.

U.S. institutional investor), and accompany the foreign associated person on all visits with U.S. institutional investors. By virtue of this participation, the U.S. registered broker-dealer would become responsible for the content of all these communications.

Description of the Exemption Transactions

6. The exemption will apply to transactions involving principal transactions, extensions of credit and securities borrowing transactions that would be exempt under Prohibited Transaction Class Exemption 75–1 (PTCE 75–1, 40 FR 50845, October 31, 1975) and Prohibited Transaction Class Exemption 81–6 (PTCE 81–6, 46 FR 7527, January 23, 1981, amended at 52 FR 18754, May 19, 1987) but for the fact that BNP Paribas and its French Affiliates are not supervised by the U.S. government or registered under the Securities Exchange Act in the manner required under PTCE 75–1 and PTCE 81–6.

The exemption will be applicable only to transactions effected by BNP Paribas or any affiliated French broker-dealers holding a securities dealers license issued by the CECEI or subject to the rules and regulations of the CB and the AMF and compliant with Rule 15a–6.

Principal Transactions

7. BNP Paribas represents that in the ordinary course of business, it customarily operates as a trader, dealer and market maker in securities markets wherein it purchases and sells securities for its own account and engages in purchases and sales of securities with its clients. Such trades are referred to as principal transactions. Part II of PTCE 75–1 provides exemptive relief from section 406(a) of the Act and section 4975(c)(1)(A) through (D) of the Code for principal transactions between plans and U.S. banks and broker-dealers which are registered under the 1934 Act and are parties in interest with respect to such plans, provided all requirements stated in part II are satisfied. In the absence of an exemption for principal transactions, such as PTCE 75–1, those responsible for trading activities on behalf of plan investors would be prevented from engaging in transactions with those broker-dealers and banks that provide the markets for the securities and are most capable of handling such transactions. Like the U.S. dealer markets, international equity and debt markets, including the options markets, are no less dependent on a willingness of dealers to trade as principals.

Over the past decade, plans have increasingly invested in foreign equity and debt securities, including foreign government securities. Plans seeking to enter into such investments may wish to increase the number of trading partners available to them by trading with foreign banks, such as BNP Paribas and certain of its French Affiliates. However, where BNP Paribas or certain of its French Affiliates provide services to such Plans which are covered by the Act, principal transactions with BNP Paribas or certain of its French Affiliates would be prohibited by the Act. Thus, the exemptive relief afforded U.S. banks and U.S. broker-dealers by PTCE 75–1 would not be available with respect to BNP Paribas because that class exemption is limited to (a) banks supervised by the U.S. or a State thereof and (b) broker-dealers registered with the SEC under the 1934 Act.[7] The business carried out by BNP Paribas and its French Affiliates is not so supervised or registered.

Because of the conditions of PTCE 75–1 which require that a bank be supervised by the U.S. or a U.S. State and a broker-dealer be registered with the SEC, BNP Paribas is prevented from engaging in principal transactions with Plans with respect to which it is a party in interest. This is so even though BNP Paribas is subject to the stringent regulations of the CB and AMF, and it is able to satisfy the Rule 15a–6 requirements for an exemption from registration under the Securities Exchange Act. Accordingly, BNP Paribas is requesting an individual exemption to permit it and its French Affiliates (collectively referred to herein as the BNP Entities) to engage in principal transactions with Plans under the terms and conditions set forth herein, which are equivalent to those set forth in PTCE 75–1.

The BNP Entities will comply with all conditions set forth in PTCE 75–1 other than the condition to be a U.S. bank or registered broker-dealer under the Securities Exchange Act. With respect to principal transactions, the BNP Paribas entities will engage in such transactions only where (a) BNP Paribas or the relevant French Affiliates are not a fiduciary with respect to the transaction (in other words, the BNP Entity will have no discretionary authority or control with respect to the investment of a Plan's assets involved in a principal transaction or render investment advice (within the meaning of 29 CFR 2510.3–21(c)) with respect to those assets.); (b) the BNP Entity will customarily purchase and sell securities for its own account in the ordinary course of business as a bank or broker-dealer; (c) the transaction will be at least as favorable to the Plan as an arm's length transaction with an unrelated party would be; and (d) the BNP Entity will be a party in interest or a disqualified person with respect to the Plan assets involved in a principal transaction solely by reason of section 3(14)(B) of the Act or section 4975(e)(2)(B) of the Code (*i.e.*, a service provider to the Plan), or by reason of a relationship to such a person as described in such sections.

Extensions of Credit

8. BNP Paribas represents that a normal part of the execution of securities transactions by broker-dealer on behalf of clients, including Plans, is the extension of credit to clients so as to permit the settlement transactions in the customary settlement period. Such extensions of credit are also customary in connection with the writing of option contracts.

BNP requests that the proposed exemption include relief for extensions of credit to the Plans by the BNP Entities in the ordinary course of their purchases or sales of securities, regardless of whether they are effected on an agency or a principal basis, or in connection with the writing of options contracts. In this regard, an exemption for such extensions of credit is provided under PTCE 75–1, Part V, only for transactions between Plans and U.S. registered broker or dealers.[8]

Under the conditions of this proposed exemption, as in PTCE 75–1, part V, BNP Paribas and its French Affiliates may not be fiduciaries with respect to the Plan assets involved in the transaction. However, an exception to such condition would be provided herein, as in PTCE 75–1, if no interest or other consideration is received by the BNP Entity or an affiliate thereof, in connection with any such extension of credit. In addition, the extension of credit must be lawful under the 1934 Act and any rules or regulations thereunder, if the 1934 Act rules or regulations were applicable, and such

[7] The Department notes that the proposed principal transactions are subject to the general fiduciary responsibility provisions of part 4 of Title I of the Act. Section 404(a) of the Act requires, among other things, that a fiduciary of a plan act prudently and solely in the interest of the participants and beneficiaries of a plan, when making investment decisions on behalf of the plan.

[8] PTCE 75–1, part V, provides an exemption, under certain conditions, from section 406 of the Act and section 4975(c)(1) of the Code, for extensions of credit, in connection with the purchase or sale of securities, between employee benefit plans and U.S. registered broker-dealers that are parties in interest with respect to such plans.

extension of credit must not be a prohibited transaction under section 503(b) of the Code. If the 1934 Act would not be applicable, the extension of credit must still be lawful under applicable French law, where BNP Paribas and its French Affiliates are domiciled.

Securities Lending

9. BNP Paribas or its French Affiliates, acting as principals, actively engage in the borrowing and lending of securities, typically foreign securities, from various institutional investors, including employee benefit plans.

Accordingly, BNP Paribas requests an exemption for securities lending transactions between the BNP Entities and the Plans under terms and conditions equivalent to those required in PTCE 81–6 (46 FR 7527, January 23, 1981, as amended at 52 FR 18754, May 19, 1987). Because PTCE 81–6 provides an exemption only for U.S. registered broker-dealers and U.S. banks, the securities lending transactions at issue would fall outside the scope of relief provided by PTCE 81–6.

10. BNP Paribas or its French Affiliates utilize borrowed securities either to satisfy their own trading requirements or to re-lend to other broker-dealers and entities which need a particular security for a certain period of time. As described in the Federal Reserve Board's Regulation T, borrowed securities are often used to meet delivery obligations in the case of short sales or the failure to receive securities that a broker-dealer is required to deliver. BNP Paribas represents that foreign broker-dealers are those broker-dealers most likely to seek to borrow foreign securities. Thus, the requested exemption will increase the lending demand for such securities, providing the Plans with increased securities lending opportunities, which will earn such Plans additional rates of return on the borrowed securities (as discussed below).

11. An institutional investor, such as a pension fund, lends securities in its portfolio to a broker-dealer or bank in order to earn a fee while continuing to enjoy the benefits of owning the securities, (*e.g.*, from the receipt of any interest, dividends, or other distributions due on those securities and from an appreciation in the value of the securities). The lender generally requires that the securities loan be fully collateralized, and the collateral usually is in the form of cash, irrevocable bank letters of credit, or high quality liquid securities, such as U.S. Government or Federal Agency obligations.

12. With respect to the subject securities lending transactions, BNP Paribas or its French Affiliates will have no discretionary authority or control with respect the investment of the Plan assets involved in the transaction, or render investment advice (within the meaning of 29 CFR 2510.3–21(c)) with respect to those assets.

13. By the close of business on the day the loaned securities are delivered, the Plan will receive from the BNP Entity (by physical delivery book entry in a securities depository, wire transfer, or similar means) collateral consisting of cash, securities issued or guaranteed by the U.S. Government or its agencies or instrumentalities, irrevocable U.S. bank letters of credit issued by person other than the BNP Entity or an affiliate of thereof, or any combination thereof. All collateral will be in U.S. dollars, or dollar-denominated securities or bank letters of credit, and will be held in the United Sates. The collateral will have, as of the close of business on the business day preceding the day it is posted by the BNP Entity, a market value equal to at least 100% of the then market value of the loaned securities (or, in the case of letter of credit, a stated amount equal to same).

14. The loan will be made pursuant to a written Loan Agreement, which may in the form of a master agreement covering a series of securities lending transactions between the Plan and the BNP Entity. The terms of the Loan Agreement will be at least as favorable to the Plan as those the Plan could obtain in a comparable arm's length transaction with an unrelated party. The Loan Agreement will also contain a requirement that the BNP Entity pay all transfer fees and transfer taxes relating to the securities loans.

15. In return for lending securities, the Plan will either (a) receive a reasonable fee, which is related to the value of the borrowed securities and the duration of the loan, or (b) have the opportunity to derive compensation through the investment of cash collateral. Where the Plan has that opportunity, the Plan may pay a loan rebate of similar fee to the BNP Entity, if such fee is not greater than what the Plan would pay in comparable arm's length transaction with an unrelated party. Earnings generated by non-cash collateral will be returned to the BNP Entity. The Plan will be entitled to at least the equivalent of all distributions on the borrowed securities made during the term of the loan. Such distributions will include cash dividends, interest payments, shares of stock as a result of stock splits, and rights to purchase additional securities, that the Plan would have received (net of any applicable tax withholdings) had it remained the record owner of such securities.

16. If the market value of the collateral as of the close of trading on a business day falls below 100 percent of the market value of the borrowed securities as of the close of trading on that day, the BNP Entity will deliver additional collateral, by the close of business on the following business day, to bring the level of collateral back to at least 100 percent. However, if the market value of the collateral exceeds 100 percent of the market value of the borrowed securities, the BNP Entity may require the Plan to return part of the collateral to reduce the level of the collateral to 100 percent.

17. Before entering into a Loan Agreement, the BNP Entity will furnish to the independent Plan fiduciary (a) the most recent available audited statement of the BNP Entity's financial condition, (b) the most recent available unaudited statement of its financial condition (if more recent than the audited statement), and (c) a representation that, at the time the loan is negotiated, there has been no material adverse change in its financial condition that has not been disclosed since the date of the most recent financial statement furnished to the independent Plan fiduciary. Such representation may be made by the BNP Entity agreeing that each loan of securities shall constitute a representation that there has been no such material adverse change.

18. The Loan Agreement and/or any securities loan outstanding may be terminated by the Plan at any time, whereupon the BNP Entity will deliver certificates for securities identical to the borrowed securities (or the equivalent thereof in the event of reorganization, recapitalization, or merger of the issuer of the borrowed securities) to the Plan within (a) the customary delivery period for such securities, (b) five business days, or (c) the time negotiated for such delivery by the Plan and the BNP Entity, whichever is least, or, alternatively, such period as permitted by PTE 81–6, as it may be amended or superseded. In the event the loan is terminated and the BNP Entity fails to return the borrowed securities or the equivalent thereof with the designated time, the Plan will have certain rights under the Loan Agreement to realize upon the collateral. The Plan may purchase securities identical to the borrowed securities, or the equivalent thereof, and may apply the collateral to the payment of the purchase price, any other obligations of the BNP Entity under the Loan Agreement, and any

expenses associated with replacing the borrowed securities.

The BNP Entity is obligated to pay to the Plan the amount of any remaining obligations and expenses not covered by the collateral (the value of which shall be determined as of the date the borrowed securities should have been returned to the Plan), plus interest at a reasonable rate as determined in accordance with an independent market source. If replacement securities are not available, the BNP Entity will pay the Plan an amount equal to (a) the value of the securities as of the date such securities should have been returned to the Plan, plus (b) all the accrued financial benefits derived from the beneficial ownership of such borrowed securities as of such date, plus (c) interest at a reasonable rate determined in accordance with an independent market source from such date to the date of payment. The amounts paid shall be reduced by the amount or value of the collateral determined as of the date the borrowed securities should have been returned to the Plan. Notwithstanding the foregoing, the BNP Entity may, in the event it fails to return borrowed securities as described above, replace non-cash collateral with an amount of cash not less than the then current market value of the collateral, provided that such replacement is approved by the lending independent Plan fiduciary.

19. The independent Plan fiduciary will maintain the situs of the Loan Agreement in accordance with the indicia of ownership requirement under section 404(b) of the Act and the regulations promulgated under 29 CFR 2550.404(b)–1.[9]

20. In summary, BNP Paribas represents that the subject transactions will satisfy the statutory criteria for an exemption under section 408(a) of the Act for the following reasons:

(a) With respect to principal transactions effected by the BNP Entities, the proposed exemption will enable the Plans to realize the same benefits of efficiency and convenience which derive such Plans could derive from principal transactions executed by U.S. registered broker-dealers or U.S. Banks, pursuant to PTCE 75–1, part II;

(b) With respect to extensions of credit by the BNP Entities in connection with purchases or sales of securities, the proposed exemption will enable the BNP Entities and the Plans to extend credit in the ordinary course of business to effect agency or principal transactions within the customary three-day settlement period, or in connection with the writing of options contracts for transactions between Plans and U.S. registered broker-dealers, pursuant to PTCE 75–1, part V;

(c) With respect to securities lending transactions effected by the BNP Entities, the proposed exemption will enable the Plans to realize a low-risk return on securities that otherwise would remain idle, as in securities lending transactions between plans and U.S. registered broker-dealers or U.S. Banks, pursuant to PTCE 81–6; and

(d) The proposed exemption will provide the Plans with virtually the same terms and conditions upon the transactions executed by the BNP Entities as those imposed on U.S. banks and U.S. registered, pursuant to PTCE 75–1 and PTCE 81–6.

Notice to Interested Persons

Notice of proposed exemption will be provided to all interested persons by first class mail within 4 days of publication of the notice of pendency in the **Federal Register**. Such notice shall include a copy of the notice of pendency of the exemption as published in the **Federal Register** and a supplemental statement, as required pursuant to 29 CFR 2570.43(b)(2), which will inform interested persons of their right to comment on the proposed exemption and/or to request a hearing. Comments and hearing requests are due within 34 days of the date of publication of the proposed exemption in the **Federal Register**.

FOR FURTHER INFORMATION CONTACT: Ms. Silvia Quezada of the Department, telephone (202) 693–8553. (This is not a toll-free number.)

Best Business Products Inc. Employee Stock Ownership Plan (the ESOP) Located in Sioux Falls, SD

[Exemption Application No. D–11305]

Proposed Exemption

The Department is considering granting an exemption under the authority of section 408(a) of the Employee Retirement Income Security Act (the Act) and section 4975(c)(2) of the Internal Revenue Code of 1986 (the Code), and in accordance with the procedures set forth in 29 CFR Part 2570, Subpart B, 55 FR 32836, 32847 (August 10, 1990).[10] If the exemption is granted, the restrictions of sections 406(a)(1)(A) through (D), 406(b)(1), and 406(b)(2) of the Act and the sanctions resulting from the application of section 4975, by reason of section 4975(c)(1)(A) through (E) of the Code, shall not apply, effective July 7, 2004, to: (1) The purchase from the ESOP by Best Business Products, Inc. (BBP), a party in interest with respect to the ESOP, of shares of the voting common stock of BBP (the Stock) which were allocated to the accounts of the participants in the ESOP; and (2) the transfer to BBP of shares of the Stock which were held by the ESOP in a suspense account in exchange for the assumption by BBP of the ESOP's obligation to pay the balance of a note (the Note) to Betty B. Best (Ms. Best), a party in interest with respect to the ESOP; provided that prior to entering into the subject transactions: (a) An independent fiduciary (the Independent Fiduciary) was responsible for each of the transactions, and in accordance with the fiduciary provisions of the Act, reviewed, analyzed, and determined that the ESOP should enter into each of the transactions; (b) the Independent Fiduciary reviewed, negotiated, and approved the terms of each of the transactions, and determined on behalf of the ESOP and solely in the interest of the ESOP, its participants, and beneficiaries that the terms of each of the transactions were fair and reasonable; (c) the Independent Fiduciary monitored compliance with the terms of each of the transactions by the parties; (d) an independent qualified appraiser determined the fair market value of the Stock as of the date each of the transactions were entered; and (e) the ESOP incurred no fees, commissions, or other charges or expenses as a result of its participation in each of the transactions.

Effective Date: If the proposed exemption is granted, the exemption will be effective July 7, 2004.

Summary of Facts and Representations

1. BBP, a South Dakota Corporation, located in Sioux Falls, SD, sells, installs, and services electronic office equipment and sells related supplies to customers throughout the state of South Dakota and in southwestern Minnesota. It is represented that BBP has, at all relevant times, been taxed pursuant to subchapter ''S'' tax provisions of the Code. As of December 31, 2003, BBP had $5.7 million in assets, $1.9 million in liabilities, and $3.8 million in shareholder equity.

Ms. Best is the major shareholder of BBP, the President of BBP, and the sole director of BBP. As such, Ms. Best is a party in interest with respect to the

[9] Section 404(b) of the Act states that no fiduciary may maintain the indicia of ownership of any assets of a plan outside the jurisdiction of the district courts of the United States, except as authorized by regulation by the Secretary of Labor.

[10] For purposes of this exemption, references to specific provisions of Title I of the Act, unless otherwise specified, refer also to the corresponding provisions of the Code.

ESOP, pursuant to section 3(14)(E) and 3(14)(H) of the Act.

2. For the benefit of its eligible employees and their beneficiaries, BBP adopted the ESOP, effective January 1, 1997, as an employee stock ownership plan, as amended and restated from time to time, to meet the requirements of the Act and the Code. As an employer any of whose employees are covered by the ESOP, BBP is a party in interest with respect to the ESOP, pursuant to section 3(14)(C) of the Act.

On December 31, 1997, BBP entered into a trust agreement with the First National Bank in Sioux Falls (the Bank), a South Dakota Banking Corporation, in which the Bank agreed to serve as the trustee of the assets of the ESOP. As a trustee, the Bank is a fiduciary and party in interest with respect to the ESOP, pursuant to section 3(14)(A) of the Act. It is represented that the Bank served in this capacity as trustee until replaced by Ms. Best on December 19, 2001. Since that time, Ms. Best has been the sole trustee of the assets of the ESOP held in the trust. As a trustee, Ms. Best is a fiduciary and party in interest with respect to the ESOP, pursuant to section 3(14)(A) of the Act.

As of July 7, 2004, the date the subject transactions were entered, there were 71 participants and beneficiaries in the ESOP. As of December 31, 2003, the aggregate fair market value of the total assets available to pay benefits to participants in the ESOP was $822,889. As of the same date, the value of the ESOP's assets, after subtracting liabilities was $338,681.

3. On June 12, 1998, it is represented that an Amendment to the Articles of Incorporation of BBP was adopted which combined two classes of shares (voting and non-voting) into a single class of shares of voting common stock and which authorized a stock dividend converting each single share of common stock then outstanding into 100 shares. It is represented that in July 1998, there were 181,100 shares of Stock issued and outstanding of which Ms. Best was the sole shareholder.

It is represented that the Stock that is the subject of this exemption (*i.e.* the voting common stock of BBP) is the only class of stock authorized or issued by BBP. The Stock is not publicly traded.

4. On July 17, 1998, the ESOP purchased a block of Stock from Ms. Best for a purchase price of $2.6 million dollars.[11] As a result of this transaction, of the 181,100 shares of Stock issued and outstanding, Ms. Best retained ownership to 126,770 shares, and the ESOP acquired 54,330 shares of the Stock, representing approximately 70 percent (70%) and approximately 30 percent (30%), respectively of the equity of BBP. It is represented that the acquisition of the block of Stock by the ESOP provided equity ownership to employees so that such employees had a direct stake in the success of BBP.

On July 17, 1998, the ESOP acquired title to the block of Stock (54,330 shares) in exchange for a loan (the Loan)[12] in the amount of $2.6 million dollars, representing the entire purchase price for such block of Stock. The Loan was evidenced by a non-recourse Note payable to Ms. Best. The Note was payable in annual installments of principal and interest over a period of ten (10) years, beginning September 1, 1998. The interest rate applied to the outstanding balance on the Note was the prime interest rate in effect from time to time as published by the ''Wall Street Journal.'' Payment of the Loan was secured by a pledge to Ms. Best of a security interest in the block of Stock purchased by the ESOP. In addition, BBP guaranteed payment of the Note.

5. In a letter dated, July 17, 1998, James L. Werness, JD (Mr. Werness), a principal of the Hawthorne Company (Hawthorne), determined that the purchase of the block of Stock by the ESOP for consideration of $2.6 million dollars was fair and equitable and that the purchase price paid was not more than the ''fair market value'' of such block of Stock. In support of this opinion, Hawthorne prepared an appraisal report, dated June 20, 1998, to establish the fair market value of the block of Stock purchased by the ESOP.

It is represented that the professional staff of Hawthorne is qualified to provide the 1998 valuation of the Stock. In addition, Hawthorne has made similar statements regarding its qualifications with respect to annual valuations of the Stock which Hawthorne prepared during the period 1998 through 2004, as discussed more fully in paragraph 8, below. In this regard, Mr. Werness is a member of the Institute of Business Appraisers and a candidate member of the American Society of Appraisers. Other principals of Hawthorne have earned the following designations: (a) Accredited Senior Appraiser from the American Society of Appraisers, (b) Certified Business Appraiser through the Institute of Business Appraisers, and (c) Chartered Financial Analyst.

Hawthorne certified that its research, analysis, and conclusions on the value of the Stock were conducted on an independent basis. In this regard, it is represented that neither Hawthorne, nor any employee of Hawthorne owns any present or prospective future interest in BBP or its affiliates. Further, Hawthorne represented that it does not know of any other relationship that would prevent it from, in fact, acting independently in connection with this valuation. Hawthorne made similar statements regarding its independence with respect to annual valuations of the Stock prepared by Hawthorne during the period from 1998 through 2004, as discussed more fully in paragraph 8, below.

It is represented that because the block of Stock purchased by the ESOP in 1998 represented a small percentage of all the voting rights in BBP, Hawthorne would normally have defined the fair market value of such block of Stock as a ''minority interest value.'' However, as the block of Stock was subject to a buy/sell agreement, discussed more fully in paragraph 6, below, that entitled the holder to ''put'' the shares of Stock back to BBP and required BBP to pay a price for such shares equal to the *pro-rata* enterprise value, Hawthorne conducted its analysis on the basis of an ''enterprise'' level of value. Accordingly, in the opinion of Hawthorne, the fair market value of the ESOP's block of Stock (54,330 shares), as of June 30, 1998, was $48.00 per share for a total value of $2,607,840.[13]

[11] The applicant maintains that the statutory exemption, pursuant to section 408(e) of the Act, provided relief for the 1998 purchase by the ESOP of the block of Stock from Ms. Best, where the shares of the Stock are qualifying employer securities, as defined in section 407(d)(5) of the Act, the purchase of the shares of Stock was made for adequate consideration, and no commission was charged to the ESOP with respect thereto. The Department is offering no view, herein, as to the applicant's reliance on section 408(e) of the Act with respect to the purchase of the block of Stock by the ESOP in 1998, nor has the Department made a determination that the applicant satisfied all of the requirements of section 408(e) of the Act. Further, the Department is not providing any relief, herein, with respect to such purpose.

[12] The applicant maintains that the statutory exemption, pursuant to section 408(b)(3) of the Act, provided relief for the 1998 Loan between the ESOP and Ms. Best, because the Loan: (a) was primarily for the benefit of the participants and beneficiaries of the ESOP; (b) contained an interest rate that was not in excess of a reasonable rate; (c) was used to purchase employer stock; and (d) satisfied the other requirements, as set forth in the Department's regulations at 29 CFR 2550.408b–3. The Department is offering no view, herein, as to the applicant's reliance on section 408(b)(3) of the Act with respect to the 1998 Loan, nor has the Department made a determination that the applicant satisfied all of the requirements of section 408(b)(3) of the Act. Further, the Department is not providing any relief, herein, with respect to such Loan transaction.

[13] The Department, herein, is offering no view as to whether the value per share of the block of Stock purchased by the ESOP in 1998, based on the methodology used by Hawthorne in appraising such

Continued

6. On July 17, 1998, contemporaneously with the purchase of the block of Stock by the ESOP, Ms. Best and BBP entered into a buy-sell Agreement, referred to in paragraph 5, above. It is represented that this agreement was entered in order to protect the election by BBP of subchapter ''S'' corporation status and to ensure that possible future transfers of ownership of Stock occur in a business-like manner. Accordingly, Ms. Best and BBP contractually agreed to restrictions on the transferability of the Stock and provided for the purchase of Stock in certain events.

It is represented that the ESOP was not a party to such buy-sell agreement. Notwithstanding the fact that the ESOP was not a party, it is represented that the shares of Stock owned by the ESOP, its assignees or distributees possesses all the benefits and advantages contemplated in the buy-sell agreement, including but not limited to a ''put'' provision contained in such agreement.

7. It is represented that BBP from 1998 through 2003 made dividend payments totaling approximately $489,278 to the ESOP as an owner of the Stock. In addition, during the same period, BBP made periodic contributions to the ESOP totaling approximately $1,851,037 that enabled the ESOP to make installment payments on the Loan under the terms of the Note held by Ms. Best. It is represented that as the ESOP made installment payments, shares of Stock held in a suspense account in the ESOP were allocated to the accounts of participants. In this regard, 28,532.896 shares of Stock had been allocated, as of July 7, 2004, to the accounts of the participants in the ESOP (the Allocated Shares), and as of the same date, 25,797.104 shares of Stock were in a suspense account (the Unallocated Shares) held by the ESOP.

8. It is represented that, in 1998, BBP experienced a loss of several key employees, some of whom were subsequently employed by competitors. It is further represented that the electronic business machine industry has become more competitive, and that the earnings of BBP have suffered. In this regard, over the course of six (6) years from 1998 through 2004, the value of the Stock declined.

The applicants submitted to the Department annual valuation reports prepared by Hawthorne during the period from 1998 through 2003, and working papers for the fiscal year ending December 31, 2004. According to Hawthorne, the aggregate ''enterprise value'' (EV) [14] or the aggregate ''controlling interest value'' (CIV),[15] and the per share value of the Stock during the period from 1998 through 2004 was as follows:

Date	Total value of 181,100 shares of stock	Per share value of the stock (per share)
June 20, 1998	$8,700,000 EV	$48.00
December 31, 1999	$6,450,606 EV	35.62
December 31, 2000	$5,833,910 CIV	32.21
December 31, 2001	$5,816,940 CIV	32.12
December 31, 2002	$5,475,453 CIV	30.14
December 31, 2003	$5,222,109 CIV	28.84
Working papers 2004	$5,118,699 CIV	28.26

9. It is represented that given the loss of several key employees, losses in earnings as a result of a more competitive industry, and the costs of maintaining the ESOP, effective July 7, 2004, BBP decided to terminate the ESOP. On September 24, 2004, BBP submitted to the Internal Revenue Service (IRS) FORM 5310, Application for determination for Terminating Plan, with respect to the ESOP. In connection with the termination of the ESOP, it is represented that all participants became 100 percent (100%) vested, as of June 30, 2004. On January 14, 2005, the IRS issued a favorable determination letter on the termination of the ESOP.

10. In connection with the termination of the ESOP, BBP determined to make lump sum distributions to each of the participants of the ESOP in order to increase employee morale and to allow BBP to invest its remaining resources in creating a more viable company. Accordingly, under the terms of a Stock Purchase and Sale Agreement, dated July 7, 2004, BBP purchased the Allocated Shares (28,532.896 shares of Stock) from the ESOP for an aggregate purchase price in cash of approximately $900,000 at a price per share of $31.54.

It is further represented that since the ESOP was being terminated and would receive no more contributions from BBP, it was expected that the ESOP would default on the payments on the Note held by Ms. Best. In order to avoid such default, on July 7, 2004, the Independent Fiduciary (described more fully in paragraph 14, below) transferred the Unallocated Shares (25,797.104 shares of the Stock) in the suspense account held by the ESOP to BBP in exchange for an assumption by BBP of the ESOP's responsibility to pay to Ms. Best the balance due under the Note as of that date in the amount $1,234,538.

It is represented that as a result of the transactions which are the subject of this proposed exemption, the ESOP's ownership interest in BBP decreased from 30 percent (30%) to zero. It is further represented that notwithstanding the transfer of title to the Unallocated Shares to BBP, such shares continued to be subject to the pledge securing the Note in favor of Ms. Best. Accordingly, it is represented that after the subject transactions were completed, the Unallocated Shares were still considered to be issued and outstanding.

11. The applicant has requested a retroactive administrative exemption, effective July 7, 2004, the date when the subject transactions were entered. In this regard, it is represented that before entering into such transactions, the applicant was advised by legal counsel. In this regard, legal counsel for the applicant has certified in writing that he was aware that such transactions were prohibited under section 406 of the Act, but that he believed the statutory exemption, set forth in section 408(e) of the Act, applied to the subject transactions and that an administrative

block of Stock constituted ''adequate consideration'' for purposes of section 408(e) of the Act.

[14] Hawthorne defines ''enterprise value'' or ''EV'' in its 1998 appraisal report as the value attributable to the ownership of 100 percent of the common stock of a corporation.

[15] Hawthorne defines ''controlling interest value'' or ''CIV'' in its 1998 appraisal report as the value attributable to the ownership of a block of stock which maintains greater than 50 percent ownership, yet less than 100 percent ownership.

exemption, pursuant to section 408(a) of the Act was not necessary. Further, legal counsel for the applicant has certified in writing that because the applicant relied in good faith on the advice of counsel, the applicant carried out the subject transactions with only the precautions required by section 408(e) of the Act in place at the time the transactions were entered. In this regard, it is represented that the ESOP received not less than adequate consideration, as determined by an independent appraiser, and no commission was charged with respect to such transactions.

Legal counsel for the applicant has represented that upon further review, he subsequently advised the applicant that the subject transactions may have resulted in violations of sections 406(a)(1)(A) and (D), 406(b)(1) and (b)(2) of the Act. In this regard, although section 408(e) of the Act contains a statutory exemption for the sale of ''qualifying employer securities'' (QES), as defined in section 407(d)(5) of the Act, by an ''eligible individual account plan,'' as defined in section 407(d)(3)(A) of the Act, to a ''party in interest,'' as defined in section 3(14) of the Act, other sections of the Act provide that this statutory exemption may not be available under certain circumstances. Specifically, section 408(d) of the Act excludes owner-employees (including shareholder-employees, such as Ms. Best), and any corporation that is 50 percent (50%) or more owned by such persons (such as BBP) from using the statutory exemption provided under section 408(e) of the Act for purchases or sales of QES.

The applicant notes that, in the Taxpayer Relief Act of 1997, Congress provided some relief from the exclusion, set forth in section 408(d) of the Act, (for taxable years beginning after December 31, 1997) with regard to subchapter ''S'' corporations that maintain ESOPS. Specifically, section 408(d)(2)(B) of the Act provides an exception to the exclusion under 408(d) of the Act for sales of QES to an employee stock ownership plan by a shareholder-employee or related subchapter ''S'' corporation. The applicant maintains that the failure of Congress to provide an exception for the purchase of QES by a subchapter ''S'' corporation from its employee stock ownership plan was a drafting oversight. In the opinion of the applicant, there would seem to be more need for protection of an employee stock ownership plan when purchasing stock of a closely held corporation and taking on debt than when selling such shares for cash.

Notwithstanding the argument presented in the paragraph above, the applicant has acknowledged that BBP, even though it is a subchapter ''S'' corporation, is excluded from relying on the statutory exemption, under section 408(e) of the Act, and that the purchase of the Allocated Shares by BBP from the ESOP does not fall within the exception to the exclusion found in section 408(d)(2)(B) of the Act. Accordingly, the applicant has requested a retroactive administrative exemption for the purchase of the Allocated Shares by BBP from the ESOP, pursuant to 408(a) of the Act.

It is the position of the applicant that the transfer of the Unallocated Shares to BBP in exchange for the assumption by BBP of the ESOP's obligation under the Note is not a new sale transaction, but should be considered part of the original acquisition by the ESOP of the block of Stock. In this regard, as part of the original acquisition, the applicant points out that the block of Stock purchased by the ESOP was pledged to Ms. Best, and that BBP guaranteed the debt owed by the ESOP under the Note. It is the position of the applicant that in order to avoid default on the Note once the ESOP was terminated: (a) BBP, pursuant to its guaranty of the Note, assumed, with the consent of Ms. Best, the ESOP's debt under the Note; and (b) the ESOP transferred its interest in the Unallocated Stock to BBP, subject to the pledge of the Stock to Ms. Best.

The applicant has requested that if the Department disagrees with this analysis, relief should be provided for the transfer of the Unallocated Stock to BBP and the assumption by BBP of the ESOP's obligation under the Note. Accordingly, retroactive administrative relief, pursuant to section 408(a) of the Act, has been proposed for both: (a) The purchase of the Allocated Shares by BBP from the ESOP, and (b) the transfer of the Unallocated Shares to BBP in exchange for the assumption of the ESOP's obligation to pay Ms. Best under terms of the Note.

12. BBP maintains that the subject transactions were in the interest of the ESOP, because the ESOP received a price for the Allocated Shares in excess of the fair market value of such shares. As discussed more fully in the paragraphs below, the final negotiated price paid by BBP for the Allocated Shares, was $31.54 per share.

13. The application file contains a letter dated April 15, 2004, to the trustee of the ESOP prepared by Mr. Werness, one of the principals of Hawthorne, the independent, qualified appraiser. The letter is incorporated into an appraisal report, dated May 4, 2004, prepared by Hawthorne that provided an annual update of the value of the Stock for the year ended December 31, 2003. In this regard, it is represented that Hawthorne established that the fair market value of the Stock owned by the ESOP was $28.84 per share, as of December 31, 2003.

The file also contains a letter from Mr. Werness, dated July 7, 2004. In this letter, Mr. Werness offers an opinion regarding ''adequate consideration'' with respect to the subject transactions that closed on July 7, 2004. In connection with this opinion, it is represented that Hawthorne, among other things: (a) Reviewed the annual financial statements of BBP prepared by Henry Scholten & Company, CPA and reviewed the April 2004, interim financial statement of BBP; (b) reviewed various documents involved with the subject transactions, including the Stock Purchase and Sale Agreement, Consent Minutes of the Board of Directors of BBP, Amendments to the Trust Agreement for the ESOP, and Amendment to the ESOP; (c) held discussions with certain members of the management of BBP and representatives of BBP regarding the operations, financial condition, future prospects, and projected performance of BBP; (d) reviewed Hawthorne's history of valuations conducted on behalf of the trustee of the ESOP; and (e) conducted other studies, analyses, and inquiries deemed appropriate. Based on the business, economic, market, and other conditions as such existed on July 7, 2004, the date of the letter and the date the subject transactions closed, it is the opinion of Hawthorne that the aggregate purchase price paid by BBP for the Stock was not less than the fair market value of such Stock and that the ESOP received no less than ''adequate consideration.''

In addition to Hawthorne's opinion regarding ''adequate consideration,'' on the date the subject transactions closed, as discussed in the paragraph above, the application file also contains a letter to counsel for BBP, dated November 11, 2004, from Mr. Werness, which encloses working papers relating to the projected performance schedule of BBP for the fiscal year ending December 31, 2004. In this letter, Mr. Werness states that the working papers were provided to the special trustee, as discussed in the paragraph below, prior to the date when the subject transactions were entered. These working papers indicate a per share value for the Stock of $28.26. Accordingly, it is represented that the $31.54 per share price paid by BBP to the ESOP for the Allocated Shares included an 11.6% premium over the

$28.26 per share fair market value for such shares of Stock.

14. The applicant maintains that safeguards were in place at the time each of the transactions were entered which were designed to protect the interests of the ESOP and its participants and beneficiaries. It is represented that as early as May 2004, Stanton Trust Company, N.A. (Stanton) and counsel for BBP had conversations regarding the subject transactions. Subsequently, in an engagement letter, dated June 3, 2004, BBP appointed Stanton to act as special trustee on behalf of the ESOP.

According to its letter of engagement, Stanton agreed to act as the Independent Fiduciary and to review, analyze, and determine whether or not to accept the subject transactions on behalf of the ESOP in accordance with fiduciary provisions of the Act. To assist in this regard, Stanton retained the services of Lindquist & Vennum P.L.L.P. (L&V) to act as its legal counsel and retained Hawthorne to act as a financial advisor.

Based on Stanton's review of the opinion prepared by Hawthorne and related documents and schedules, its review of documents and information provided by BBP, and other documents deemed necessary and appropriate, Stanton issued a letter, dated July 7, 2004, the date the transactions were entered. In this letter, Stanton states that its role as special trustee is limited to an evaluation of the proposed transactions on behalf of, and solely in the interest of the participants and beneficiaries of the ESOP and determining that the transactions are fair and reasonable to the ESOP and its participants. Further, Stanton stated in the July 7 letter that: (1) The sale of 28,532.896 shares of the Allocated Shares by the ESOP at a price of $31.54 per share for a total purchase price of approximately $900,000, and (2) the exchange by the ESOP of its outstanding debt in the amount of $1,234,538 for transfer to BBP of the 25,797.104 Unallocated Shares held in suspense is fair and reasonable to the ESOP and its participants and beneficiaries.

The application file also contains letters, dated March 2, and March 24, 2005, from Robert J. Hartman, JD (Mr. Hartman) of L&V, acting as legal counsel to Stanton. In this regard, in a declaration under penalty of perjury, dated April 1, 2005, the current President of Stanton, confirms that Mr. Hartman and the law firm of L&V have represented Stanton from the inception and throughout the engagement of Stanton as special trustee to the ESOP and that representations made in Mr. Hartman's March 2, and March 24, 2005, letters to the Department are true and correct.

Mr. Hartman represents that the purpose of his letter of March 2, 2004, is to identify the actions taken by Stanton to complete the transactions and confirm that such actions were taken in full compliance with Stanton's obligations as a fiduciary to the ESOP and in the best interest of the ESOP participants. Further, Mr. Hartman represents that prior to Stanton issuing its July 7, 2004, opinion that the transactions were fair and reasonable, Stanton, Hawthorne, and L&V reviewed documents, including but not limited to those concerning the establishment of the ESOP and the trust, those relevant to the subject transactions, valuation reports prepared by Hawthorne for 2001, 2002, and 2003, financial statements of BBP, and minutes of the Board of Directors of BBP. It is further represented that interviews were conducted with Mr. Werness of Hawthorne, the trust officer of the Bank, the record keeper for the ESOP, and the counsel for BBP.

Based on the review of the foregoing documents and interviews with the parties closely associated with BBP, Mr. Hartman represents that Stanton concluded: (a) That financial records and appraisals confirmed that BBP sales had declined for each of the three preceding years, and the office products market had become increasingly competitive; (b) that the value of BBP had declined and was likely to continue to decline; (c) that Ms. Best had rejected an offer to sell BBP to an unrelated third party and planned to turn over operations of BBP to her grandson who had little or no experience in the company; and (d) that BBP retained the ability to terminate the ESOP, distribute the Stock, and allow the participants to put the shares back to BBP at $28.26 per share.

Based on the conclusions in the paragraph above, Mr. Hartman represents that Stanton determined that the best interest of the participants were served by selling the Allocated Shares to BBP. To this end, Mr. Hartman states that Stanton negotiated favorable terms in connection with the sale for the exclusive purpose of protecting the interest of the ESOP participants and enhancing the benefits to participants. In this regard, it is represented that Stanton: (a) Negotiated a sale price for the Allocated Shares that included a premium over the interim valuation performed by Hawthorne; (b) negotiated specific ''tag along'' rights for the ESOP in the event of a subsequent sale of BBP at a higher price following the transactions; and (c) obtained a representation from BBP that it would consider regular profit sharing contributions following the termination of the ESOP, subject to the financial circumstances of BBP. In light of the foregoing, it is the opinion of Mr. Hartman that Stanton fully discharged its fiduciary obligation to the ESOP in connection with the subject transactions.

In his letter of March 2, 2005, Mr. Hartman also addresses the issue of independence of both L&V and Stanton. In this regard, Mr. Hartman represents that prior to the subject transactions neither L&V nor Stanton had had any dealings with BBP. It is further represented by Mr. Hartman that under the terms of Stanton's engagement letter with BBP, Stanton was not required to complete the transactions, and Stanton's fee was not conditioned upon such completion. Further, Mr. Hartman represents that had Stanton concluded that the transactions were not in the best interest of participants, Stanton would have withdrawn from the engagement.

Mr. Hartman also enclosed with his letter of March 2, 2005, information regarding his qualifications and those of Stanton. With regard to his qualifications, Mr. Hartman represents that he practices in the employee benefits area, with an emphasis on qualified and non-qualified deferred compensation and on counseling clients on fiduciary matters. Further, Mr. Hartman represents that he has extensive experience with the creation and operation of employee stock ownership plans and has served as a special counsel to trustees of such plans with respect to fiduciary issues.

With regard to Stanton's qualifications, Mr. Hartman encloses documents which state that Stanton has been providing trust, custody, and other fiduciary services to institutions and individuals since 1919 and is dedicated to the professional management of its clients' assets. In addition, it is represented that Stanton has extensive employee stock ownership plan experience as an independent fiduciary for leveraged and non-leveraged transactions.

In addition to his letter of March 2, 2005, Mr. Hartman submitted another letter, dated March 24, 2005, to the Department in which he clarified that Stanton was fully aware that the subject transactions included both the sale of the Allocated Shares to BBP and the transfer of the Unallocated Shares to BBP in exchange for assumption by BBP of the ESOP's debt under the Note. Further, Mr. Hartman stated that the actions taken by Stanton outlined in his letter of March 2, 2005, apply with

equal effect to both of the subject transactions.

In addition in his March 24, 2005 letter, Mr. Hartman informed the Department that, although no longer employed by Stanton, Richard Joseph (Mr. Joseph), formerly the President of Stanton, was the individual who analyzed and completed the subject transactions on behalf of Stanton. However, both Stanton and Mr. Joseph agreed to the accuracy of the discussion in Mr. Hartman's March 24 letter and confirmed the same by signing such letter.

15. The applicant maintains that the requested exemption is administratively feasible in that the application contains all of the facts and law necessary for the Department to issue an exemption.

The applicant further maintains that the exemption is feasible in that it involves a one-time transaction for cash in the case of the purchase by BBP of the Allocated Shares and a one-time exchange of the Unallocated Shares for the assumption by BBP of the ESOP's liability under the Note.

Further, it is represented that the cash received by the ESOP in the sale of the Allocated Shares was immediately credited to the accounts of the each of the Participants in proportion to the shares of Stock that were sold from each participant's account. It is represented that each of the participants in the ESOP will be given the option to elect a lump sum distribution in cash or to rollover the distribution into a 401(k) plan sponsored by BBP or into such participant's individual retirement account.

16. It is represented that were the sale to BBP of the Allocated Shares rescinded, the Allocated Shares distributed to participants upon termination of the ESOP, and the Allocated Shares purchased by BBP directly from the participants at the then fair market value, the participants might receive substantially less on such shares, than if the exemption were to be granted.

17. In summary, the applicant represents that the subject transactions met the statutory criteria of section 408(a) of the Act and 4975(c)(2) of the Code because: (a) Stanton was responsible for each of the transactions, and in accordance with the fiduciary provisions of the Act, reviewed, analyzed, and determined that the ESOP should enter into each of the transactions; (b) Stanton reviewed, negotiated, and approved the terms of each of the transactions, and determined on behalf of the ESOP and solely in the interest of the ESOP, its participants, and beneficiaries that the terms of each of the transactions were fair and reasonable; (c) Stanton monitored compliance with the terms of each of the transactions by the parties; (d) Hawthorne, acting as the independent qualified appraiser, determined the fair market value of the Stock as of the date each of the transactions were entered; (e) the ESOP incurred no fees, commissions, or other charges or expenses as a result of its participation in each of the transactions; (f) the subject transactions were one-time transactions; (g) the purchase price which the ESOP received from sale of the Allocated Shares to BBP included a premium over the fair market value of such shares; (h) each of the participants in the ESOP will be given the option to elect a lump sum distribution in cash or to rollover the distribution into a 401(k) plan sponsored by BBP or into such participant's individual retirement account; (i) the cash received by the ESOP in the sale of the Allocated Shares was credited to the accounts of the each of the Participants in proportion to the Allocated Shares that were sold from each participant's account; (j) the proceeds from the sale of the Allocated Shares provide participants with additional investment liquidity and diversification.

Notice to Interested Persons

Those persons who may be interested in the pendency of the requested exemption include participants and beneficiaries of the ESOP, alternative payees, participants who are current employees but who are absent from the work site, the employer, officers and employees of the employer, fiduciaries of the ESOP, Stanton, and all other interested persons or parties involved in the subject transactions. It is represented that these various classes of interested persons will be notified as follows.

All participants and beneficiaries and all other interested persons will be provided with a copy of the notice of this proposed exemption (the Notice), plus a copy of the supplemental statement (the Supplemental Statement), as required, pursuant to 29 CFR 2570.43(b)(2), which will advise such interested persons of their right to comment and to request a hearing. The Notice and the Supplemental statement will be provided to all interested persons within fifteen (15) days of the publication of the Notice in the **Federal Register**.

The Notice and the Supplemental Statement will be personally delivered to all participants who are current employees of BBP and who are present at the work site on the date the Notice and Supplemental Statement are provided. The Notice and the Supplemental Statement will be sent by first class mail to all other participants and beneficiaries or other interested persons. It is represented that for the purpose of sending the Notice and Supplemental Statement by mail, the last known addresses of such participants, beneficiaries, or other interested persons maintained by the ESOP will be used.

The Department must receive written comments and requests for a hearing no later than forty-five (45) days from the date of the publication of the Notice in the **Federal Register**.

FOR FURTHER INFORMATION CONTACT: Angelena C. Le Blanc of the Department, telephone (202) 693–8540. (This is not a toll-free number.)

General Information

The attention of interested persons is directed to the following:

(1) The fact that a transaction is the subject of an exemption under section 408(a) of the Act and/or section 4975(c)(2) of the Code does not relieve a fiduciary or other party in interest or disqualified person from certain other provisions of the Act and/or the Code, including any prohibited transaction provisions to which the exemption does not apply and the general fiduciary responsibility provisions of section 404 of the Act, which, among other things, require a fiduciary to discharge his duties respecting the plan solely in the interest of the participants and beneficiaries of the plan and in a prudent fashion in accordance with section 404(a)(1)(b) of the Act; nor does it affect the requirement of section 401(a) of the Code that the plan must operate for the exclusive benefit of the employees of the employer maintaining the plan and their beneficiaries;

(2) Before an exemption may be granted under section 408(a) of the Act and/or section 4975(c)(2) of the Code, the Department must find that the exemption is administratively feasible, in the interests of the plan and of its participants and beneficiaries, and protective of the rights of participants and beneficiaries of the plan;

(3) The proposed exemptions, if granted, will be supplemental to, and not in derogation of, any other provisions of the Act and/or the Code, including statutory or administrative exemptions and transitional rules. Furthermore, the fact that a transaction is subject to an administrative or statutory exemption is not dispositive of whether the transaction is in fact a prohibited transaction; and

(4) The proposed exemptions, if granted, will be subject to the express condition that the material facts and representations contained in each application are true and complete, and that each application accurately describes all material terms of the transaction which is the subject of the exemption.

Signed at Washington, DC, this 10th day of May, 2005.

Ivan Strasfeld,

Director of Exemption Determinations, Employee Benefits Security Administration, U.S. Department of Labor.

[FR Doc. 05–9577 Filed 5–12–05; 8:45 am]

BILLING CODE 4510–29–P

DEPARTMENT OF LABOR

Employee Benefits Security Administration

[Prohibited Transaction Exemption 2005–05; Exemption Application No. D–11212, et al.]

Grant of Individual Exemptions; R. G. Daily Company, Inc. Defined Benefit Plan (the Plan)

AGENCY: Employee Benefits Security Administration, Labor.

ACTION: Grant of individual exemptions.

SUMMARY: This document contains exemptions issued by the Department of Labor (the Department) from certain of the prohibited transaction restrictions of the Employee Retirement Income Security Act of 1974 (the Act) and/or the Internal Revenue Code of 1986 (the Code).

A notice was published in the **Federal Register** of the pendency before the Department of a proposal to grant such exemption. The notice set forth a summary of facts and representations contained in the application for exemption and referred interested persons to the application for a complete statement of the facts and representations. The application has been available for public inspection at the Department in Washington, DC. The notice also invited interested persons to submit comments on the requested exemption to the Department. In addition the notice stated that any interested person might submit a written request that a public hearing be held (where appropriate). The applicant has represented that it has complied with the requirements of the notification to interested persons. No requests for a hearing were received by the Department. Public comments were received by the Department as described in the granted exemption.

The notice of proposed exemption was issued and the exemption is being granted solely by the Department because, effective December 31, 1978, section 102 of Reorganization Plan No. 4 of 1978, 5 U.S.C. App. 1 (1996), transferred the authority of the Secretary of the Treasury to issue exemptions of the type proposed to the Secretary of Labor.

Statutory Findings

In accordance with section 408(a) of the Act and/or section 4975(c)(2) of the Code and the procedures set forth in 29 CFR Part 2570, Subpart B (55 FR 32836, 32847, August 10, 1990) and based upon the entire record, the Department makes the following findings:

(a) The exemption is administratively feasible;

(b) The exemption is in the interests of the plan and its participants and beneficiaries; and

(c) The exemption is protective of the rights of the participants and beneficiaries of the plan.

R.G. Dailey Company, Inc. Defined Benefit Plan (the Plan) Located in Ann Arbor, MI

[Prohibited Transaction Exemption 2005–05; Exemption Application No. D–11212]

Exemption

The sanctions resulting from the application of section 4975 of the Code, by reason of section 4975(c)(1)(A) through (E) of the Code,[1] shall not apply to the in kind contributions made to the Plan on August 12, 1999, June, 12, 2000, May 17, 2001 and March 21, 2002 by the Employer, a disqualified person with respect to the Plan, of certain publicly-traded securities (the Securities), provided: (a) Each contribution was a one-time transaction; (b) the Securities were valued at their fair market value as of the date of the contribution, as listed on a national securities exchange; (c) no commissions were paid in connection with the transactions; (d) the terms of the transactions between the Plan and the Employer were no less favorable to the Plan than terms negotiated at arm's length under similar circumstances between unrelated parties; and (e) Mr. Dailey, who was the only person affected by the transactions, believes that the transactions were in the best interest of the Plan.

[1] Because Mr. Robert M. Dailey was the sole sponsor of the R.G. Dailey Company, Inc. (the Employer) and the only participant in the Plan, there is no jurisdiction under Title I of the Employee Retirement Income Security Act of 1974 (the Act). However, there is jurisdiction under Title II of the Act pursuant to section 4975 of the Code.

EFFECTIVE DATE: This exemption is effective for in kind contributions of Securities to the Plan occurring on the following dates: August 12, 1999, June 12, 2000, May 17, 2001 and March 21, 2002.

For a complete statement of the facts and representations supporting the Department's decision to grant this exemption, refer to the notice of proposed exemption published on March 23, 2005 at 70 FR 14718.

Written Comments

During the comment period, the Department received one written comment and no requests for a public hearing. The comment was submitted by the applicant and is intended to clarify the proposal. Basically, the comment concerns the date the Plan was terminated. In the Summary of Facts and Representations of the proposal, Representation 2 states that the Plan was terminated on May 31, 2002. However, the applicant wishes to clarify that the Plan termination amendment was signed on March 22, 2002 and became effective on March 31, 2002.

In response to the applicant's comment, the Department notes the foregoing clarifications to the proposal.

Accordingly, after giving full consideration to the entire record, including the applicant's comment, the Department has determined to grant the requested exemption. For further information regarding the comment and other matters discussed herein, interested persons are encouraged to obtain copies of the exemption application file (Exemption Application No. D–11212) the Department is maintaining in this case. The complete application file, as well as all supplemental submissions received by the Department, are made available for public inspection in the Public Disclosure Room of the Employee Benefits Security Administration, Room N–1513, U.S. Department of Labor, 200 Constitution Avenue, NW., Washington, DC 20210.

FOR FURTHER INFORMATION CONTACT: Mr. Arjumand A. Ansari of the Department at (202) 693–8566. (This is not a toll-free number.)

Riggs Bank N.A. (Riggs Bank), Washington, D.C.; and the PNC Financial Services Group, Inc. (PNC), Pittsburgh, Pennsylvania

[Prohibited Transaction Exemption 2005–06; Exemption Application No. D–11310]

Exemption

Section I. Riggs Bank N.A.

Riggs Bank shall not be precluded from functioning as a ''qualified

professional asset manager'' (''QPAM'') pursuant to Prohibited Transaction Exemption 84–14 (49 FR 9494, March 13, 1984) (''PTE 84–14'') beginning on the date of the acquisition of Riggs National Corporation, the parent of Riggs Bank, by PNC, solely because of a failure to satisfy section I(g) of PTE 84–14 as a result of the conviction of Riggs Bank for the felony described in the January 27, 2005 felony information (the ''Information'') entered in the U.S. District Court for the District of Columbia, provided that:

(a) This exemption is not applicable if Riggs becomes affiliated with any person or entity convicted of any of the crimes described in section I(g) of PTE 84–14, unless such person or entity already has been granted an exemption to continue functioning as a QPAM pursuant to PTE 84–14;

(b) This exemption is not applicable if Riggs is convicted of any of the crimes described in section I(g) of PTE 84–14, other than the specific felony charged in the Information;

(c) An independent auditor, who has appropriate technical training or experience and proficiency with Title I of ERISA's fiduciary responsibility provisions, shall conduct an audit of Riggs Bank's ERISA custody and fiduciary asset management functions. This audit will be commenced not later than June, 2005. It will be completed and a report setting forth the procedures conducted and the results obtained will be sent to the Department as soon as possible, but in no event later than September 30, 2005;

(d) The audit described above will cover the following matters for the period commencing in March, 1999 and ending with the date of the closing of the Riggs-PNC transaction (the Time Period): Reconciliations (to determine that reconciliations and settlements are performed accurate and timely, and outstanding items are monitored and cleared in a timely manner); unitizations (to determine that daily processes, including trade requests, valuation and reconciliation of unitized assets are authorized and properly performed, are consistent with liquidity requirements and to ensure that unitized assets evaluations are valid); conversions (to determine that adequate controls are in place and working effectively to ensure that conversions are completed accurately, in a timely manner, and in accordance with the client's contract); fees (to determine that controls over the fee assessment and collection process are adequately designed and operating accurately and effectively); annual and monthly statements (to determine that statements are prepared accurately and distributed to clients independently and within the required frequency and time frame); training (to determine that account administrators and administrative assistants are adequately trained, including with respect to the requirements of ERISA); system authorization (to determine whether there are controls in place to ensure access to systems is authorized, approved and limited based on employees' particular duties and responsibilities); new accounts (to determine controls in place to ensure new accounts receive appropriate approvals and are accurately set up for future required reviews and other account activities); the adequacy of the written policies and procedures adopted by Riggs to ensure compliance with the terms of the QPAM exemption (other than paragraph 1(g) of PTE 84–14), and the requirements of Title I of ERISA (including ERISA's prohibited transaction provisions and applicable statutory and administrative exemptions); and compliance (through a test of a representative sample of transactions of client plans during the Time Period) with: (1) The written policies and procedures that it has adopted and (ii) the objective requirements of Title I of ERISA and PET 84–14 (other than paragraph 1(g) of PTE 84–14);

(e) Any irregularities identified as a results of the audit will be promptly corrected; and

(f) On the closing of the acquisition transaction, PNC will apply the same internal control and audit policies and procedures applied and enforced with respect to its pre-existing ERISA fiduciary asset management functions to the ERISA custody and fiduciary asset management functions formerly associated with Riggs Bank.

Section II. PNC

PNC and its affiliates shall not be precluded from functioning as a QPAM pursuant to PTE 84–14 beginning on the date of the acquisition of Riggs National Corporation, the parent of Riggs Bank, by PNC, solely because of a failure to satisfy section I(g) of PTE 84–14 as a result of the conviction of Riggs Bank for the felony described in the Information entered in the U.S. District Court for the District of Columbia, provided that:

(a) This exemption is not applicable if PNC or any affiliate becomes affiliated with any person or entity convicted of any of the crimes described in section I(g) of PTE 84–14, unless such person or entity already has been granted an exemption under PTE 84–14; and

(b) This exemption is not applicable if PNC or any affiliate is convicted of any of the crimes described in section I(g) of PTE 84–14, other than the conviction of Riggs Bank for the specific felony charged in the Information.

Section III. Definitions

(a) For purposes of this exemption, the term ''Riggs'' means and includes Riggs Bank and any entity that was affiliated with Riggs Bank, including but not limited to its corporate parent Riggs National Corporation, prior to the date of acquisition of Riggs National Corporation by PNC.

(b) For purposes of this exemption, the term ''PNC'' includes PNC Financial Services Group, Inc. and any entity that was affiliated with PNC Financial Services Group, Inc. prior to the date of acquisition of Riggs National Corporation by PNC, and any future affiliates, other than Riggs Bank, as defined in such seciton (a).

(c) The term ''affiliate'' of a person means—

(1) Any person directly or indirectly through one or more intermediaries, controlling, controlled by, or under common control with the person,

(2) Any director of, relative of, or partner in, any such person,

(3) Any corporation, partnership, trust or unincorporated enterprise of which such person is an officer, director, or a 5 percent or more partner or owner, and,

(4) Any employee or officer of the person who—

(A) Is a highly compensated employee (as defined in section 4975(e)(2)(H) of the Code) or officer (earning 10 percent or more of the wages of such person) or;

(B) Has direct or indirect authority, responsibility or control regarding the custody, management or disposition of plan assets.

(d) The term ''control'' means the power to exercise a controlling influence over the management or policies of a person other than an individual.

For a more complete statement of the facts and representations supporting the Department's decision to grant this exemption, refer to the notice of proposed exemption published on March 23, 2005 at 70 FR 14729.

Written Comments: The Department received one written comment with respect to the proposed exemption. The comment was submitted on behalf of an employee benefit plan with assets invested in the Riggs Bank-trusteed Multi-Employer Property Trust. The commenter noted that the exemption as proposed provides relief only for the period after Riggs is purchased by PNC. The commenter requested modification

of the exemption to permit Riggs to function as a QPAM for the interim period between the March 29, 2005 sentencing of Riggs and the acquisition of Riggs by PNC, during which time Riggs will operate as a stand-alone entity, as well as for the period of time after it is acquired by PNC.

The Department notes that the acquisition of Riggs by a large financial institution was an important factor in the Department's determination to propose exemptive relief. The Department has concluded that it is unable to make the findings required by section 408(a) of the Act necessary to provide relief covering the interim period between the sentencing of Riggs and the acquisition of Riggs by PNC. In the absence of the availability of PTE 84–14 for this interim period, it is the responsibility of Riggs to ensure that it has not engaged in any prohibited transactions for which there is no other exemptive relief.

Accordingly, the Department has considered the entire record, including the one comment received, and has determined to grant the exemption as it was proposed.

FOR FURTHER INFORMATION CONTACT: Mr. Gary H. Lefkowitz of the Department, telephone (202) 693–8546. (This is not a toll-free number.)

General Information

The attention of interested persons is directed to the following:

(1) The fact that a transaction is the subject of an exemption under section 408(a) of the Act and/or section 4975(c)(2) of the Code does not relieve a fiduciary or other party in interest or disqualified person from certain other provisions to which the exemption does not apply and the general fiduciary responsibility provisions of section 404 of the Act, which among other things require a fiduciary to discharge his duties respecting the plan solely in the interest of the participants and beneficiaries of the plan and in a prudent fashion in accordance with section 404(a)(1)(B) of the Act; nor does it affect the requirement of section 401(a) of the Code that the plan must operate for the exclusive benefit of the employees of the employer maintaining the plan and their beneficiaries;

(2) This exemption is supplemental to and not in derogation of, any other provisions of the Act and/or the Code, including statutory or administrative exemptions and transactional rules. Furthermore, the fact that a transaction is subject to an administrative or statutory exemption is not dispositive of whether the transaction is in fact a prohibited transaction; and

(3) The availability of this exemption is subject to the express condition that the material facts and representations contained in the application accurately describes all material terms of the transaction which is the subject of the exemption.

Signed at Washington, DC, this 10th day of May, 2005.

Ivan Strasfeld,

Director of Exemption Determinations, Employee Benefits Security Administration, U.S. Department of Labor.

[FR Doc. 05–9578 Filed 5–12–05; 8:45 am]

BILLING CODE 4510–29–M

DEPARTMENT OF LABOR

Employment Standards Administration; Wage and Hour Division

Minimum Wages for Federal and Federally Assisted Construction; General Wage Determination Decisions

General wage determination decisions of the Secretary of Labor are issued in accordance with applicable law and are based on the information obtained by the Department of Labor from its study of local wage conditions and data made available from other sources. They specify the basic hourly wage rates and fringe benefits which are determined to be prevailing for the described classes of laborers and mechanics employed on construction projects of a similar character and in the localities specified therein.

The determinations in these decisions of prevailing rates and fringe benefits have been made in accordance with 29 CFR part 1, by authority of the Secretary of Labor pursuant to the provisions of the Davis-Bacon Act of March 3, 1931, as amended (46 Stat. 1494, as amended, 40 U.S.C. 276a) and of other Federal statutes referred to in 29 CFR part 1, Appendix, as well as such additional statutes as may from time to time be enacted containing provisions for the payment of wages determined to be prevailing by the Secretary of Labor in accordance with the Davis-Bacon Act. The prevailing rates and fringe benefits determined in these decisions shall, in accordance with the provisions of the foregoing statutes, constitute the minimum wages payable on Federal and federally assisted construction projects to laborers and mechanics of the specified classes engaged on contract work of the character and in the localities described therein.

Good cause is hereby found for not utilizing notice and public comment procedure thereon prior to the issuance of these determinations as prescribed in 5 U.S.C. 553 and not providing for delay in the effective date as prescribed in that section, because the necessity to issue current construction industry wage determinations frequently and in large volume causes procedures to be impractical and contrary to the public interest.

General wage determination decisions, and modifications and supersedes decisions thereto, contain no expiration dates and are effective from the date of notice in the **Federal Register**, or on the date written notice is received by the agency, whichever is earlier. These decisions are to be used in accordance with the provisions of 29 CFR parts 1 and 5. Accordingly, the applicable decision, together with any modifications issued, must be made a part of every contract for performance of the described work within the geographic area indicated as required by an applicable Federal prevailing wage law and 29 CFR part 5. The wage rates and fringe benefits, notice of which is published herein, and which are contained in the Government Printing Office (GPO) document entitled ''General Wage Determinations Issued Under The Davis-Bacon And Related Acts,'' shall be the minimum paid by contractors and subcontractors to laborers and mechanics. Any person, organization, or governmental agency having an interest in the rates determined as prevailing is encouraged to submit wage rate and fringe benefit information for consideration to the Department.

Further information and self-explanatory forms for the purpose of submitting this data may be obtained by writing to the U.S. Department of Labor, Employment Standards Administration, Wage and Hour Division, Division of Wage Determinations, 200 Constitution Avenue, NW., Room S–3014, Washington, DC 20210.

Modification to General Wage Determination Decisions

The number of decisions listed to the Government Printing Office document entitled ''General Wage Determinations Issued Under the Davis-Bacon and related Acts'' being modified are listed by Volume and State. Dates of publication in the **Federal Register** are in parentheses following the decision being modified.

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MO20030010 (Jun. 13, 2003)
MO20030015 (Jun. 13, 2003)
MO20030019 (Jun. 13, 2003)
MO20030043 (Jun. 13, 2003)
MO20030051 (Jun. 13, 2003)
MO20030052 (Jun. 13, 2003)
MO20030056 (Jun. 13, 2003)

Volume VI

Washington
WA20030003 (Jun. 13, 2003)

Volume VII

Nevada
NV20030007 (Jun. 13, 2003)

General Wage Determination Publication

General wage determinations issued under the Davis-Bacon and related Acts, including those noted above, may be found in the Government Printing Office (GPO) document entitled ''General Wage Determinations Issued Under The Davis-Bacon And Related Acts''. This publication is available at each of the 50 Regional Government Depository Libraries and many of the 1,400 Government Depository Libraries across the country.

General wage determinations issued under the Davis-Bacon and related acts are available electronically at no cost on the Government Printing Office site at *http://www.access.gpo.gov/davisbacon*. They are also available electronically by subscription to the Davis-Bacon Online Service (*http://davisbacon.fedworld.gov*) of the National Technical Information Service (NTIS) of the U.S. Department of Commerce at 1–800–363–2068. This subscription offers value-added features such as electronic delivery of modified wage decisions directly to the user's desktop, the ability to access prior wage decisions issued during the year, extensive Help Desk support, etc.

Hard-copy subscriptions may be purchased from: Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20402, (202) 512–1800.

When ordering hard-copy subscription(s), be sure to specify the State(s) of interest, since subscriptions may be ordered for any or all of the six separate volumes, arranged by State. Subscriptions include an annual edition (issued in January or February) which includes all current general wage determinations for the States covered by each volume. Throughout the remainder of the year, regular weekly updates will be distributed to subscribers.

Signed at Washington, DC this 5th day of May 2002.

John Frank,

Acting Chief, Branch of Construction Wage Determinations.

Note: This document was received by the Office of the **Federal Register** on May 5, 2005.

[FR Doc. 05–9337 Filed 5–12–05; 8:45 am]

BILLING CODE 4510–27–M

LEGAL SERVICES CORPORATION

Sunshine Act Meeting of the Board of Directors

TIME AND DATE: The Board of Directors of the Legal Services Corporation will meet on May 19, 2005 via conference call. The meeting will begin at 2 p.m., and continue until conclusion of the Board's agenda.

LOCATION: 3333 K Street, NW., Washington, DC 20007, 3rd Floor Conference Room.

STATUS OF MEETING: Open. Directors will participate by telephone conference in such a manner as to enable interested members of the public to hear and identify all persons participating in the meeting. Members of the public wishing to observe the meeting may do so by joining participating staff at the location indicated above.

MATTERS TO BE CONSIDERED:

1. Approval of the agenda.
2. Consider and act on Board of Directors' response to the Inspector General's Semiannual Report to Congress for the period of October 1, 2004, through March 31, 2005.
3. Consider and act on other business.
4. Public comment.

FOR FURTHER INFORMATION CONTACT: Patricia Batie, Manager of Board Operations, at (202) 295–1500.

SPECIAL NEEDS: Upon request, meeting notices will be made available in alternate formats to accommodate visual and hearing impairments. Individuals who have a disability and need an accommodation to attend the meeting may notify Patricia Batie at (202) 295–1500.

Dated: May 10, 2005.

Victor M. Fortuno,

Vice President for Legal Affairs, General Counsel & Corporate Secretary.

[FR Doc. 05–9644 Filed 5–10–05; 4:10 pm]

BILLING CODE 7050–01–P

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

[Notice (05–087)]

NASA Aeronautical Technologies Strategic Roadmap Committee; Meeting

AGENCY: National Aeronautics and Space Administration.

ACTION: Notice of Meeting Cancellation.

Federal Register Citation of Previous Announcement: Volume 70, Number 78, Page 21254, Notice Number 05–078, April 25, 2005.

Previously Announced Dates of Meeting: Thursday, May 26, 2005, 8 a.m. to 5 p.m. Friday, May 27, 2005, 8 a.m. to 5 p.m. eastern standard time. Meeting has been cancelled.

FOR FURTHER INFORMATION CONTACT: Yuri Gawdiak, 202–358–1853.

Dated: May 3, 2005.

P. Diane Rausch,

Advisory Committee Management Officer, National Aeronautics and Space Administration.

[FR Doc. 05–9619 Filed 5–12–05; 8:45 am]

BILLING CODE 7510–13–P

NATIONAL FOUNDATION ON THE ARTS AND THE HUMANITIES

National Endowment for the Arts; Arts Advisory Panel

Pursuant to Section 10(a)(2) of the Federal Advisory Committee Act (Pub. L. 92–463), as amended, notice is hereby given that two meetings of the Arts Advisory Panel to the National Council on the Arts will be held at the Nancy Hanks Center, 1100 Pennsylvania Avenue, NW., Washington, DC 20506 as follows:

Media Arts (Access to Artistic Excellence): June 14–16, 2005, Room 716. This meeting, from 9 a.m. to 5:30 p.m. on June 14th, from 9 a.m. to 6 p.m. on June 15th, and from 9 a.m. to 3:30 p.m. on June 16th, will be closed.

Visual Arts (Access to Artistic Excellence): June 28–July 1, 2005, Room 716. This meeting, from 9 a.m. to 5:30 p.m. on June 28th, 29th, and 30th, and from 9 a.m. to 3:30 p.m. on July 1st, will be closed.

These meetings are for the purpose of Panel review, discussion, evaluation, and recommendations on financial assistance under the National Foundation on the Arts and the Humanities Act of 1965, as amended, including information given in confidence to the agency. In accordance with the determination of the Chairman of April 8, 2005, these sessions will be closed to the public pursuant to subsection (c)(6) of section 552b of Title 5, United States Code.

Further information with reference to this meeting can be obtained from Ms. Kathy Plowitz-Worden, Office of Guidelines & Panel Operations, National Endowment for the Arts, Washington, DC, 20506, or call (202) 682–5691.

Dated: May 6, 2005.

Kathy Plowitz-Worden,

Panel Coordinator, Panel Operations, National Endowment for the Arts.

[FR Doc. 05–9585 Filed 5–12–05; 8:45 am]

BILLING CODE 7537–01–P

NATIONAL SCIENCE FOUNDATION

National Science Board and Its Subdivisions; Sunshine Act Meeting

DATE AND TIME: May 25–26, 2005.

May 25, 2005—7 a.m.–5 p.m.

Sessions

7 a.m.–9:30 a.m.—Open
8 a.m.–8:15 a.m.—Closed
8:15 a.m.–9 a.m.—Open
9 a.m.–9:30 a.m.—Open
9:30 a.m.–10:30 a.m.—Open
10:30 a.m.–11:10 a.m.—Open
11:10 a.m.–11:45 a.m.—Closed
12 noon–12:15 p.m.—Open
12:15 p.m.–12:30 p.m.—Closed
12:30 p.m.–3:15 p.m.—Open
3:15 p.m.–5 p.m.—Open

May 26, 2005—7:45 a.m.–3:15 p.m.

Sessions

7 a.m.–8:30 a.m.—Closed
8:30 a.m.–9:15 a.m.—Executive Closed
9:15 a.m.–11:15 a.m.—Closed
11:15 a.m.–11:45 a.m.—Open
12 noon–12:30 p.m.—Executive Closed
12:30 p.m.–1 p.m.—Closed
1 p.m.–3:30 p.m.—Open

PLACE: National Science Foundation, 4201 Wilson Blvd., Room 1295 and 1235, Arlington, VA 22230.

PUBLIC MEETING ATTENDANCE: All visitors must report to the NSF's visitor's desk at the 9th and N. Stuart Streets entrance to receive a visitor's badge.

FOR FURTHER INFORMATION CONTACT: Please refer to the National Science Board Web site (*http://www.nsf.gov/nsb*) for updated schedule. NSB Office: (703) 292–7000.

STATUS: Part of this meeting will be closed to the public. Part of this meeting will be open to the public.

MATTERS TO BE CONSIDERED:

Wednesday, May 25, 2005

Open:

Education & Human Resources Subcommittee on S&E Indicators (7 a.m.–9:30 a.m.) Room 1295

- Chair's Remarks and Approval of Minutes
- Discussion of Industry, Technology, and the Global Marketplace Chapter
- Discussion of Higher Education Chapter
- Discussion of Academic R&D Chapter
- Discussion of S&E Labor Force Chapter
- Discussion of R&D Funds and Technology Chapter

Committee on Programs & Plans Subcommittee on Polar Issues (8:15 a.m.–9 a.m.) Room 1235

- Chair's Remarks and Approval of Minutes
- OPP Director's Report
- OPP Advisory Committee Study of USAP Resupply Options
- Arctic Trip Report of NSB Delegation

Task Group on Transformative Research [TR] (9 a.m.–9:30 a.m.) Room 1235

- Chair's Remarks and Approval of Minutes
- Discussion of Upcoming Workshop

Joint Session: Committee on Strategy and Budget and Committee on Programs and Plans (9:30 a.m.–10:30 a.m.) Room 1235

- Centers and the NSF Portfolio
- Funding Rates, Award Size and Duration

Committee on Strategy and Budget (10:30 a.m.–11:30 a.m.)

- Chair's Remarks and Approval of Minutes
- Discussion of Committee Input to Vision Task Force
- Long Range Planning Book Overview

Executive Committee (12 noon–12:15 p.m.) Room 1235

- Approval of Minutes
- Updates or New Business from Committee Members
- Transmittal Letter: Proposed Awards to NSB Members
- Annual Report of Executive Committee

Committee on Programs & Plans (12:30 p.m.–3:15 p.m.) Room 1235

- Approval of Minutes
- Vision Task Force
- New *ad hoc* Task Group to update the NSB Report on International Science
- Status Reports
  - Long-lived Digital Data Collections
  - Transformative Research Task Force
  - Subcommittee on Polar Issues
- Environment Status Report
- Process for Sending Information & Actions to CPP & NSB
- NSF Strategy for High Performance Computing
- Major Research Facilities:
  - Final Approval of ''Setting Priorities for Large Research Facility Projects Supported by the NSF''
  - Status of Facility Plan & Guide
  - Overview of Process for CPP/NSB Re-examination of Priority Order for New Start MREFC Projects

Committee on Education & Human Resources (3:15 p.m.–5 p.m.) (Room 1235)

- Approval of Minutes
- NSF Staff Presentations
  - NSF/EHR Directorate Activities Update
  - NSF Integration of Research Education
- 21st Century Workforce
- NSB items
- NSB/EHR Committee's Contribution to Board's Vision for NSF
- Response to Congressman Ehlers

• Subcommittee on Science and Engineering Indicators
• Update on Engineering Education Workshop

Closed

Committee on Programs & Plans Subcommittee on Polar Issues (8 a.m.–8:15 a.m.) Room 1235
• Polar icebreakers—future budget issues
Committee on Strategy and Budget (11:10 a.m. –11:45 a.m.) Room 1235
• Preliminary Discussion of FY 2007 Budget
Executive Committee (12:15 p.m.–12:30 p.m.) Room 1235
• Director's Items: Personnel Matters and Future Budgets

Thursday, May 26, 2005

Open

Committee on Audit & Oversight (9:15 a.m.–11:15 a.m.) Room 1235
• Approval of Minutes
• Management Response to OIG Semiannual Report
• Discussion of NSF Vision Document: NSB Roles and Responsibilities
• Discussion of Draft Outline of NSF Merit Review System Review
• The Sarbanes Oxley Act and Implications for the NSF
• CFO Update on Plan to Address Reportable Conditions of FY 2004 Audit

Closed Session

Committee on Programs & Plans (7 a.m.–8:30 a.m.) Room 1235
• Update on RSVP
• NSB Information Item: Plan for extending LIGO
• NSB Information Item: Renewal of Cooperative Agreement between NSF and IRIS
• Reexamination of Priority Order for New Start MREFC Projects
Committee on Audit & Oversight (11:15 a.m.–11:45 a.m.) Room 1235
• Pending Investigations

Executive Closed

Committee on Programs & Plans (8:30 a.m.–9:15 a.m.) Room 1235
• Re-examination of Priority Order for New Start MREFC Projects

Plenary Session of the Board (12 noon–3:30 p.m.)

Executive Closed Plenary Session of the Board (12 noon–12:30 p.m.) Room 1235

• Approval of Executive Closed Minutes
• Executive Committee Elections
• Board Member Proposals

Closed Plenary Session of the Board (1 p.m.–1:30 p.m.) Room 1235

• Approval of Closed Session Minutes
• Closed Committee Reports

Open Plenary Session of the Board (1 p.m.–3:30 p.m.) Room 1235

• Approval of Open Session Minutes
• Resolution to Close August 2005 Meeting
• NSB Chairman's Report
○ Approval of 2006 Board Meeting Calendar
• NSF Director's Report
• Committee Reports
○ 2004 Annual Report of Executive Committee
• Overview of Millennium Ecosystem Assessment
• Presentations by 2005 Alan T. Waterman and NSB Public Service Awardees

Michael P. Crosby,
Executive Officer, NSB.
[FR Doc. 05–9727 Filed 5–11–05; 1:47 pm]
BILLING CODE 7555–01–M

NUCLEAR REGULATORY COMMISSION

[Docket No. 50–305]

Nuclear Management Company, LLC; Notice of Consideration of Issuance of Amendment to Facility Operating License, Proposed No Significant Hazards Consideration Determination, and Opportunity for a Hearing

The U.S. Nuclear Regulatory Commission (the Commission) is considering issuance of an amendment to Facility Operating License No. DPR–43 issued to Nuclear Management Company, LLC (the licensee), for operation of the Kewaunee Nuclear Power Plant located in Kewaunee County, Wisconsin.

The proposed amendment would change the Technical Specifications to modify the auxiliary feedwater (AFW) pump suction protection requirements and change the design basis as described in the Updated Safety Analysis Report to revise the functionality of the discharge pressure switches to provide pump runout protection, which requires operator actions to restore the AFW pumps for specific post-accident recovery activities.

Before issuance of the proposed license amendment, the Commission will have made findings required by the Atomic Energy Act of 1954, as amended (the Act), and the Commission's regulations.

The Commission has made a proposed determination that the amendment request involves no significant hazards consideration. Under the Commission's regulations in Title 10 of the Code of Federal Regulations (10 CFR), Section 50.92, this means that operation of the facility in accordance with the proposed amendment would not (1) involve a significant increase in the probability or consequences of an accident previously evaluated; or (2) create the possibility of a new or different kind of accident from any accident previously evaluated; or (3) involve a significant reduction in a margin of safety. As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration, which is presented below:

1. Does the proposed amendment involve a significant increase in the probability or consequences of an accident previously evaluated?

Response: No.

The proposed amendment does not involve a significant increase in the probability of an accident previously evaluated. The proposed changes are associated with the auxiliary feedwater (AFW) system, which is not an initiator of any accident previously evaluated.

The proposed amendment does not involve a significant increase in the consequences of an accident previously evaluated. The mitigation functions assumed in the accident analyses will continue to be performed. Operator actions may be required to assure the AFW pumps are aligned for post-accident recovery operations. With these actions additional consequences are not incurred.

Therefore, operation of the facility in accordance [with] the proposed amendment would not involve a significant increase in the probability or consequences of any accident previously evaluated.

2. Does the proposed amendment create the possibility of a new or different kind of accident from any accident previously evaluated?

Response: No.

The AFW system is being modified by adding suction pressure switches to protect the AFW pumps from damage due to a loss of normal suction. The addition of the suction pressure switches and the associated circuitry does not introduce new failure modes or effects. The evaluation of the new suction pressure trip circuit design concluded the new suction pressure trip circuit is similar to the existing discharge pressure trip circuit design and therefore, no new failure modes or effects are introduced. In addition, the AFW system is being modified by altering the function of the discharge pressure trip channel to provide pump runout protection. Operator actions may be required to assure the AFW pumps are aligned for post-accident recovery operations. With these actions, the accident recovery operations can be performed and a new or different kind of accident is not

created. The proposed amendment ensures that the AFW system continues to performs its intended safety function.

Therefore, operation of the facility in accordance with the proposed amendment does not create the possibility of a new or different kind of accident from any previously evaluated.

3. Does the proposed amendment involve a significant reduction in a margin of safety?

Response: No.

The modifications to the AFW System and the associated Technical Specifications will ensure that the AFW system is capable of performing its intended safety function. In addition, the margin of safety in the accident analyses is not affected by the proposed changes. The manual actions that may be required to restart an AFW pump and throttle AFW flow during the cooldown/recovery phase of the event do not significantly impact the margin of safety.

Therefore, the proposed amendment does not involve a significant reduction in a margin of safety.

The NRC staff has reviewed the licensee's analysis and, based on this review, it appears that the three standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the amendment request involves no significant hazards consideration.

The Commission is seeking public comments on this proposed determination. Any comments received within 30 days after the date of publication of this notice will be considered in making any final determination.

Normally, the Commission will not issue the amendment until the expiration of 60 days after the date of publication of this notice. The Commission may issue the license amendment before expiration of the 60-day period provided that its final determination is that the amendment involves no significant hazards consideration. In addition, the Commission may issue the amendment prior to the expiration of the 30-day comment period should circumstances change during the 30-day comment period such that failure to act in a timely way would result, for example in derating or shutdown of the facility. Should the Commission take action prior to the expiration of either the comment period or the notice period, it will publish in the **Federal Register** a notice of issuance. Should the Commission make a final No Significant Hazards Consideration Determination, any hearing will take place after issuance. The Commission expects that the need to take this action will occur very infrequently.

Written comments may be submitted by mail to the Chief, Rules and Directives Branch, Division of Administrative Services, Office of Administration, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, and should cite the publication date and page number of this **Federal Register** notice. Written comments may also be delivered to Room 6D59, Two White Flint North, 11545 Rockville Pike, Rockville, Maryland, from 7:30 a.m. to 4:15 p.m. Federal workdays. 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.

The filing of requests for hearing and petitions for leave to intervene is discussed below.

Within 60 days after the date of publication of this notice, the licensee may file a request for a hearing with respect to issuance of the amendment to the subject facility operating license and any person whose interest may be affected by this proceeding and who wishes to participate as a party in the proceeding must file a written request for a hearing and a petition for leave to intervene. Requests for a hearing and a petition for leave to intervene shall be filed in accordance with the Commission's ''Rules of Practice for Domestic Licensing Proceedings'' in 10 CFR Part 2. Interested persons should consult a current copy of 10 CFR 2.309, which is available at the Commission's PDR, located at One White Flint North, Public File Area O1F21, 11555 Rockville Pike (first floor), Rockville, Maryland. Publicly available records will be accessible from the Agencywide Documents Access and Management System's (ADAMS) Public Electronic Reading Room on the Internet at the NRC Web site, *http://www.nrc.gov/reading-rm/doc-collections/cfr/.* If a request for a hearing or petition for leave to intervene is filed by the above date, the Commission or a presiding officer designated by the Commission or by the Chief Administrative Judge of the Atomic Safety and Licensing Board Panel, will rule on the request and/or petition; and the Secretary or the Chief Administrative Judge of the Atomic Safety and Licensing Board will issue a notice of a hearing or an appropriate order.

As required by 10 CFR 2.309, a petition for leave to intervene shall set forth with particularity the interest of the petitioner in the proceeding, and how that interest may be affected by the results of the proceeding. The petition should specifically explain the reasons why intervention should be permitted with particular reference to the following general requirements: (1) The name, address and telephone number of the requestor or petitioner; (2) the nature of the requestor's/petitioner's right under the Act to be made a party to the proceeding; (3) the nature and extent of the requestor's/petitioner's property, financial, or other interest in the proceeding; and (4) the possible effect of any decision or order which may be entered in the proceeding on the requestor's/petitioner's interest. The petition must also identify the specific contentions which the petitioner/requestor seeks to have litigated at the proceeding.

Each contention must consist of a specific statement of the issue of law or fact to be raised or controverted. In addition, the petitioner/requestor shall provide a brief explanation of the bases for the contention and a concise statement of the alleged facts or expert opinion which support the contention and on which the petitioner intends to rely in proving the contention at the hearing. The petitioner/requestor must also provide references to those specific sources and documents of which the petitioner is aware and on which the petitioner intends to rely to establish those facts or expert opinion. The petition must include sufficient information to show that a genuine dispute exists with the applicant on a material issue of law or fact. Contentions shall be limited to matters within the scope of the amendment under consideration. The contention must be one which, if proven, would entitle the petitioner to relief. A petitioner/requestor who fails to satisfy these requirements with respect to at least one contention will not be permitted to participate as a party.

Those permitted to intervene become parties to the proceeding, subject to any limitations in the order granting leave to intervene, and have the opportunity to participate fully in the conduct of the hearing.

If a hearing is requested, the Commission will make a final determination on the issue of no significant hazards consideration. The final determination will serve to decide when the hearing is held. If the final determination is that the amendment request involves no significant hazards consideration, the Commission may issue the amendment and make it immediately effective, notwithstanding the request for a hearing. Any hearing held would take place after issuance of the amendment. If the final determination is that the amendment request involves a significant hazards consideration, any hearing held would take place before the issuance of any amendment.

Nontimely requests and/or petitions and contentions will not be entertained absent a determination by the Commission or the presiding officer of the Atomic Safety and Licensing Board that the petition, request and/or the contentions should be granted based on a balancing of the factors specified in 10 CFR 2.309(c)(1)(i)–(viii).

A request for a hearing or a petition for leave to intervene must be filed by: (1) First class mail addressed to the Office of the Secretary of the Commission, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, Attention: Rulemaking and Adjudications Staff; (2) courier, express mail, and expedited delivery services: Office of the Secretary, Sixteenth Floor, One White Flint North, 11555 Rockville Pike, Rockville, Maryland, 20852, Attention: Rulemaking and Adjudications Staff; (3) E-mail addressed to the Office of the Secretary, U.S. Nuclear Regulatory Commission, *HEARINGDOCKET@NRC.GOV;* or (4) facsimile transmission addressed to the Office of the Secretary, U.S. Nuclear Regulatory Commission, Washington, DC, Attention: Rulemakings and Adjudications Staff at (301) 415–1101, verification number is (301) 415–1966. A copy of the request for hearing and petition for leave to intervene should also be sent to the Office of the General Counsel, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, and it is requested that copies be transmitted either by means of facsimile transmission to 301–415–3725 or by email to *OGCMailCenter@nrc.gov.* A copy of the request for hearing and petition for leave to intervene should also be sent to Bradley D. Jackson, Esq., Foley and Lardner, P.O. Box 1497, Madison, WI 53701–1497, attorney for the licensee.

For further details with respect to this action, see the application for amendment dated May 5, 2005, which is available for public inspection at the Commission's PDR, located at One White Flint North, File Public Area O1 F21, 11555 Rockville Pike (first floor), Rockville, Maryland. Publicly available records will be accessible from the Agencywide Documents Access and Management System's (ADAMS) Public Electronic Reading Room on the Internet at the NRC Web site, *http://www.nrc.gov/reading-rm/adams.html.* 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, 301–415–4737, or by e-mail to *pdr@nrc.gov.*

Dated at Rockville, Maryland, this 9th day of May, 2005.

Carl F. Lyon,

Project Manager, Section 1 Project Directorate III , Division of Licensing Project Management, Office of Nuclear Reactor Regulation.

[FR Doc. E5–2378 Filed 5–12–05; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

[Docket Nos. 50–266 & 50–301]

Nuclear Management Company, LLC; Notice of Consideration of Issuance of Amendment to Facility Operating License and Opportunity for a Hearing

The U.S. Nuclear Regulatory Commission (the Commission) is considering issuance of an amendment to Facility Operating License Nos. DPR–24 and DPR–27, issued to Nuclear Management Company, LLC (NMC or the licensee), for operation of the Point Beach Nuclear Plant (PBNP), Units 1 and 2 located in Two Rivers, WI.

The proposed amendment would alter the PBNP Final Safety Analysis Report (FSAR) to include a reactor vessel head drop event.

Before issuance of the proposed license amendment, the Commission will have made findings required by the Atomic Energy Act of 1954, as amended (the Act), and the Commission's regulations.

Within 60 days after the date of publication of this notice, the licensee may file a request for a hearing with respect to issuance of the amendment to the subject facility operating license and any person whose interest may be affected by this proceeding and who wishes to participate as a party in the proceeding must file a written request for a hearing and a petition for leave to intervene. Requests for a hearing and a petition for leave to intervene shall be filed in accordance with the Commission's ''Rules of Practice for Domestic Licensing Proceedings'' in 10 CFR part 2. Interested persons should consult a current copy of 10 CFR 2.309, which is available at the Commission's PDR, located at One White Flint North, Public File Area 01F21, 11555 Rockville Pike (first floor), Rockville, Maryland. Publicly available records will be accessible from the Agencywide Documents Access and Management System's (ADAMS) Public Electronic Reading Room on the Internet at the NRC Web site, *http://www.nrc.gov/reading-rm/doc-collections/cfr/.* If a request for a hearing or petition for leave to intervene is filed by the above date, the Commission or a presiding officer designated by the Commission or by the Chief Administrative Judge of the Atomic Safety and Licensing Board Panel, will rule on the request and/or petition; and the Secretary or the Chief Administrative Judge of the Atomic Safety and Licensing Board will issue a notice of a hearing or an appropriate order.

As required by 10 CFR 2.309, a petition for leave to intervene shall set forth with particularity the interest of the petitioner/requestor in the proceeding, and how that interest may be affected by the results of the proceeding. The petition should specifically explain the reasons why intervention should be permitted with particular reference to the following general requirements: (1) The name, address and telephone number of the requestor or petitioner; (2) the nature of the requestor's/petitioner's right under the Act to be made a party to the proceeding; (3) the nature and extent of the requestor's/petitioner's property, financial, or other interest in the proceeding; and (4) the possible effect of any decision or order which may be entered in the proceeding on the requestor's/petitioner's interest. The petition must also identify the specific contentions which the petitioner/requestor seeks to have litigated at the proceeding.

Each contention must consist of a specific statement of the issue of law or fact to be raised or controverted. In addition, the petitioner/requestor shall provide a brief explanation of the bases for the contention and a concise statement of the alleged facts or expert opinion which support the contention and on which the petitioner intends to rely in proving the contention at the hearing. The petitioner must also provide references to those specific sources and documents of which the petitioner is aware and on which the petitioner intends to rely to establish those facts or expert opinion. The petition must include sufficient information to show that a genuine dispute exists with the applicant on a material issue of law or fact. Contentions shall be limited to matters within the scope of the amendment under consideration. The contention must be one which, if proven, would entitle the petitioner/requestor to relief. A petitioner/requestor who fails to satisfy these requirements with respect to at least one contention will not be permitted to participate as a party.

Those permitted to intervene become parties to the proceeding, subject to any limitations in the order granting leave to intervene, and have the opportunity to

participate fully in the conduct of the hearing.

Nontimely requests and/or petitions and contentions will not be entertained absent a determination by the Commission or the presiding officer of the Atomic Safety and Licensing Board that the petition, request and/or the contentions should be granted based on a balancing of the factors specified in 10 CFR 2.309(a)(1)(i)–(viii).

A request for a hearing or a petition for leave to intervene must be filed by: (1) First class mail addressed to the Office of the Secretary of the Commission, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, Attention: Rulemaking and Adjudications Staff; (2) courier, express mail, and expedited delivery services: Office of the Secretary, Sixteenth Floor, One White Flint North, 11555 Rockville Pike, Rockville, Maryland 20852, Attention: Rulemaking and Adjudications Staff; (3) E-mail addressed to the Office of the Secretary, U.S. Nuclear Regulatory Commission, *HEARINGDOCKET@NRC.GOV;* or (4) facsimile transmission addressed to the Office of the Secretary, U.S. Nuclear Regulatory Commission, Washington, DC, Attention: Rulemakings and Adjudications Staff at (301) 415–1101, verification number is (301) 415–1966. A copy of the request for hearing and petition for leave to intervene should also be sent to the Office of the General Counsel, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, and it is requested that copies be transmitted either by means of facsimile transmission to 301–415–3725 or by e-mail to *OGCMailCenter@nrc.gov.* A copy of the request for hearing and petition for leave to intervene should also be sent to Jonathan Rogoff, Esquire, Vice President, Counsel & Secretary, Nuclear Management Company, LLC, 700 First Street, Hudson, WI 54016, attorney for the licensee.

For further details with respect to this action, see the application for amendment dated April 29, 2005, which is available for public inspection at the Commission's 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 System's (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, 301–415–4737, or by e-mail to *pdr@nrc.gov.*

Dated at Rockville, Maryland, this 9th day of May 2005.

For the Nuclear Regulatory Commission.

Harold K. Chernoff,

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NUCLEAR REGULATORY COMMISSION

Proposed Generic Communication; Clarification of Post-Fire Safe-Shutdown Circuit Regulatory Requirements

AGENCY: Nuclear Regulatory Commission.

ACTION: Notice of opportunity for public comment.

SUMMARY: The U.S. Nuclear Regulatory Commission (NRC) is proposing to issue a regulatory information summary (RIS) to clarify regulatory requirement issues associated with post-fire safe-shutdown circuit analyses and protection, particularly the requirements of Title 10 of the Code of Federal Regulations, Part 50 (10 CFR 50), Appendix R, which have been interpreted by licensees in a manner that is not consistent with regulatory expectations. The industry and NRC regional inspectors have requested clarification of regulatory expectations with respect to post-fire safe-shutdown circuits. In addition, clarification of these requirements will assist licensees in evaluating the transition to a risk-informed, performance-based fire protection program.

Three terms are to be addressed in this RIS: ''any-and-all'' (with respect to spurious actuations), ''associated circuits,'' and ''emergency control station.'' Clarification of the term ''one-at-a-time'' (with respect to spurious actuations) will be provided in a separate generic communication. For each term addressed, this RIS identifies the applicable NRC regulatory requirement, provides the regulatory expectation with respect to the requirement, and specifies one acceptable approach to achieving regulatory compliance.

Attachment 1 to this RIS provides additional discussion that explains the basis for the regulatory expectations, including a discussion of the various ways in which each term or phrase has been interpreted by stakeholders.

This RIS also gives the staff's views on the use of Nuclear Energy Institute (NEI) guidance document NEI 00–01, ''Guidance for Post-Fire Safe Shutdown Circuit Analysis,'' Revision 1 (ML050310295), in complying with Appendix R. The deterministic methodology presented in NEI 00–01, in conjunction with the guidance in this RIS, is one acceptable approach to achieving regulatory compliance with post-fire safe-shutdown circuit protection requirements. Note that RIS 2004–03, Revision 1, ''Risk-Informed Approach for Post-Fire Safe-Shutdown Circuit Inspections'' (ML042440791) provides guidance on conducting risk-informed circuit inspections, whereas this RIS clarifies the regulatory requirements for compliance with Appendix R.

This **Federal Register** notice is available through the NRC's Agencywide Documents Access and Management System (ADAMS) under accession number ML051110160.

DATES: Comment period expires July 12, 2005. Comments submitted after this date will be considered if it is practical to do so, but assurance of consideration cannot be given except for comments received on or before this date.

ADDRESSES: Submit written comments to the Chief, Rules and Directives Branch, Division of Administrative Services, Office of Administration, U.S. Nuclear Regulatory Commission, Mail Stop T6–D59, Washington, DC 20555–0001, and cite the publication date and page number of this **Federal Register** notice. Written comments may also be delivered to NRC Headquarters, 11545 Rockville Pike (Room T–6D59), Rockville, Maryland, between 7:30 am and 4:15 pm on Federal workdays.

FOR FURTHER INFORMATION, CONTACT: Robert F. Radlinski at 301–415–3174 or by email *rfr1@nrc.gov,* Chandu Patel at 301–415–3025 or email *cpp@nrc.gov,* or Sunil Weerakkody at 301–415–2870 or by email at *sdw1@nrc.gov.*

SUPPLEMENTARY INFORMATION:

NRC Regulatory Issue Summary 2005–XX; Clarification of Post-Fire Safe-Shutdown Circuit Regulatory Requirements

Addressees

All holders of operating licenses for nuclear power reactors, except those who have permanently ceased operations and have certified that fuel has been permanently removed from the reactor vessel.

Intent

The U.S. Nuclear Regulatory Commission (NRC) is issuing this

regulatory issue summary (RIS) to clarify regulatory requirement issues associated with post-fire safe-shutdown circuit analyses and protection, particularly the requirements of Title 10 of the Code of Federal Regulations, Part 50 (10 CFR 50), Appendix R, which have been interpreted by licensees in a manner that is not consistent with regulatory expectations.

The industry and NRC regional inspectors have requested clarification of regulatory expectations with respect to post-fire safe-shutdown circuits. In addition, clarification of these requirements will assist licensees in evaluating the transition to a risk-informed performance-based fire protection program.

Three terms are to be addressed in this RIS: ''any-and-all'' (with respect to spurious actuations), ''associated circuits,'' and ''emergency control station.'' Clarification of the term ''one-at-a-time'' (with respect to spurious actuations) will be provided in a separate generic communication. For each term addressed, this RIS identifies the applicable NRC regulatory requirement, provides the regulatory expectation with respect to the requirement, and specifies one acceptable approach to achieving regulatory compliance.

Attachment 1 to this RIS provides additional discussion that explains the basis for the regulatory expectations, including a discussion of the various ways in which each term or phrase has been interpreted by stakeholders.

This RIS also gives the staff's views on the use of Nuclear Energy Institute (NEI) guidance document NEI 00–01, ''Guidance for Post-Fire Safe Shutdown Circuit Analysis,'' Revision 1 (ML050310295), in complying with Appendix R. The deterministic methodology presented in NEI 00–01, in conjunction with the guidance in this RIS, is one acceptable approach to achieving regulatory compliance with post-fire safe-shutdown circuit protection requirements. Note that RIS 2004–03, Revision 1, ''Risk-Informed Approach for Post-Fire Safe-Shutdown Circuit Inspections'' (ML042440791) provides guidance on conducting risk-informed circuit inspections, whereas this RIS clarifies the regulatory requirements for compliance with Appendix R.

This RIS requires no action or written response on the part of an addressee.

Background Information

The regulatory requirements regarding post-fire safe shutdown are contained in 10 CFR 50.48 and 10 CFR Part 50, Appendix A, General Design Criterion (GDC) 3. Additionally, all nuclear power plants (NPPs) licensed to operate prior to January 1, 1979, are required to comply with 10 CFR Part 50, Appendix R, Section III.G, ''Fire Protection of Safe Shutdown Capability.'' All NPPs licensed to operate after January 1, 1979, were evaluated against Section 9.5.1 of NUREG–0800, Standard Review Plan (SRP). All NPP licensees are responsible for meeting fire protection and license condition commitments made during the establishment of their fire protection program.

The objective of the fire protection requirements and guidance is to provide reasonable assurance that one train of systems necessary to achieve and maintain hot shutdown is free of fire damage. This includes protecting circuits whose fire-induced failure could prevent the operation, or cause maloperation, of equipment necessary to achieve and maintain post-fire safe-shutdown. As part of its fire protection program, each licensee performs a circuit analysis to identify these circuits and to provide adequate protection against fire-induced failures. Beginning in 1997, the NRC staff noticed that a series of licensee event reports (LERs) identified plant-specific problems related to potential fire-induced electrical circuit failures that could prevent operation or cause maloperation of equipment necessary to achieve and maintain hot shutdown. The staff documented these problems in Information Notice 99–17, ''Problems Associated With Post-Fire Safe-Shutdown Circuit Analysis.'' Based on the number of similar LERs, the NRC treated the issue generically. In 1998, the NRC staff started to interact with interested stakeholders in an attempt to understand the problem and develop an effective risk-informed solution to the circuit analysis issue. NRC also issued Enforcement Guidance Memorandum (EGM) 98–002, Revision 2 (ML003710123), to provide a process for treating inspection findings while the issues were being clarified. Due to the number of different stakeholder interpretations of the regulations, the NRC decided to temporarily suspend the associated circuit portion of fire protection inspections. This decision is documented in an NRC memorandum from John Hannon to Gary Holahan dated November 29, 2000 (ML003773142). In 2001 the Electric Power Research Institute (EPRI) and NEI performed a series of cable functionality fire tests to further the nuclear industry's knowledge about the nature and characteristics of fire-induced circuit failures, particularly the potential for spurious equipment actuations initiated by hot shorts. The Electric Power Research Institute (EPRI) coordinated this effort and issued the final report, ''Spurious Actuation of Electrical Circuits Due to Cable Fires: Results of an Expert Elicitation'' (Report No. 1006961, May 2002).[1] The results of the testing were considered in the preparation of NEI 00–01.

Over the past 5 years, the industry and the staff have worked together to gain a better understanding of possible and probable modes of circuit failures. This work has included numerous meetings and facilitated public workshops. Based on this work the staff has identified circuit configurations that are likely to fail in the event of a fire and circuit configurations that have little or no likelihood of failing. The results of this work are reflected in RIS 2004–03 and in the revised inspection procedures. Inspection of fire-induced safe-shutdown circuits was resumed in January 2005.

The issues clarified in this RIS were discussed in an NRC public meeting on October 14, 2004, in Atlanta, GA (Summary of October 2004 Public Meeting on Fire Protection in Atlanta, ML043290020). The clarifications in this RIS have considered the comments provided by stakeholders during the October meeting and subsequent to the meeting.

Summary of Issue

Although the NRC has issued a number of guidance documents to assist licensees in assuring compliance with fire protection requirements, certain terms related to post-fire safe-shutdown circuit analysis have been interpreted differently by stakeholders or in a manner inconsistent with our regulatory expectations/requirements. In accordance with SECY–99–143, ''Revisions to Generic Communication Program,'' dated May 26, 1999 (ML992850037), the staff believes that a RIS is the appropriate regulatory vehicle to address this need for additional clarification. This RIS clarifies terms related to post-fire safe-shutdown circuits to help a licensee understand the staff's expectations with respect to regulatory requirements.

The variety of interpretations of the terms addressed in this RIS is due in part to the previous lack of knowledge regarding the potential for certain types of circuit failure mechanisms. The cable fire tests performed by EPRI/NEI

[1] Additional analysis of the EPRI/NEI test results can be found in NUREG/CR–6776, ''Cable Insulation Resistance Measurements Made During Cable Fire Tests,'' which can be accessed on the NRC's public Web site.

significantly increased the body of knowledge available to the industry and the NRC with respect to fire-induced circuit failures and their potential to cause spurious actuations that could impact post-fire safe shutdown. The staff positions presented in this RIS are justified based on the potential safety significance of these issues and on compliance with the current regulations applicable to these circuits. The staff positions are also consistent with the National Fire Protection Association (NFPA) industry consensus standard NFPA 805, ''Performance-Based Standard for Fire Protection for Light Water Reactor Electric Generating Plants,'' 2001 Edition, as they relate to deterministic-based fire protection program features.

The positions presented in this RIS describe the bases for compliance with the current deterministic regulations applicable to post-fire safe-shutdown circuits. With the issuance of 10 CFR 50.48(c), licensees have the alternative of adopting a fire protection licensing basis which allows the use of risk-informed, performance-based methods to address program features that do not comply with the deterministic regulations. In accordance with 10 CFR 50.12 and 10 CFR 50.90, licensees may also submit exemption requests or license amendment requests for NRC's consideration where deviations from the regulatory requirements can be adequately justified for a plant-specific condition.

The deterministic methodology in NEI 00–01, Chapter 3, for analysis of post-fire safe-shutdown circuits, in conjunction with the guidance provided in this RIS, is one acceptable approach to achieving regulatory compliance with post-fire safe-shutdown circuit protection requirements. The risk significance analysis methodology provided in Chapter 4 of NEI 00–01 should not be applied as a basis for regulatory compliance except where an NFPA 805 licensing basis has been adopted in accordance with 10 CFR 50.48(c). Risk-informed or performance-based methodologies which use the methods and information provided in NEI 00–01 (*e.g.*, Chapter 4 and Appendix B–1) may also be used to support exemption requests for plants that have not adopted an NFPA 805 licensing basis. Furthermore, regardless of the plant licensing basis, the NRC endorses the NEI 00–01 guidance that ''all failures deemed to be risk significant, whether they are clearly compliance issues or not, should be placed in the plant Corrective Action Program with an appropriate priority for action.'' The remaining sections of NEI 00–01 provide acceptable circuit analysis guidance on both the deterministic approach and the risk-informed, performance-based approach.

The phrase ''one-at-a-time,'' as used to characterize fire-induced hot shorts that cause spurious actuations that could impact safe shutdown has been interpreted in a number of different ways. However, since the staff position on the regulatory basis for this phrase may be considered a new staff position by some stakeholders, the staff position on this phrase will be handled in a separate generic communication.

Three terms are to be addressed in this RIS: ''any-and-all'' (with respect to spurious actuations), ''associated circuits,'' and ''emergency control station.'' The discussion for each term includes a summary description of the regulatory requirement, a statement of the NRC staff position and a method to achieve compliance. A more detailed discussion of the staff's positions is contained in the Attachment.

Any-and-All

A. NRC Regulatory Requirement—Paragraph III.G.2 of Appendix R states that ''cables or equipment, including associated non-safety circuits that could prevent operation or cause maloperation due to hot shorts, open circuits, or shorts to ground, of redundant trains of systems necessary to achieve and maintain hot shutdown conditions'' must be protected.

B. NRC Staff Position—The requirement to protect against ''any-and-all'' spurious actuations is implicit in Paragraph III.G.2. Post-fire safe-shutdown circuit analyses should address any-and-all possible failures and combinations of multiple failures caused by spurious actuations resulting from fire-induced circuit failures in redundant systems in areas in which the failures could impact safe shutdown (III.G.2 areas).

The requirement to protect against ''any-and-all'' possible failures includes, for example, the requirement to protect against a possible failure of a motor operated valve as a result of a fire-induced spurious signal that could override the valve motor's protective features, causing valve failure, where such fire-induced valve damage could impair the capability to shut down the plant and maintain it in a safe-shutdown condition.

C. Method To Achieve Compliance—The staff position described above with respect to the term ''any-and-all'' is consistent with the circuit analysis approach described in NEI 00–01, Revision 1. The deterministic methodology presented in Chapter 3 and Appendix B of NEI 00–01, in conjunction with the guidance provided in this RIS, is one acceptable approach to achieving regulatory compliance with respect to the application of the term ''any-and-all.''

Further discussion of the staff's position on this issue is contained in the Attachment.

Associated Circuits

A. NRC Regulatory Requirement—Appendix R, Section III.G.2, states: ''Except as provided for in paragraph G.3 of this section, where cables or equipment, including associated non-safety circuits that could prevent operation or cause maloperation due to hot shorts, open circuits, or shorts to ground, of redundant trains of systems necessary to achieve and maintain hot shutdown conditions are located within the same fire area outside of primary containment, one of the following means of ensuring that one of the redundant trains is free of fire damage shall be provided * * *''

B. NRC Staff Position—Any-and-all cables that could cause maloperation of redundant trains in a III.G.2 area due to fire-induced hot shorts must be protected. Unless approved by the NRC, post-fire safe-shutdown circuit analyses may not credit operator manual actions (under current regulations for plants that have not adopted an NFPA 805 licensing basis) for protection against spurious actuations caused by fire-induced failure of circuits associated with a redundant safe shutdown train located in a III.G.2 area.

The requirement to protect ''associated'' circuits includes a requirement to protect against circuits that are themselves not directly required to perform safe-shutdown function but which could cause a spurious actuation that could impact safe shutdown. Therefore, operator manual actions may not be credited for such circuits.

C. Method To Achieve Compliance—The deterministic methodology presented in Chapter 3 and Appendix B of NEI 00–01, in conjunction with the guidance provided in this RIS, is one acceptable approach to achieving regulatory compliance with respect to the application of the term ''associated circuit''. The NEI 00–01 approach to identifying circuits that must be protected and to protecting those circuits is consistent with the NRC position on this issue.

Further discussion of the staff's position on this issue is contained in the Attachment.

Emergency Control Station

A. NRC Regulatory Requirement—10 CFR Part 50, Appendix R, Section I, ''Introduction and Scope,'' states: ''One train of equipment necessary to achieve hot shutdown from either the control room or emergency control station(s) must be maintained free of fire damage by a single fire, including an exposure fire.'' Paragraph III.G.1.a of Appendix R also refers to emergency control stations.

B. NRC Staff Position—III.G.1 protection for redundant safe-shutdown systems may not be claimed for redundant systems in a III.G.2 area by crediting an operator manual action at an emergency control station. Unless alternative or dedicated shutdown capability is provided, redundant circuits credited for post-fire safe shutdown and located in the same fire area must be protected in accordance with III.G.2 without the use of emergency control stations of any kind.

C. Method To Achieve Compliance—The deterministic methodology presented in Chapter 3 and Appendix B of NEI 00–01, in conjunction with the guidance provided in this RIS, is one acceptable approach to achieving regulatory compliance with respect to the application of the term ''emergency control station.'' NEI 00–01 refers to the regulations, the plant licensing basis, and NRC approvals for guidance on this issue. The NEI guidance document also includes the NRC position on this issue without commenting on the position.

Further discussion of the staff's position on this issue is contained in the Attachment.

Backfit Discussion

Some inspectors have not challenged alternative licensee interpretations of the regulatory requirements mentioned in this RIS. However, as stated in NUREG–1409, ''Backfitting Guidelines,'' if a determination is made that action is needed to bring the licensee back into compliance with the regulations, no backfit analysis is required. Section 3.3(1) of NUREG–1409 states that ''simply not challenging a licensee's practice would not be considered tacit approval.'' Since this RIS does not change any staff position on the terms addressed herein and does not require an action or written response from licensees, this RIS is not a backfit under 10 CFR 50.109. Consequently, the staff did not perform a backfit analysis.

Federal Register Notification

The subject matter of this RIS was discussed on October 14, 2004, at a public meeting in Atlanta, Georgia. Stakeholder feedback was considered in developing the final version of this RIS.

In addition, a notice of opportunity for public comment on this RIS will be published in the **Federal Register**.

Small Business Regulatory Enforcement Fairness Act of 1996

In accordance with the Small Business Regulatory Enforcement Fairness Act of 1996, the NRC has determined that this action is not a major rule and has verified this determination with the Office of Information and Regulatory Affairs of OMB.

Paperwork Reduction Act Statement

This RIS does not contain information collections and, therefore, is not subject to the requirements of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*).

Contact

Please direct any questions about this matter to the technical contact(s) or the Lead Project Manager listed below, or to the appropriate Office of Nuclear Reactor Regulation (NRR) project manager.

Patrick L. Hilland, Chief, Reactor Operations Branch, Division of Inspection Program Management, Office of Nuclear Reactor Regulation.

Technical Contact: Bob Radlinski, NRR/DSSA/SPLB, 301–415–3174. E-mail: *rfr1@nrc.gov.*

Lead Project Manager: Chandu Patel, NRR/DLPM, 301–415–3025. E-mail: *CPP@nrc.gov.*

Note: NRC generic communications may be found on the NRC public Web site, *http://www.nrc.gov,* under Electronic Reading Room/Document Collections.

Attachment 1—Discussion of Regulatory Expectations Post-Fire Safe-Shutdown Circuit Analysis

The following discussion provides the background of each of the terms that have been clarified by the RIS. This background discussion identifies the various interpretations that have been applied to the terms and notes the regulatory position and the basis for that position for each interpretation.

Any-and-All

Appendix R, paragraph III.G.2, does not identify any exceptions to the type of post-fire safe-shutdown circuit failures that must be protected against in accordance with III.G.2. However, Generic Letter 86–10 (response to Question 5.3.1) describes two specific exceptions to the circuit evaluation requirement of ''all possible functional failure states.'' These two exceptions are (1) three-phase hot shorts in proper sequence and (2) more than two hot shorts of the proper polarity in ungrounded DC circuits (the response does not allow either of these exceptions to be applied to high/low pressure interfaces). Since these two exceptions were not characterized in GL 86–10 as examples of exceptions, they are the only exceptions allowed by GL 86–10 to the type of post-fire safe-shutdown circuit failures that must be protected against in accordance with III.G.2. Furthermore, it is generally agreed that for a deterministic approach to fire protection, such as that required by Appendix R, a fire is assumed to damage all circuits and equipment in the fire area under consideration. Therefore, any-and-all other post-fire safe-shutdown circuits must be protected in accordance with III.G.2 (unless an alternative or dedicated shutdown system is provided in accordance with III.G.3).

One industry challenge to the ''any-and-all'' scope of circuit failures defined by Appendix R and GL 86–10 was presented to the NRC in a letter from R.E. Beedle of NEI dated January 14, 1997, to F.J. Miraglia, Jr. of the NRC and in a letter from D.J. Modeen of NEI dated May 30, 1997, to L. B. Marsh of the NRC. These letters were in response to Information Notice 92–18, ''Potential for Loss of Remote Shutdown Capability During a Control Room Fire'' (IN 92–18). The letters stated the industry's position on the possible failure of motor operated valves as a result of a fire-induced spurious signal that could override the valve motor's protective features, causing valve failure. Although the industry agreed that IN 92–18 describes a credible failure and that some licensees had addressed this failure mechanism in response to IN 92–18, the industry's position on this type of failure is that it is highly improbable and does not warrant consideration.

The NRC position on this issue, as noted in IN 92–18, is that such fire-induced valve damage could impair the capability to shut down the plant and maintain it in a safe-shutdown condition. In addition, in Regulatory Guide 1.106, ''Thermal Overload Protection for Electric Motors on Motor-Operated Valves'' (RG 1.106), the staff had stated that if thermal overload protection devices are bypassed, it is important to ensure that the bypassing does not jeopardize the completion of the safety function or degrade other safety systems because of any sustained abnormal circuit currents that may be present.

Following the January 14, 1997, letter from NEI, a public meeting was held on

February 7, 1997, in which the NRC staff discussed with NEI the questions and comments in NEI's letter. Following the meeting, an NRC letter was sent from S.J. Collins dated March 11, 1997, to R.E. Beedle of NEI to further document and clarify the NRC's position on this issue. During the meeting and in the followup letter the staff stated that the safety issue addressed in IN 92–18 does not represent a new staff position and is within the scope of the existing fire protection regulation. Consequently, fire-induced failure, whether direct (failure to perform a safe-shutdown function) or indirect (maloperation that impacts safe shutdown), of a motor-operated valve that is required for post-fire safe shutdown must be addressed. The May 30, 1997, letter response from NEI did not result in a change to the NRC's original position. The second NEI letter also questioned whether the potential risk is applicable to fires in areas other than the control room since IN 92–18 identified a potential failure resulting from a control room fire. Regulatory requirements do not identify any exceptions for fires in other areas of the plant. Consequently, if the mechanistic failure of a motor-operated valve, as described in IN 92–18, can be caused by the fire-induced failure of an electrical circuit and prevent safe shutdown, the circuit must be protected. Where a licensee can make a case that this type of failure is possible but not safety significant in a specific fire area, the licensee can apply for an exemption or adopt a licensing basis in accordance with 10 CFR 50.48(c) and address the issue in accordance with this rule.

Associated Circuits

The Appendix R requirement to protect circuits from the effects of fire does not exempt any type of circuits and specifically mentions nonsafety circuits to emphasize that all circuits whose fire-induced failure could prevent safe shutdown must be protected from the effects of fire, even nonsafety circuits. The term ''associated circuit'' has been used to identify circuits that are not directly required to perform a safe-shutdown function (*e.g.*, the control circuit cable to a pump suction valve that is normally in the correct position for post-fire shutdown) but must also not cause a spurious actuation that could impact safe shutdown. However, no distinction is made in Appendix R between circuits whose failure could directly affect safe shutdown and those whose failure could indirectly affect safe shutdown (*e.g.*, by causing spurious actuations).

Note that the term ''associated circuits'' has a different connotation in Regulatory Guide 1.75, ''Criteria for Independence of Electrical Safety Systems,'' than it does for fire protection. Regulatory Guide 1.75 defines ''associated circuits'' as ''non-safety-related circuits that are not physically separated or not electrically isolated from safety-related circuits by acceptable separation distance, safety class structures, barriers, or isolation devices.'' The ''associated circuits'' in Appendix R include both safety-related and non-safety-related circuits. Post-fire safe-shutdown capability is distinctly different from, and credits operability of different equipment than the safety-related equipment required for emergency shutdown of a nuclear power plant. In 1981, the NRC issued Generic Letter (GL) 81–12, ''Fire Protection Rule'' (45 FR 76602, November 19, 1980), to clarify and provide guidance on alternative and dedicated shutdown systems. Enclosure 2 of GL 81–12 gives the following definition of associated circuits (called ''associated circuits of concern'') as they relate to alternative and dedicated shutdown systems: ''In evaluating alternative shutdown methods, associated circuits are circuits that could prevent operation or cause maloperation of the alternative train which is used to achieve and maintain hot shutdown condition due to fire induced hot shorts, open circuits or shorts to ground.'' The NRC provided additional guidance on alternative and dedicated shutdown systems in a followup memorandum of March 22, 1982, from R.J. Mattson to Darrell G. Eisenhut (ML050140137). This memorandum, which was made publically available, defined associated circuits of concern as follows:

Associated Circuits of Concern are defined as those cables (safety related, non-safety related, Class 1E, and non-Class 1E) that:

1. Have a physical separation less than that required by Section III.G.2 of Appendix R, and;

2. Have one of the following:

a. A common power source with the shutdown equipment (redundant or alternative) and the power source is not electrically protected from the circuit of concern by coordinated breakers, fuses, or similar devices, or

b. A connection to circuits of equipment whose spurious operation would adversely affect the shutdown capability (*e.g.,* RHR/RCS isolation valves, ADS valves, PORVs, steam generator atmospheric dump valves, instrumentation, steam bypass, etc.), or

c. A common enclosure (*e.g.,* raceway, panel, junction) with the shutdown cables (redundant and alternative) and,

(1) Are not electrically protected by circuit breakers, fuses or similar devices, or

(2) Will allow propagation of the fire into the common enclosure.

As noted above, these definitions of associated circuits were presented in the context of alternative and dedicated shutdown systems and apply to the specific categories of circuits specified in the definitions. The industry has also used the term ''associated'' to refer to a larger category of circuits that includes all post-fire safe-shutdown circuits that have the potential to cause spurious operations that could prevent or adversely affect safe shutdown. This broader definition of associated circuits has caused confusion about the protection required for post-fire safe-shutdown circuits.

The Mattson/Eisenhut memorandum of March 1982 and Regulatory Guide 1.189, ''Fire Protection for Operating Nuclear Power Plants,'' noted acceptable methods for mitigating spurious actuations, including operator manual actions. However, these methods are only applicable to alternative and dedicated shutdown systems and they do not comply with regulations for protection of post-fire safe-shutdown circuits in III.G.2 areas. The NRC has specifically noted in correspondence with licensees that ''it is essential to remember that these alternative requirements (*i.e.,* III.G.3 and III.L) are not deemed to be equivalent * * *'' to III.G.2 protection. The examples of equipment identified in the above definition belong to a specific category of systems and components that does not include redundant shutdown components and systems.

Redundant safe-shutdown systems are defined in the response to Question 3.8.3 in GL 86–10 as follows: ''If the system is being used to provide its design function, it generally is considered redundant. If the system is being used in lieu of the preferred system because the redundant components of the preferred system do not meet the separation criteria of paragraph III.G.2, the system is considered an alternative shutdown capability.'' The GL 81–12 definition of associated circuits specifically refers to both redundant and alternative shutdown trains with respect to circuits associated by common enclosures and common power supplies (2.a and 2.c above), but does not mention redundant systems with respect to circuits associated by spurious actuation (2.b above). The examples given in GL 81–

12 for components that could spuriously actuate and affect the safe-shutdown capability are not components of normal redundant safe-shutdown systems (the RHR/RCS isolation valves are in a normal redundant safe-shutdown system, but the post-fire function of these valves is to prevent a loss-of-coolant accident). These components were included in the definition as possible alternative shutdown components.

The response to Question 5.3.8 of GL 86–10 allows operators to clear multiple high-impedance faults by manual breaker trips governed by written procedures. This question and response apply to a unique set of circuits associated with redundant safe-shutdown systems by virtue of having a common power supply where multiple high impedance faults could cause a loss of that power supply to the safe-shutdown equipment. The response references III.G.2 areas and allows operator manual action to mitigate the fault. Some licensees have interpreted this response to imply that the regulations allow them to credit operator manual actions in III.G.2 areas for any associated circuit, including circuits whose failure could cause spurious actuations. However, multiple high-impedance faults are not the same as spurious actuation faults. Consequently, this response does not provide a basis for crediting operator manual actions for mitigation of spurious actuations.

The reference to III.G.2 in the GL 86–10 Question 5.3.8 response is recognition that a high-impendence fault could affect a redundant shutdown train located in a III.G.2 area and does not imply that manual actions may be credited in these areas for other types of faults. It is also important to note that the questions and responses in GL 86–10 are under the heading Alternative and Dedicated Shutdown Capability. Therefore it is not appropriate to apply the guidance provided by this response to the protection of spurious actuation circuit faults for redundant safe-shutdown systems in III.G.2 areas of the plant.

The staff position on associated circuits presented in this RIS is consistent with Section 9.5.1 of the SRP, which distinguishes between ''associated circuits'' and ''associated circuits of concern'' by giving a separate definition for each. Associated circuits are defined as ''circuits within a fire area that may be subject to fire damage that can affect or prevent post-fire safe shutdown capability.'' Associated circuits of concern are defined as ''those cables (safety-related, non-safety-related Class 1E and non-Class 1E) that do not meet fire separation requirements and have (1) a common power source with the safe shutdown equipment, (2) a connection to circuits for equipment whose spurious operation could adversely affect safe shutdown, or (3) a common enclosure with safe shutdown circuits.'' This section of the SRP also states: ''Manual actions may not be credited in lieu of providing the required separation of redundant systems or associated circuits located in the same fire area unless alternate, dedicated, or backup shutdown capability is provided.''

To summarize, circuits that are associated with the operation of credited redundant post-fire safe-shutdown systems in accordance with III.G.2 such as ''cables or equipment, including associated non-safety circuits that could prevent operation or cause maloperation due to hot shorts, open circuits, or shorts to ground, of redundant trains of systems necessary to achieve and maintain hot shutdown conditions'' must be protected in accordance with III.G.2 and operator manual actions may not be credited for III.G.2 redundant train circuits under regulations for plants that have not adopted an NFPA 805 licensing basis (except through staff-approved exemptions for specific manual actions). This staff position was reiterated in a May 16, 2002, NRC letter from J. N. Hannon to A. Marion of NEI (ML021410026). Committee To Review Generic Requirements (CRGR) Meeting Minutes No. 367 (ML021750218) noted that this letter does not contain any new staff positions.

This staff position is also supported by the results of the EPRI/NEI fire testing. The distinction between associated circuits and other safe-shutdown circuits has been used as a basis for addressing hot shorts and spurious actuations that could prevent safe shutdown by crediting operator manual actions to maintain redundant safe-shutdown trains free of fire damage. The tests demonstrated that operator manual actions may not be practical or possible for the required mitigation between multiple spurious actuations since there may not be sufficient time to take action.

To clarify this issue for all stakeholders, future NRC documentation related to post-fire safe-shutdown circuits will not distinguish between associated circuits and other post-fire safe-shutdown circuits, except for alternative and dedicated shutdown systems as defined by GL 81–12. RIS 2004–03, ''Risk-Informed Approach for Post-Fire Safe-Shutdown Associated Circuit Inspections'' (ML040620400), has been revised and reissued as RIS 2004–03, Revision 1, ''Risk-Informed Approach for Post-Fire Safe-Shutdown Circuit Inspections'' (ML042440791), to eliminate this distinction in inspection guidance. NFPA 805 uses a similar approach, noting that any circuit whose function or absence of malfunction, including circuits whose failure can cause a spurious actuation, is required for safe shutdown and should be protected from fire.

Emergency Control Station

The term ''emergency control station'' has not been clearly defined and it has not been used consistently by the industry. The term was most recently defined in Regulatory Guide 1.189 as a ''location outside the main control room where actions are taken by operations personnel to manipulate plant systems and controls to achieve safe shutdown of the reactor.'' However, this definition does not tell what type of hardware is considered an emergency control station, a control panel with multiple functions or a single device such as a valve or breaker. The definition also does not indicate the number of emergency control stations that are considered reasonable and acceptable to maintain a single train free of fire damage.

Since Appendix R did not require post-fire protection of automatic functioning of systems, manual actions may be credited to maintain a train free of fire damage in accordance with III.G.1, as noted in an NRC memorandum of July 2, 1982, from R. J. Mattson to R. H. Vollmer (ML050140106). This memorandum, which was made public, notes that for III.G.1 areas, ''manual operation of valves, switches and circuit breakers is allowed to operate equipment and isolate systems and is not considered a repair.'' This allowance for manual operation of individual devices for III.G.1 areas has led to the interpretation that emergency control stations include individual valves, switches, and circuit breakers.

The interpretation of emergency control station to include individual devices has been used by some licensees as a basis for substituting operator manual actions for the protection of redundant safe-shutdown trains located in the same fire area. This industry position is that if operator manual actions can restore a post-fire safe-shutdown train to a free-of-fire-damage condition, the criteria for a III.G.1 level of protection have been met and therefore even where redundant trains are located in the same fire area, the

protection requirements of III.G.2 are not applicable. During an NRC internal meeting on May 7, 1986, to discuss SECY–85–306, ''Appendix R, Post-Fire Safe Shutdown'' (ML050140123), one staff member voiced this industry position. In that meeting, the NRC Office of the Executive Legal Director (now Office of General Counsel) confirmed that the line of reasoning proposed is only applicable to licensees that have requested and received an exemption, as this position does not meet regulatory requirements. These meeting minutes later became publicly available.

The requirements of paragraph III.G.1 are not independent of the requirements of paragraph III.G.2 and the requirements are not necessarily progressive. Paragraph III.G.2 states: ''Except as provided for in paragraph G.3 of this section, where cables or equipment, including associated non-safety circuits that could prevent operation or cause maloperation due to hot shorts, open circuits, or shorts to ground, of redundant trains of systems necessary to achieve and maintain hot shutdown conditions are located within the same fire area outside of primary containment, one of the following means of ensuring that one of the redundant trains is free of fire damage shall be provided: * * *'' Consequently, unless alternative or dedicated shutdown capability is provided, redundant circuits credited for post-fire safe shutdown and located in the same fire area must be protected in accordance with III.G.2 without the use of emergency control stations of any kind. The regulatory requirement to provide either III.G.2 or III.G.3 protection was noted in GL 86–10 (response to Question 5.1.2).

This staff position was reiterated in the May 16, 2002, letter from J. N. Hannon of the NRC to A. Marion of NEI (ML021410026), and Committee To Review Generic Requirements (CRGR) Meeting Minutes No. 367 (ML021750218) noted that this letter does not contain any new staff positions.

This RIS does not give a precise definition of emergency control stations, but clarifies that, under the current regulations, manual actions may not be credited to claim that a III.G.2 area is a III.G.1 area. Where redundant trains are located in the same fire area and where an alternative shutdown capability is not provided, the protection required by III.G.2, including detection and suppression (where noted), must be provided.

The operator manual actions rulemaking currently in process is expected to provide guidance to licensees on using operator manual actions to comply with III.G.2. In addition, licensees may address these issues by adopting a risk-informed, performance-based fire protection program in accordance with NFPA 805 and 10 CFR 50.48(c).

End of Draft Regulatory Issue Summary

Documents may be examined, and/or copied for a fee, at the NRC's Public Document Room at One White Flint North, 11555 Rockville Pike (first floor), Rockville, Maryland. Publicly available records will be accessible electronically from the Agencywide Documents Access and Management System (ADAMS) Public electronic reading room on the internet at the NRC Web site, *http://www.nrc.gov/nrc/adams/index.html*. If you do not have access to adams or if you have problems in accessing the documents in adams, contact the NRC public document room (pdr) reference staff at 1–800–397–4209 or 301–415–4737 or by e-mail to *pdr@nrc.gov*.

Dated at Rockville, Maryland, this 4th day of May 2005.

For the Nuclear Regulatory Commission.

Patrick H. Hiland,

Chief, Reactor Operations Branch, Division of Inspection Program Management, Office of Nuclear Reactor Regulation.

[FR Doc. E5–2377 Filed 5–12–05; 8:45 am]

BILLING CODE 7590–01–P

PENSION BENEFIT GUARANTY CORPORATION

Required Interest Rate Assumption for Determining Variable-Rate Premium; Interest Assumptions for Multiemployer Plan Valuations Following Mass Withdrawal

AGENCY: Pension Benefit Guaranty Corporation.

ACTION: Notice of interest rates and assumptions.

SUMMARY: This notice informs the public of the interest rates and assumptions to be used under certain Pension Benefit Guaranty Corporation regulations. These rates and assumptions are published elsewhere (or can be derived from rates published elsewhere), but are collected and published in this notice for the convenience of the public. Interest rates are also published on the PBGC's Web site *(http://www.pbgc.gov)*.

DATES: The required interest rate for determining the variable-rate premium under part 4006 applies to premium payment years beginning in May 2005. The interest assumptions for performing multiemployer plan valuations following mass withdrawal under part 4281 apply to valuation dates occurring in June 2005.

FOR FURTHER INFORMATION CONTACT: Catherine B. Klion, Attorney, Legislative and Regulatory Department, Pension Benefit Guaranty Corporation, 1200 K Street, NW., Washington, DC 20005, 202–326–4024. (TTY/TDD users may call the Federal relay service toll-free at 1–800–877–8339 and ask to be connected to 202–326–4024.)

SUPPLEMENTARY INFORMATION:

Variable-Rate Premiums

Section 4006(a)(3)(E)(iii)(II) of the Employee Retirement Income Security Act of 1974 (ERISA) and § 4006.4(b)(1) of the PBGC's regulation on Premium Rates (29 CFR part 4006) prescribe use of an assumed interest rate (the ''required interest rate'') in determining a single-employer plan's variable-rate premium. Pursuant to the Pension Funding Equity Act of 2004, for premium payment years beginning in 2004 or 2005, the required interest rate is the ''applicable percentage'' (currently 85 percent) of the annual rate of interest determined by the Secretary of the Treasury on amounts invested conservatively in long-term investment grade corporate bonds for the month preceding the beginning of the plan year for which premiums are being paid. Thus, the required interest rate to be used in determining variable-rate premiums for premium payment years beginning in May 2005 is 4.72 percent (*i.e.*, 85 percent of the 5.55 percent composite corporate bond rate for April 2005 as determined by the Treasury).

The following table lists the required interest rates to be used in determining variable-rate premiums for premium payment years beginning between June 2004 and May 2005.

For premium payment years beginning in:	The required interest rate is:
June 2004	5.26
July 2004	5.25
August 2004	5.10
September 2004	4.95
October 2004	4.79
November 2004	4.73
December 2004	4.75
January 2005	4.73
February 2005	4.66
March 2005	4.56
April 2005	4.78
May 2005	4.72

Multiemployer Plan Valuations Following Mass Withdrawal

The PBGC's regulation on Duties of Plan Sponsor Following Mass Withdrawal (29 CFR part 4281) prescribes the use of interest assumptions under the PBGC's regulation on Allocation of Assets in Single-Employer Plans (29 CFR part 4044). The interest assumptions applicable to valuation dates in June 2005 under part 4044 are contained in an amendment to part 4044 published elsewhere in today's **Federal Register**. Tables showing the assumptions applicable to prior periods are codified in appendix B to 29 CFR part 4044.

Issued in Washington, DC, on this 6th day of May 2005.

Vincent K. Snowbarger,

Deputy Executive Director, Pension Benefit Guaranty Corporation.

[FR Doc. 05–9549 Filed 5–12–05; 8:45 am]

BILLING CODE 7708–01–P

SECURITIES AND EXCHANGE COMMISSION

Sunshine Act Meeting

Notice is hereby given, pursuant to the provisions of the Government in the Sunshine Act, Public Law 94–409, that the Securities and Exchange Commission will hold the following meeting during the week of May 16, 2005:

A Closed Meeting will be held on Tuesday, May 17, 2005 at 10 a.m.

Commissioners, Counsel to the Commissioners, the Secretary to the Commission, and recording secretaries will attend the Closed Meeting. Certain staff members who have an interest in the matters may also be present.

The General Counsel of the Commission, or his designee, has certified that, in his opinion, one or more of the exemptions set forth in 5 U.S.C. 552b(c)(3), (5), (7), (9)(B), and (10) and 17 CFR 200.402(a)(3), (5), (7), 9(ii) and (10), permit consideration of the scheduled matters at the Closed Meeting.

Commissioner Glassman, as duty officer, voted to consider the items listed for the closed meeting in closed session.

The subject matter of the Closed Meeting scheduled for Tuesday, May 17, 2005, will be:

Formal orders of investigations;

Institution and settlement of injunctive actions; and

Institution and settlement of administrative proceedings of an enforcement nature.

At times, changes in Commission priorities require alterations in the scheduling of meeting items.

For further information and to ascertain what, if any, matters have been added, deleted or postponed, please contact: The Office of the Secretary at (202) 942–7070.

Dated: May 10, 2005.

Jonathan G. Katz,

Secretary.

[FR Doc. 05–9678 Filed 5–11–05; 11:15 am]

BILLING CODE 8010–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–51671; File No. SR–Amex–2005–033]

Self-Regulatory Organizations; American Stock Exchange LLC; Notice of Filing of Proposed Rule Change and Amendment No. 1 Thereto To Amend Rule 918—ANTE(a)(4) Regarding Closing Rotations

May 9, 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 March 17, 2005, the American Stock Exchange LLC (''Amex'' 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 Amex. The Amex submitted an amendment to the proposal on April 14, 2005.[3] 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 Amex proposes to amend Rule 918—ANTE (a)(4) to eliminate the requirement that a closing rotation be held in every option series at the end of every trading day. The text of the proposed rule change, as amended, is available on the Amex's Web site (*http://www.amex.com*), at the Amex's Office of the Secretary, and at the Commission's Public Reference Room.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Form 19b–4 dated April 4, 2005 (''Amendment No. 1''). Amendment No. 1 replaced the proposal in its entirety.

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 Amex included statements concerning the purpose of and basis for the proposed rule change, as amended, and discussed any comments it received on the proposed rule change, as amended. The text of these statements may be examined at the places specified in item IV below. The Amex has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

On May 20, 2004, the Commission approved the Amex's proposal to implement a new options trading platform known as the Amex New Trading Environment (''ANTE''). On May 25, 2004, the Amex began rolling out the ANTE System on its trading floor on a specialist's post-by-specialist's post basis. Amex Rule 918—ANTE (a)(4) currently requires an automatic trading rotation to be employed promptly after the close of trading on each trading day for every option series. The automated closing rotation is used to execute at-the-close orders received by the Exchange prior to the close. If no at-the-close orders are received in a particular option series, the ANTE System's automated closing rotation simply closes trading in that series. Orders may be entered, modified or cancelled into the ANTE System up to 4:02 p.m. or 4:15 p.m. for options on Exchange Traded Fund Shares, when the underlying Fund Share ceases trading at 4:15 p.m. Quotes may be submitted up until the commencement of the rotation in such series. The closing rotation may begin once the underlying security has closed.

The Exchange believes that use of the ANTE System during the last eleven months has shown that a closing rotation is not necessary and serves no purpose when no market-on-close or limit-on-close orders have been submitted. Therefore, the Exchange proposes to revise the text of Amex Rule 918—ANTE (a)(4) to provide that closing rotations shall only occur in those option series in which market-on-close and limit-on-close orders have been submitted.

2. Statutory Basis

The Exchange believes that the proposed rule change, as amended, is consistent with section 6(b) of the Act,[4] in general, and furthers the objectives of section 6(b)(5) of the Act,[5] in particular, in that it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest; and is designed to prohibit unfair discrimination between customers, issuers, brokers and dealers.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change, as amended, will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were solicited or received by the Exchange on this proposal, as amended.

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 arguments concerning the foregoing, including whether the proposed rule change, as amended, is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to *rule-comments@sec.gov.* Please include File Number SR–Amex–2005–033 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–Amex–2005–033. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Section, 450 Fifth Street, NW., Washington, DC 20549. Copies of such filing also will be available for inspection and copying at the principal office of the Amex. 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–Amex–2005–033 and should be submitted on or before June 6, 2005.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[6]

Jill M. Peterson,

Assistant Secretary.

[FR Doc. E5–2380 Filed 5–12–05; 8:45 am]

BILLING CODE 8010–01–P

[4] 15 U.S.C. 78f(b).

[5] 15 U.S.C. 78f(b)(5).

[6] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–51675; File No. SR–DTC–2005–03]

Self-Regulatory Organizations; The Depository Trust Company; Notice of Filing of a Proposed Rule Change Relating to the Collection of Fees for Services Provided by Other Entities

May 9, 2005.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] notice is hereby given that on April 26, 2005, The Depository Trust Company (''DTC'') 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 primarily by DTC. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The proposed rule change would amend DTC's rules to allow DTC to collect fees for services provided by unregulated subsidiaries of The Depository Trust and Clearing Corporation (''DTCC'') and by other entities.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, DTC 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. DTC has prepared summaries, set forth in sections (A), (B), and (C) below, of the most significant aspects of such statements.[2]

(A) Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

DTC is a subsidiary of DTCC. Participants of DTC and their affiliates may from time to time utilize the services of DTCC subsidiaries that are not registered as clearing agencies with the Commission. Such subsidiaries include Global Asset Solutions LLC and DTCC Deriv/Serv LLC. In addition,

[1] 15 U.S.C. 78s(b)(1).

[2] The Commission has modified parts of these statements.

participants of DTC and their affiliates may utilize the services of other third parties. DTC has determined that it would be more efficient and less costly if the fees that members agree to pay for such services were collected by DTC rather than through independent billing mechanisms that would otherwise have to be established by each subsidiary of DTCC and third party that is not a registered clearing agency.

DTC's rules currently allow for fee collection arrangements with respect to collection of fees from participants. The proposed rule change would further clarify this practice and facilitate collection of fees with respect to affiliates of participants. DTC will enter into appropriate agreements with such subsidiaries and others regarding the collection of fees.

DTC believes that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder because DTC will implement this service in a manner whereby DTC will be able to assure the safeguarding of securities and funds which are in its custody or control or for which it is responsible.

(B) Self-Regulatory Organization's Statement on Burden on Competition

DTC does not believe that the proposed rule change would have any impact or impose any burden on competition.

(C) Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

Written comments relating to the proposed rule change have not been solicited or received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within thirty-five 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 ninety days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

(a) By order approve the 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 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–DTC–2005–03 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–DTC–2005–03. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site *(http://www.sec.gov/rules/sro.shtml)*. Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Section, 450 Fifth Street, NW., Washington, DC 20549. Copies of such filing also will be available for inspection and copying at the principal office of DTC and on DTC's Web site at *http://www.dtc.com*. 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–DTC–2005–03 and should be submitted on or before June 3, 2005. For the Commission by the Division of Market Regulation, pursuant to delegated authority.[3]

Jill M. Peterson,

Assistant Secretary.

[FR Doc. E5–2376 Filed 5–12–05; 8:45 am]

BILLING CODE 8010–01–P

[3] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–51666; File No. SR–ISE–2003–07]

Self-Regulatory Organizations; International Securities Exchange, Inc.; Order Approving Proposed Rule Change and Amendment No. 1 Thereto and Order Granting Accelerated Approval of Amendment Nos. 2, 3, 4, and 5 Thereto Relating to the Pricing of Block and Facilitation Trades

May 9, 2005.

I. Introduction

On February 25, 2003, the International Securities Exchange, Inc. (''ISE'' 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 provide for the entry and execution of block and facilitation trades at the midpoint between the standard trading increments. On December 18, 2003, the ISE amended the proposed rule change. The proposed rule change, as amended by Amendment No. 1, was published for comment in the **Federal Register** on January 20, 2004.[3]

The Commission received two comment letters in response to the proposed rule change, which were submitted by the Boston Stock Exchange and its wholly-owned subsidiary, Boston Options Exchange Regulation (collectively, ''BSE''),[4] and the Chicago Board Options Exchange, Incorporated (''CBOE'').[5] The ISE submitted a letter in response to the BSE Letter on March 4, 2004.[6] Also, on March 4, 2004, the ISE filed Amendment No. 2 to the proposed rule change.[7] On March 24, 2004, the

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 49056 (January 12, 2004), 69 FR 2798.

[4] *See* Letter from Glenn Verdi, Chief Regulatory Officer, Boston Options Exchange Regulation, to Jonathan G. Katz, Secretary, Commission, dated February 26, 2004 (''BSE Letter'').

[5] *See* E-mail from Steve Youhn, CBOE, to Elizabeth King, Associate Director, Division of Market Regulation (''Division''), Commission, and Ira Brandriss, Assistant Director, Division, Commission, dated April 26, 2005 (''CBOE Letter'').

[6] *See* Letter from Michael J. Simon, Senior Vice President and General Counsel, ISE, to Jonathan G. Katz, Secretary, Commission, dated March 4, 2004.

[7] In Amendment No. 2, the ISE revised the text of the proposed rule change to remove language relating to the ISE's Solicited Order Mechanism. This language, however, was reinserted in Amendment No. 4 because the Commission had approved the ISE's Solicited Order Mechanism. *See* Securities Exchange Act Release No. 49943 (June 30, 2004), 69 FR 41317 (July 8, 2004) (SR–ISE–2001–22).

ISE filed Amendment No. 3 to the proposed rule change.[8] On April 18, 2005, the ISE filed Amendment No. 4 to the proposed rule change.[9] On May 4, 2005, the ISE filed Amendment No. 5 to the proposed rule change.[10] This order approves the proposed rule change, as amended, grants accelerated approval to Amendment Nos. 2, 3, 4, and 5 and solicits comments from interested persons on Amendment Nos. 2, 3, 4, and 5.

II. Description of the Proposed Rule Change

The proposed rule change would permit the ISE to execute and report block, facilitation, and solicited order trades through its Block Order, Facilitation, and Solicited Order Mechanisms at prices that are at the midpoint between the standard $.05 and $.10 trading increments (''Split Prices''), *i.e.*, in $.025 increments for options with a standard minimum trading increment of $.05 (*e.g.*, $1.025, $1.05, $1.075, etc.) and in $.05 increments for options with a standard minimum trading increment of $.10 (*e.g.*, $4.05, $4.10, $4.15, etc.). The proposal would permit members to enter both public customer and broker-dealer orders into the Block Order, Facilitation, and Solicited Order Mechanisms at Split Prices. As is the case under the ISE's current rules, upon the entry of an order into the Block Order, Facilitation, and Solicited Order Mechanisms, a broadcast message is sent. The proposed rule change, however, would expand the members who receive such broadcast messages to include all members, not just market makers appointed to an options class and other members with proprietary orders at the inside bid or offer for a particular series. In addition, the proposal would permit members to enter ''Responses'' [11] to a broadcast message at Split Prices. Finally, while the ISE's current rules only permit members to indicate whether they want to participate in the facilitation of an order at the facilitation price or a price no better than the ISE's best bid or offer, the proposed rule change would permit members to enter Responses that improve the ISE's best bid or offer. The proposed rule change also would bar executions of orders of between 50 and 499 contracts through the Block Order and Facilitation Mechanisms at prices inferior to the national best bid or offer at the time of execution. Orders executed at a Split Price would be reported to the Options Price Reporting Authority (''OPRA'') and cleared by The Options Clearing Corporation (''OCC'') at the Split Price.

III. Discussion

After careful consideration of the proposed rule change, the BSE Letter, the CBOE Letter, and the ISE's response to the BSE Letter, 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.[12] In particular, the Commission believes that the proposed rule change is consistent with Section 6(b)(5) of the Act,[13] which requires, among other things, that the Exchange's rules be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and in general, to protect investors and the public interest.

A. Participation in Block Order, Facilitation, and Solicited Order Mechanisms

Currently ISE Rule 716 provides that only market makers appointed to an options class and other members with proprietary orders at the inside bid or offer for a particular series (''Crowd Participants'') receive notifications of orders entered into the Block Order, Facilitation, and Solicited Order Mechanisms, and only Crowd Participants may enter Responses to such orders. The proposal would expand the universe of market participants who would receive notification of an order entered into the Block Order, Facilitation, or Solicited Order Mechanism to all ISE members. The proposal also would expand the universe of market participants who could enter Responses into the Block Order, Facilitation, or Solicited Order Mechanism to all market participants, other than Responses for the account of an options market maker from another options exchange.[14]

The BSE Letter commented that the proposal is unclear as to how the ISE defines an ''options market maker from another options exchange.'' Further, the BSE Letter contends that if the ISE is referring to the unit that acts as a market maker on another options exchange, the proposal is unfairly discriminatory against BOX market makers. The CBOE Letter similarly contends that this aspect of the proposal is discriminatory. In its response, the ISE clarified that the ''account of an options market maker on another exchange'' is the options market maker account of a member at OCC. Thus, the limitation in Supplementary Material .03 does not restrict members from entering Responses with respect to any other firm proprietary accounts.

The Commission believes that the ISE's proposal to expand those ISE members who can enter Responses into the Block Order, Facilitation, and Solicited Order Mechanisms will improve the opportunities for orders executed in those Mechanisms to receive price improvement. The Commission does not believe that it is unfairly discriminatory for the ISE not to further expand to away options market makers the ability to enter Responses into the Block Order, Facilitation, and Solicited Order Mechanisms.

B. Consistency With Linkage Plan

The BSE Letter expressed concern that the ISE's proposed rule does not require that the EAM's facilitation price be equal to or greater than the ISE best bid or offer or the national best bid or offer and that, therefore, facilitated orders could trade at prices inferior to these on other exchanges, *i.e.*, a trade-through, in contravention of the ISE's obligations under the Linkage Plan. In Amendment No. 4, the ISE revised the proposed rule text to bar executions in the Block Order and Facilitation

[8] In Amendment No. 3, the ISE revised the text of the proposed rule change to delete the phrase ''Public Customer'' from Rule 716(d). The ISE stated that the purpose of this change is to allow Electronic Access Members (''EAMs'') to use ISE's facilitation mechanism to facilitate broker-dealer orders as well as Public Customer orders.

[9] In Amendment No. 4, the ISE added Paragraph .07 to Supplementary Material to ISE Rule 716 to state that orders of 50 to 499 contracts executed through the Block Order and Facilitation Mechanisms will not be executed at prices inferior to the national best bid or offer at the time of execution. Amendment No. 4 also reinstated language removed in Amendment No. 2 that proposes to permit Orders and Responses to be entered into the Solicited Order Mechanism at Split Prices. In addition, Amendment No. 4 expands the group of participants who may enter Responses in to the ISE's Solicited Order Mechanism to all ISE members.

[10] In Amendment No. 5, the ISE explained that Amendment No. 4 reinstated references to the Solicited Order Mechanism removed by Amendment No. 2 to reflect the Commission's approval of the Solicited Order Mechanism. *See* Exchange Act Release No. 49943, *supra* note 7. Amendment No. 5 also explained that Amendment No. 4 revised the Solicited Order Mechanism to expand to all ISE members the group of participants who receive broadcast messages and who may enter Responses and to permit orders to be entered and executed at Split Prices.

[11] A ''Response'' is an electronic message that is sent by a member in response to a broadcast message.

[12] In approving this proposed rule change, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

[13] 15 U.S.C. 78f(b)(5).

[14] *See* Paragraph .03 to Supplementary Material to ISE Rule 716.

Mechanisms of orders of 50 to 499 contracts at prices inferior to the national best bid or offer. Accordingly, the Commission believes the ISE's proposal is now consistent with the Linkage Plan.

In addition, the BSE Letter expressed concern that the ISE's rules do not address how incoming Options Intermarket Linkage orders interact with the Block Order and Facilitation Mechanisms and the orders being submitted to the Mechanisms. The Linkage Plan does not require incoming orders sent to the ISE through the Options Intermarket Linkage to interact with orders submitted to the Mechanisms, and this is not inconsistent with the Options Intermarket Linkage.

C. Trading and Reporting at Non-Standard Increments

The BSE Letter expressed concerns that the ISE's proposal ''is attempting to introduce subpenny trading in the options arena,'' and recommended that the Commission seek additional comment on this issue in light of its proposal ''in new Regulation NMS to eliminate subpenny trading in equities.'' The BSE believes that ''it is inconsistent for the Commission to approve the ISE proposal for subpenny trading while at the same time it seeks to eliminate the practice for the equities market.''

The ISE responded to this comment by reiterating that its proposal would introduce a single price point between the existing $.05 and $.10 trading increments to permit the ISE to achieve what floor-based exchanges currently achieve by executing half of a trade at one standard trading increment and half at one standard trading increment higher, thereby creating an average price for the trade that is at the mid-point between the standard increments. However, the ISE continued, reporting and clearing trades at the actual price, rather than achieving an average price, provides greater transparency to the market.[15] The Commission agrees with this analysis and believes that the ISE's proposal is consistent with the Act. The Commission notes that there are significant differences in the options and stock markets. Most notably, options are not quoted in pennies. Accordingly, the Commission does not agree with the BSE that approving the ISE's proposal is inconsistent with its adoption of a rule to limit subpenny pricing of stocks.

In addition, the BSE Letter commented that the ISE's proposal does not explain how the ISE would report Split Price trades, and expressed concern that OPRA might not be prepared to report Split Price trades. The Commission believes the ISE's proposal is clear that the trades would be reported and cleared at Split Prices. Moreover, the ISE confirmed in its response that OPRA and OCC could process Split Prices.

D. Section 11(a) Under the Exchange Act

The BSE Letter and the CBOE Letter expressed the view that the ISE's Facilitation Mechanism violates Section 11(a) of the Act[16] and Rule 11a1–1(T) thereunder[17] because the EAM is not required to yield to certain non-customer orders. Section 11(a) of the Act prohibits a member of a national securities exchange from effecting transactions on that exchange for its own account, the account of an associated person, or an account over which it or its associated person exercises discretion (collectively, ''covered accounts'') unless an exception applies. In addition to the exceptions set forth in the statute and Rule 11a1–1(T), Rule 11a2–2(T)[18] provides exchange members with an exemption from this prohibition. Known as the ''effect versus execute'' rule, Rule 11a2–2(T) permits an exchange member, subject to certain conditions, to effect transactions for covered accounts by arranging for an unaffiliated member to execute the transactions on the exchange.

To comply with the rule's conditions, a member: (i) Must transmit the order from off the exchange floor; (ii) may not participate in the execution of the transaction once it has been transmitted to the member performing the execution;[19] (iii) may not be affiliated with the executing member; and (iv) with respect to an account over which the member has investment discretion, neither the member nor its associated person may retain any compensation in connection with effecting the transaction except as provided in the rule. The Commission believes that the ISE's Facilitation, Block Order, and Solicited Order Mechanisms satisfy the four conditions of Rule 11A2–2(T).[20] First, all orders are electronically submitted through remote terminals. Second, because a member relinquishes control of its order after it is submitted to the Facilitation, Block Order, and Solicited Order Mechanisms, the member does not receive special or unique trading advantages. Third, although the rule contemplates having an order executed by an exchange member who is not affiliated with the member initiating the order, the Commission recognizes that this requirement is satisfied when automated exchange facilities are used.[21] Finally, to the extent that ISE members rely on Rule 11a2–2(T) for a managed account transaction, they must comply with the limitations on compensation set forth in the rule. Therefore, the Commission believes that the ISE's Facilitation, Block Order, and Solicited Order Mechanisms comply with the requirements of Section 11(a) of the Act and Rule 11a2–2(T) thereunder.

E. Other Issues Raised by Comments

The BSE objected to the fact that if Public Customer bids or offers on the ISE are better than the facilitation price, those Public Customer bids or offers receive the facilitated price, such that the Public Customer receives price improvement rather than the customer order being facilitated. This feature of the ISE's Facilitation Mechanism was previously approved by the Commission

[15] *See supra* note 6.

[16] 15 U.S.C. 78k(a).

[17] 17 CFR 240.11a1–1(T).

[18] 17 CFR 240.11a2–2(T).

[19] The member, however, may participate in clearing and settling the transaction.

[20] The Commission and its staff, on numerous occasions, have considered the application of Rule 11a2–2(T) to electronic trading and order routing systems. See, *e.g.*, Securities Exchange Act Release Nos. 49068 (January 13, 2004) (Order approving the Boston Options Exchange as a facility of the Boston Stock Exchange, Inc.); 44983 (October 25, 2001) (Order approving the Archipelago Exchange as the equities trading facility of PCX Equities Inc.); and 29237 (May 31, 1991) (regarding NYSE's Off-Hours Trading Facility); 15533 (January 29, 1979) (regarding the Amex Post Execution Reporting System, the Amex Switching System, the Intermarket Trading System, the Multiple Dealer Trading Facility of the Cincinnati Stock Exchange, the PCX's Communications and Execution System, and the Phlx's Automated Communications and Execution System); and 14563 (March 14, 1978) (regarding the NYSE's Designated Order Turnaround System). *See also* Letter from Larry E. Bergmann, Senior Associate Director, Division, Commission to Edith Hallahan, Associate General Counsel, Phlx (March 24, 1999) (regarding Phlx's VWAP Trading System); letter from Catherine McGuire, Chief Counsel, Division, Commission, to David E. Rosedahl, PCX (November 30, 1998) (regarding Optimark); and Letter from Brandon Becker, Director, Division, Commission, to George T. Simon, Foley & Lardner (November 30, 1994) (regarding Chicago Match).

[21] In considering the operation of automated execution systems operated by an exchange, the Commission noted that while there is no independent executing exchange member, the execution of an order is automatic once it has been transmitted into the systems. Because the design of these systems ensures that members do not possess any special or unique trading advantages in handling their orders after transmitting them to the exchange, the Commission has stated that executions obtained through these systems satisfy the independent execution requirement of Rule 11a2–2(T). *See* Securities Exchange Act Release No. 15533 (January 29, 1979).

and the Commission continues to believe it is consistent with the Act.[22]

The BSE Letter also expressed concern that the ISE's Facilitation Mechanism contains no prohibition on the cancellation of a facilitation order, which the BSE stated could leave a customer order potentially unexecuted and subject to market risk. The BSE contends that BOX's rules are better because they prohibit cancellation of facilitation orders. The Commission, however, previously found this feature of the ISE's Facilitation Mechanism to be consistent with the Act.[23] Moreover, the Commission notes that Paragraph .01 to Supplementary Material to ISE Rule 716 states, among other things:

> It will be a violation of a Member's duty of best execution to its customer if it were to cancel a facilitation order to avoid execution of the order at a better price. The availability of the Facilitation Mechanism does not alter a Member's best execution duty to get the best price for its customer.

The BSE Letter also commented that the ISE's Facilitation Mechanism does not provide for the dissemination to ISE members of information regarding the price and size of the orders competing with the facilitation order, which the BSE believes restricts potential price improvement. Although the ISE's rules are different than those proposed by the BSE and approved by the Commission, the Commission nevertheless believes the ISE's rules in this regard are consistent with the Act.[24]

In addition, the BSE Letter asked why ''Public Customer Order'' would be replaced by ''order'' in ISE Rule 716(d)(1). The ISE explains in Amendment No. 3 that the purpose of the deletion of the phrase ''Public Customer'' is to allow the use of the Facilitation Mechanism for broker-dealer orders as well as Public Customer orders.[25]

The BSE Letter questioned the reference in the Supplementary Material to ISE Rule 716 to ''Solicited Order'' Mechanism, which at the time the ISE filed its proposal was not part of the ISE's rules. As noted above, Amendment No. 2 addressed this comment by removing the reference to ''Solicited Order'' Mechanism.[26] Amendment No. 4, however, reinserted this language following the Commission's approval of the ISE's Solicited Order Mechanism.[27]

The BSE Letter asked why the proposed rule change would delete the phrase ''on the Exchange'' from ISE Rule 716(d)(3)(i). The ISE represents that the deletion of ''on the Exchange,'' is a technical clarification that will not affect the operation of Rule 716.[28]

The Commission finds good cause for approving Amendment Nos. 2, 3, 4, and 5 to the proposed rule change prior to the thirtieth day after the date of publication of notice of filing thereof in the **Federal Register.** The Commission believes that accelerated approval of Amendment Nos. 2, 3, 4, and 5 is appropriate because it will immediately allow broker-dealer and public customer orders to be executed at Split Prices. Accordingly, the Commission believes that there is good cause, consistent with Section 19(b) of the Act, to approve Amendment Nos. 2, 3, 4, and 5 to the proposed rule change on an accelerated basis.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether Amendment Nos. 2, 3, 4, and 5 are 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–ISE–2003–07 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–ISE–2003–07. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Section, 450 Fifth Street, NW., Washington, DC 20549. Copies of such filing also will be available for inspection and copying at the principal office of the ISE. 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–ISE–2003–07 and should be submitted on or before June 3, 2005.

V. Conclusion

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,[29] that the proposed rule change (SR–ISE–2003–07) and Amendment No. 1 thereto are hereby approved and that Amendment Nos. 2, 3, 4, and 5 thereto are hereby approved on an accelerated basis.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[30]

Jill M. Peterson,

Assistant Secretary.

[FR Doc. E5–2381 Filed 5–12–05; 8:45 am]

BILLING CODE 8010–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–51669; File No. SR–NSCC–2004–09]

Self-Regulatory Organizations; National Securities Clearing Corporation; Order Approving Proposed Rule Change To Establish a Comprehensive Standard of Care and Limitation of Liability to Its Members

May 9, 2005.

I. Introduction

On December 8, 2004, the National Securities Clearing Corporation (''NSCC'') filed with the Securities and Exchange Commission (''Commission'') proposed rule change SR–NSCC–2004–09 pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'').[1] Notice of the proposal was

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[22] *See* Securities Exchange Act Release No. 42455 (February 24, 2000), 65 FR 11388 (March 2, 2000) (File No. 10–127) (order approving the application of the ISE for registration as a national securities exchange) at 11397.

[23] *Id.* at 11398.

[24] *Id.* at 11397.

[25] *See* supra note 8.

[26] *See* supra note 7.

[27] *See* supra notes 9 and 10.

[28] Telephone conversation between Katherine Simmons, Vice President and Associate General Counsel, ISE, and Theodore R. Lazo, Senior Special Counsel, Division, Commission (March 22, 2004).

[29] 15 U.S.C. 78s(b)(2).

[30] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

published in the **Federal Register** on April 6, 2005.[2] No comment letters were received. For the reasons discussed below, the Commission is approving the proposed rule change.

II. Description

NSCC is establishing a comprehensive standard of care and limitation of liability with respect to its members. Historically, the Commission has left to user-governed clearing agencies the question of how to allocate losses associated with, among other things, clearing agency functions.[3] The Commission has reviewed clearing agency services on a case-by-case basis and in determining the appropriate standard of care has balanced the need for a high degree of clearing agency care with the effect the resulting liabilities may have on clearing agency operations, costs, and safekeeping of securities and funds.[4] Because standards of care represent an allocation of rights and liabilities between a clearing agency and its members, which are generally sophisticated financial entities, the Commission has refrained from establishing a unique federal standard of care and generally has allowed clearing agencies and other self-regulatory organizations and their members to establish their own standards of care.[5] In addition, the Commission has recognized that a gross negligence standard of care is appropriate for certain noncustodial functions where a clearing agency, its board of directors, and its members determine to allocate risk to individual service users.[6]

NSCC believes that adopting a uniform rule[7] limiting NSCC's liability to its members to direct losses caused by NSCC's gross negligence, willful misconduct, or violation of Federal securities laws for which there is a private right of action will: (1) Memorialize an appropriate commercial standard of care that will protect NSCC from undue liability;[8] (2) permit the resources of NSCC to be appropriately utilized for promoting the accurate clearance and settlement of securities; and (3) will be consistent with similar rules adopted by other self-regulatory organizations and approved by the Commission.[9]

III. Discussion

Section 19(b) of the Act directs the Commission to approve a proposed rule change of a self-regulatory organization if it finds that such proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to such organization. Section 17A(b)(3)(F) of the Act requires that the rules of a clearing agency be designed to assure the safeguarding of securities and funds which are in its custody or control.[10] The Commission believes that NSCC's rule change is consistent with this Section because it will permit the resources of NSCC to be appropriately utilized to protect funds and assets.

Although the Act does not specify the standard of care that must be exercised by registered clearing agencies, the Commission has determined that a gross negligence standard of care is acceptable for noncustodial functions where a clearing agency and its participants contractually agree to limit the liability of the clearing agency.[11] NSCC's

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[2] Securities Exchange Act Release No. 51458 (March 31, 2005), 70 FR 17494.

[3] Securities Exchange Act Release Nos. 20221 (September 23, 1983), 48 FR 45167 and 22940 (February 24, 1986), 51 FR 7169.

[4] *Id.*

[5] *Id.*

[6] Securities Exchange Act Release No. 26154 (October 3, 1988), 53 FR 39556. NSCC's services provided to members are noncustodial in that, other than clearing fund deposits, it does not hold its members funds or securities.

[7] New Section 2 of Rule 58 states:

SEC. 2. Notwithstanding any other provision in the Rules:

(a) The Corporation will not be liable for any action taken, or any delay or failure to take any action, hereunder or otherwise to fulfill the Corporation's obligations to its Members including Settling Members, Settling Bank Only Members, Municipal Comparison Only Members, Insurance Carrier Members, TPA Members, Mutual Fund/Insurance Services Members, Non-Clearing Members, Fund Members and Data Services Only Members, other than for losses caused directly by the Corporation's gross negligence, willful misconduct, or violation of Federal securities laws for which there is a private right of action. Under no circumstances will the Corporation be liable for the acts, delays, omissions, bankruptcy, or insolvency, of any third party, including, without limitation, any depository, custodian, sub-custodian, clearing or settlement system, transfer agent, registrar, data communication service or delivery service (''Third Party''), unless the Corporation was grossly negligent, engaged in willful misconduct, or in violation of Federal securities laws for which there is a private right of action in selecting such Third Party.

(b) Under no circumstances will the Corporation be liable for any indirect, consequential, incidental, special, punitive or exemplary loss or damage (including, but not limited to, loss of business, loss of profits, trading losses, loss of opportunity and loss of use) howsoever suffered or incurred, regardless of whether the Corporation has been advised of the possibility of such damages or whether such damages otherwise could have been foreseen or prevented.

(c) With respect to instructions given to the Corporation by a Special Representative/Index Recipient Agent, the Corporation shall have no responsibility or liability for any errors which may occur in the course of transmissions or recording of any transmissions or which may exist in any magnetic tape, document or other media so delivered to the Corporation.

(d) With respect to the Corporation's distribution facilities, the Corporation assumes no responsibility whatever for the form or content of any tickets, checks, papers, documents or other material (other than items prepared by it) placed in the boxes in its distribution facilities assigned to each Settling Member, Municipal Comparison Only Member, Insurance Carrier Member, TPA Member, Fund Member and Data Services Only Member, or otherwise handled by the Corporation; nor does the Corporation assume any responsibility for any improper or unauthorized removal from such boxes or from the Corporation's facilities of any such tickets, checks, papers, documents or other material, including items prepared by the Corporation.

(e) With respect to Fund/Serv transactions, the Corporation will not be responsible for the completeness or accuracy of any transaction or instruction received from or transmitted to a Settling Member, Data Services Only Member, TPA Member, TPA Settling Entity, Mutual Fund Processor or Fund Member through Fund/Serv, nor for any errors, omissions or delays which may occur in the transmission of a transaction or instruction to or from a Settling Member, Data Services Only Member, TPA Member, TPA Settling Entity, Mutual Fund Processor or Fund Member.

(f) The Corporation will not be responsible for the completeness or accuracy of any IPS Data and Repository Data received from or transmitted to an Insurance Carrier Member, Member or Data Services Only Member through IPS nor for any errors, omissions or delays which may occur in the transmission of such IPS Data and Repository Data to or from an Insurance Carrier Member, or Data Services Only Member.

[8] NSCC has always operated under a gross negligence standard of care and both internal and external counsel have consistently advised members that this is the case. NSCC is seeking to eliminate any confusion due to the absence of a clear standard set forth in its rules and to memorialize its historical practice. In addition, NSCC has in effect a service agreement with the Fixed Income Clearing Corporation (''FICC'') pursuant to which FICC provides services for NSCC's fixed income products. This service agreement provides for a gross negligence standard of care. In the absence of this new rule, NSCC could be in the position of having to pay for losses caused by FICC that are not recoverable under the agreement.

[9] *See, e.g.*, Securities Exchange Act Release Nos. 37421 (July 11, 1996), 61 FR 37513 [File No. SR–CBOE–96–02]; 37563 (August 14, 1996), 61 FR 43285 [File No. SR–PSE–96–21]; 48201 (July 21, 2003), 68 FR 44128 [File No. SR–GSCC–2002–10]; and 49373 (March 8, 2004), 69 FR 11921 [File No. SR–FICC–2003–09].

[10] 15 U.S.C. 78q–1(b)(3)(F).

[11] In the release setting forth standards that would be used by the Division of Market Regulation in evaluating clearing agency registration applications, the Division of Market Regulation urged clearing agencies to embrace a strict standard of care in safeguarding participants' funds and securities. Securities Exchange Act Release No. 16900 (June 17, 1980), 45 FR 4192. In the release granting permanent registration to The Depository Trust Company, the National Securities Clearing Corporation, and several other clearing agencies, however, the Commission indicated that it did not believe that sufficient justification existed at that time to require a unique Federal standard of care for registered clearing agencies. Securities Exchange Act Release No. 20221 (October 3, 1983), 48 FR 45167. In a subsequent release, the Commission stated that the clearing agency standard of care and the allocation of rights and liabilities between a clearing agency and its participants applicable to clearing agency services generally may be set by the clearing agency and its participants. In the same release, the Commission stated that it should review clearing agency proposed rule changes in this area on a case-by-case basis and balance the need for a

Continued

functions are noncustodial in that it does not hold its members' funds or securities. It is reasonable for NSCC, which is member-owned and governed, and its members to agree through board approval of the proposed rule change and to contract with one another in a cooperative arrangement as to how to allocate NSCC's liability among NSCC and its members. Therefore, the Commission has determined that given the noncustodial nature of NSCC's services, a gross negligence standard of care and limitation of liability is allowable for NSCC.[12]

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, that the proposed rule change (File No. SR–NSCC–2004–09) be and hereby is approved.

For the Commission by the Division of Market Regulation, pursuant to delegated authority.[13]

Jill Peterson,

Assistant Secretary.

[FR Doc. E5–2374 Filed 5–12–05; 8:45 am]

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high degree of clearing agency care with the effect resulting liabilities may have on clearing agency operations, costs, and safeguarding of securities and funds. Securities Exchange Act Release No. 22940 (February 24, 1986), 51 FR 7169. Subsequently, in a release granting temporary registration as a clearing agency to The Intermarket Clearing Corporation, the Commission stated that a gross negligence standard of care may be appropriate for certain noncustodial functions that, consistent with minimizing risk mutualization, a clearing agency, its board of directors, and its members determine to allocate to individual service users. Securities Exchange Act Release No. 26154 (October 3, 1988), 53 FR 39556. Finally, in a release granting the approval of temporary registration as a clearing agency to the International Securities Clearing Corporation, the Commission indicated that historically it has left to user-governed clearing agencies the question of how to allocate losses associated with noncustodial, data processing, clearing agency functions and has approved clearing agency services embodying a gross-negligence standard of care. Securities Exchange Act Release No. 26812 (May 12, 1989), 54 FR 21691.

[12] The Commission notes that the rule change does not alleviate NSCC from liability for violation of the Federal securities laws where there exists a private right of action and therefore is not designed to adversely affect NSCC's compliance with the Federal securities laws and private rights of action that exist for violations of the Federal securities laws.

[13] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–51674; File No. SR–NSCC–2005–03]

Self-Regulatory Organizations; National Securities Clearing Corporation; Notice of Filing of a Proposed Rule Change Relating to the Collecting of Fees for Services Provided by Other Entities

May 9, 2005.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] notice is hereby given that on April 26, 2005, National Securities Clearing Corporation (''NSCC'') 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 primarily by NSCC. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The proposed rule change would amend NSCC's rules to allow NSCC to collect fees for services provided by unregulated subsidiaries of The Depository Trust and Clearing Corporation (''DTCC'') and by other entities.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, NSCC 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. NSCC has prepared summaries, set forth in sections (A), (B), and (C) below, of the most significant aspects of such statements.[2]

(A) Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

NSCC is a subsidiary of DTCC. Members of NSCC and their affiliates may from time to time utilize the services of DTCC subsidiaries that are not registered as clearing agencies with the Commission. Such subsidiaries include Global Asset Solutions LLC and DTCC Deriv/Serv LLC. In addition, members of NSCC and their affiliates may utilize the services of other third parties. NSCC has determined that it would be more efficient and less costly if the fees that members agree to pay for such services were collected by NSCC rather than through independent billing mechanisms that would otherwise have to be established by each subsidiary of DTCC and third party that is not a registered clearing agency.

NSCC's rules currently allow for fee collection arrangements with respect to collection of fees from members. The proposed rule change would further clarify this practice and facilitate collection of fees with respect to affiliates of members. NSCC will enter into appropriate agreements with such subsidiaries and others regarding the collection of fees.

NSCC believes that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder because NSCC will implement the service in a manner whereby NSCC will be able to assure the safeguarding of securities and funds which are in its custody or control or for which it is responsible.

(B) Self-Regulatory Organization's Statement on Burden on Competition

NSCC does not believe that the proposed rule change would have any impact or impose any burden on competition.

(C) Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

Written comments relating to the proposed rule change have not been solicited or received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within thirty-five 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 ninety days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

(a) By order approve the proposed rule change or

(b) Institute proceedings to determine whether the proposed rule change should be disapproved.

[1] 15 U.S.C. 78s(b)(1).

[2] The Commission has modified parts of these statements.

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–NSCC–2005–03 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–NSCC–2005–03. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Section, 450 Fifth Street, NW., Washington, DC 20549. Copies of such filing also will be available for inspection and copying at the principal office of NSCC and on NSCC's Web site at *http://www.nscc.com*. 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–NSCC–2005–03 and should be submitted on or before June 3, 2005.

For the Commission by the Division of Market Regulation, pursuant to delegated authority.[3]

Jill M. Peterson,

Assistant Secretary.

[FR Doc. E5–2375 Filed 5–12–05; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–51665; File No. SR–NYSE–2005–23]

Self-Regulatory Organizations; New York Stock Exchange, Inc.; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Seek Permanent Approval of the Pilot Relating to the Allocation Policy for Trading of Exchange-Traded Funds on an Unlisted Trading Privileges Basis (NYSE Rule 103B)

May 6, 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 March 29, 2005, the New York Stock Exchange, Inc. (''NYSE'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in items I and II below, which items have been prepared by the NYSE. The proposed rule change has been filed by the NYSE as a ''non-controversial'' rule change under Rule 19b–4(f)(6) under the Act,[3] which renders the proposal effective upon filing with the Commission.[4] The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The proposed rule change seeks to adopt on a permanent basis the pilot program relating to the allocation policy for trading certain Exchange-Traded Funds (''ETFs''), which has been codified in NYSE Rule 103B, section VIII. This policy applies to ETFs which are traded on an Unlisted Trading Privileges Basis (''UTP''). The pilot is set to expire on May 8, 2005. For purposes of the allocation policy, ETFs include both Investment Company Units (as defined in paragraph 703.16 of the Listed Company Manual) and Trust Issued Receipts (as defined in Rule 1200). The text of the proposed rule change is below. Proposed new language is *italicized*.

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Rule 103B Specialist Stock Allocation

I–VII. No Changes

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VIII. Policy for Allocation of Exchange Traded Funds Admitted To Trading on the Exchange on an Unlisted Trading Privileges Basis

Investment Company Units (as defined in paragraph 703.16 of the Listed Company Manual) and Trust Issued Receipts (as defined in Exchange Rule 1200) (collectively known as Exchange-Traded Funds) (''ETFs'') admitted to trading on the Exchange on an unlisted trading privileges basis shall be allocated pursuant to this Policy rather than the Exchange's policy for allocating securities to be listed on the Exchange.

ETFs shall be allocated by a special committee consisting of the Chairman of the Allocation Committee, the three most senior Floor broker members of the Allocation Committee, and four members of the Exchange's senior management as designated by the Chief Executive Officer of the Exchange. This committee shall solicit allocation applications from interested specialist units, and shall review the same performance and disciplinary material with respect to specialist unit applicants as would be reviewed by the Allocation Committee in allocating listed stocks. The committee shall reach its decisions by majority vote with any tie votes being decided by the Chief Executive Officer of the Exchange. Specialist unit applicants may appear before the committee.

Special Criteria

In their allocation applications, specialist units must demonstrate:

(a) An understanding of the trading characteristics of ETFs;

(b) Expertise in the trading of derivatively-priced instruments;

(c) Ability and willingness to engage in hedging activity as appropriate;

(d) Knowledge of other markets in which the ETF to be allocated trades;

(e) Willingness to provide financial and other support to Exchange marketing and educational initiatives with respect to the ETF to be allocated.

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[3] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 17 CFR 240.19b–4(f)(6).

[4] Rule 19b–4(f)(6) under the Act requires the NYSE to provide the Commission with five business days notice of its intention to file a non-controversial proposed rule change. The NYSE did not provide such notice but requested that the Commission waive the notice requirement. The NYSE also requested that the Commission waive the 30-day operative delay. *See* Rule 19b–4(f)(6)(iii) under the Act. 17 CFR 240.19b–4(f)(6)(iii).

Allocation Freeze Policy

The Allocation Freeze Policy as stated in the Allocation Policy for listed stocks shall apply.

Prohibition on Functioning as Specialist in ETF and Specialist in any Component Security of the ETF

No specialist member organization may apply to be allocated an ETF if it is registered as specialist in any security which is a component of the ETF. A specialist member organization which is registered as specialist in a component stock of an ETF may establish a separate member organization which may apply to be the specialist in an ETF. The approved persons of such ETF specialist member organization must obtain an exemption from specified specialist rules pursuant to Rule 98.

If, subsequent to an ETF being allocated to a specialist member organization, a security in which the specialist member organization is registered as specialist becomes a component security of such ETF, the specialist organization must (i) withdraw its registration as specialist in the security which is a component of the ETF; (ii) withdraw its registration as specialist in the ETF; or (iii) establish a separate specialist member organization, which will be registered as specialist in the ETF and whose approved persons have received an exemption from specified specialist rules pursuant to Rule 98.

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II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the NYSE included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposal. The text of these statements may be examined at the places specified in item IV below. The NYSE has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange seeks permanent approval for the pilot relating to the allocation policy for trading ETFs on a UTP basis, as codified in NYSE Rule 103B,[5] Section VIII. This proposed rule change was originally filed as a one-year pilot in SR–NYSE–2001–07[6] and Amendment No. 1 thereto, and subsequently amended by SR–NYSE–2001–10[7] and SR–NYSE–2002–07[8]. The pilot was subsequently extended for an additional three years and is due to expire on May 8, 2005.[9]

Allocation Policy for ETFs Trading Under UTP

The purpose of the Exchange's current Allocation Policy and Procedures (the ''Policy'') is: (1) Ensure that the allocation process is based on fairness and consistency and that all specialist units have a fair opportunity for allocations based on established criteria and procedures; (2) provide an incentive for ongoing enhancement of performance by specialist units; (3) provide the best possible match between specialist unit and security; and (4) contribute to the strength of the specialist system.

The Allocation Committee has sole responsibility for the allocation of securities to specialist units under this policy pursuant to authority delegated by the Board of Directors. The Allocation Committee renders decisions based on the allocation criteria specified in this policy.[10]

In deciding to trade ETFs on a UTP basis, the Exchange considered it appropriate to modify the listed equities allocation process to provide that such ETFs be allocated by a special committee, consisting of the Chairman of the Allocation Committee, the three most senior Floor broker members on the Allocation Committee, and four members of the Exchange's senior management as designated by the Chief Executive Officer of the Exchange. This permitted Exchange management, acting with designated members of the Allocation Committee, to oversee directly the introduction of the UTP concept to the NYSE. For purposes of the Allocation Policy, ETFs collectively include Investment Company Units (as defined in paragraph 703.16 of the Listed Company Manual) and Trust Issued Receipts (as defined in Exchange Rule 1200).

Allocation applications for ETFs trading on a UTP basis are solicited by the Exchange, and this special committee reviews the same performance and disciplinary material as is reviewed by the Allocation Committee.[11] In addition, specialist unit applicants are required to demonstrate:

(a) An understanding of the trading characteristics of ETFs;

(b) Expertise in the trading of derivatively-priced instruments;

(c) Ability and willingness to engage in hedging activity as appropriate;

(d) Knowledge of other markets in which the ETF which is to be allocated trades; and

(e) Willingness to provide financial and other support to relevant Exchange publicity and educational initiatives.

Proposal To Make the Policy Permanent

The Exchange believes that the ETF allocation process has worked well and should be made permanent.[12]

In this regard, since the inception of the Allocation Policy, 59[13] ETFs have been allocated and are trading on the Exchange. This includes 17 Merrill Lynch Holding Company Depositary Receipts (HOLDRs), a type of Trust Issued Receipt, nine types of Select Sector Standard & Poor's Depositary Receipts (SPDRs), one MidCap SPDR, 29 types of iShares, one Vanguard Index Participation Equity Recipient (VIPER) Shares, the Standard & Poor's 500 Index (symbol SPY), and the Dow Industrials DIAMONDS (symbol DIA).

Currently, the special committee reviews specialist unit applications and reaches its allocation decisions by majority vote. Any tie vote is decided by

[5] *See* Securities Exchange Act Release No. 46579 (October 1, 2002), 67 FR 63004 (October 9, 2002) (SR–NYSE–2002–31).

[6] *See* Securities Exchange Act Release No. 44272 (May 7, 2001), 66 FR 26898 (May 15, 2001) (SR–NYSE–2001–07).

[7] *See* Securities Exchange Act Release No. 44306 (May 15, 2001), 66 FR 28008 (May 21, 2001) (SR–NYSE–2001–10).

[8] *See* Securities Exchange Act Release No. 45729 (April 10, 2002), 67 FR 18970 (April 17, 2002) (SR–NYSE–2002–07).

[9] *See* Securities Exchange Act Release Nos. 45884 (May 6, 2002), 67 FR 32073 (May 13, 2002) (SR–NYSE–2002–17); 47690, 68 FR 20205 (April 24, 2003) (SR–NYSE–2003–07); and 49649 (May 4, 2004), 69 FR 26200 (May 11, 2004) (SR–NYSE–2004–21).

[10] *See* Securities Exchange Act Release No. 42746 (May 2, 2000), 65 FR 30171 (May 10, 2000) (SR–NYSE–99–34).

[11] *See* NYSE Rule 103B, Section IV (''Allocation Criteria'') of the Allocation Policy and Procedures approved in Securities Exchange Act Release No. 42746 (May 2, 2000), 65 FR 30171 (May 10, 2000) (SR–NYSE–99–34) for details of the performance and disciplinary material available to the Allocation Committee.

[12] Neither the Exchange, nor the Commission received any comment letters in response to the solicitation of comments in SR–NYSE 2001–07, SR–NYSE 2002–17, SR–NYSE 2003–07, and NYSE 2004–21. Telephone conversation between Jeffrey Rosenstrock, Principal Rule Counsel, NYSE, and Florence E. Harmon, Senior Special Counsel, Division of Market Regulation (''Division''), SEC, dated May 6, 2005.

[13] The NASDAQ 100 Trust (symbol QQQ) was allocated and began trading on the Exchange on July 31, 2001, but as of December 1, 2004, no longer trades on the Exchange. The iShares MSCI Emerging Markets Free (EEM) was allocated, but never traded on the Exchange.

the Chief Executive Officer of the Exchange. The Exchange has determined that due to the unique aspects of certain ETF products, it may be helpful for the special committee to meet with and interview specialist units before making an allocation decision.

2. Statutory Basis

The Exchange believes that its proposed rule change is consistent with section 6(b) of the Act,[14] in general, and furthers the objectives of section 6(b)(5) of the Act,[15] in particular, in that it is designed to remove impediments to and perfect the mechanism for 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 NYSE does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

The Exchange has not solicited, and does not intend to solicit, comments on this proposed rule change. The Exchange has not received any unsolicited written comments from members or other interested parties.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The proposed rule change has been filed by the Exchange as a ''non-controversial'' rule change pursuant to section 19(b)(3)(A) of the Act[16] and Rule 19b–4(f)(6), thereunder.[17] Because the forgoing proposed rule change does not: (i) Significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; (iii) become operative for 30 days after the date of its filing, or such shorter time as the Commission may designate, if consistent with the protection of investors and the public interest, provided that the Exchange has given the Commission written notice of its intent to file the proposed rule change, along with a brief description and text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change, or shorter time as the Commission may designate, it has become effective pursuant to section 19(b)(3)(A) of the Act[18] and Rule 19b–4(f)(6), thereunder.[19]

The Exchange requests that the Commission waive the five-day pre-filing notice requirement and the 30-day delayed operative date of Rule 19b–4(f)(6)(iii). Under Rule 19b–4(f)(6)(iii), a proposed ''non-controversial'' rule change does not become operative for 30 days after the date of filing, unless the Commission designates a shorter time.

The Commission believes that waiving the 30-day operative delay is consistent with the protection of investors and the public interest. Acceleration of the operative date will allow for the continued operation of the Exchange's Policy for Allocation of Exchange-Traded Funds Admitted to Trading on the Exchange on an Unlisted Trading Privileges Basis, now codified in NYSE Rule 103B, Section VIII on the permanent basis without interruption.[20]

The Commission notes that it has not received any comments on previous proposed rule changes filed by NYSE for this pilot. For this reason, the Commission designates the proposed rule change to be effective and operative upon its filing with the Commission. The Commission also waives the five-business day pre-filing requirement. As any time within 60 days of the filing of the proposed rule change, the Commission may summarily abrogate such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form *http://www.sec.gov/rules/sro.shtml;* or
- Send an e-mail to *rule-comments@sec.gov.* Please include File Number SR–NYSE–2005–23 on the subject line.

Paper comments

- Send paper comments in triplicate to Jonathan G. Katz, Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549–0609.

All submissions should refer to File Number SR–NYSE–2005–23. 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 at *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–NYSE–2005–23 and should be submitted on or before June 6, 2005.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[21]

Jill M. Peterson,

Assistant Secretary.

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[14] 15 U.S.C. 78f(b).

[15] 15 U.S.C. 78f(b)(5).

[16] 15 U.S.C. 78s(b)(3)(A).

[17] 17 CFR 240.19b–4(f)(6).

[18] 15 U.S.C. 78s(b)(3)(A).

[19] 17 CFR 240.19b–4(f)(6).

[20] For the purposes only of accelerating the operative date of this proposal, the Commission has considered the proposed rules impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

[21] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–51667; File No. SR–PCX–2004–72]

Self-Regulatory Organizations; Pacific Exchange, Inc.; Order Granting Approval to a Proposed Rule Change and Amendments No. 1 and 2 Thereto and Notice of Filing and Order Granting Accelerated Approval to Amendment No. 3 Thereto Relating to Clearly Erroneous Executions on the Archipelago Exchange

May 9, 2005.

I. Introduction

On July 28, 2004, the Pacific Exchange, Inc. (''PCX'' or ''Exchange''), through its wholly-owned subsidiary PCX Equities, Inc. (''PCXE'' or ''Corporation''), 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 proposal to amend the rules setting forth the procedures that an ETP Holder would be required to follow when seeking relief for clearly erroneous executions (''CEE'') on the Archipelago Exchange (''ArcaEx''), the equities trading facility of PCXE. PCX filed Amendment No. 1 to the proposed rule change on December 29, 2004,[3] and filed Amendment No. 2 to the proposed rule change on February 15, 2005.[4] The proposed rule change and Amendments No. 1 and 2 were published for comment in the **Federal Register** on March 1, 2005.[5] The Commission received no comments on the proposal, as amended. PCX filed Amendment No. 3 with the Commission on April 22, 2005.[6] This order approves the proposed rule change and Amendments No. 1 and 2 and grants accelerated approval to and solicits comment on Amendment No. 3.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Amendment No. 1, submitted by Tania Blanford, Staff Attorney, PCX (''Amendment No. 1''). Amendment No. 1 replaces the original filing in its entirety.

[4] *See* Amendment No. 2, submitted by James Draddy, Vice President, Equities Regulation, PCX (''Amendment No. 2''). Amendment No. 2 replaces the original filing and Amendment No 1 in their entirety.

[5] *See* Securities Exchange Act Release No. 51280 (March 1, 2005), 70 FR 11300 (March 8, 2005) (''Notice'').

[6] *See* Partial Amendment, dated April 21, 2005, submitted by Tania Blanford, Regulatory Attorney, PCX (''Amendment No. 3''). In Amendment No. 3, PCX proposes to adopt an implementation date of May 16, 2005 for the proposed rule change.

II. Description of Proposed Rule

The Exchange proposes to implement a revised appeal process for determinations on CEE, to be set forth in proposed PCXE Rule 7.10(c)(2)–(4). The Exchange's proposal would allow a party affected by the determination to request an appeal to the Clearly Erroneous Execution Panel (''CEE Panel'') to review the determination made by an Exchange officer under proposed PCXE Rule 7.10(c)(1). The CEE Panel will be comprised of the PCXE Chief Regulatory Officer (''CRO''), or a designee of the CRO,[7] and representatives from two (2) ETP Holders.[8] Requests for appeal must be made via facsimile or e-mail within thirty (30) minutes after the party requesting the appeal is given notification of the initial determination. Thereafter, the CEE Panel shall review the information and may overturn or modify the action taken by the Exchange officer within the time frame prescribed by the Corporation. The revised process is intended to provide a timely appeal for ETP Holders in place of the lengthy general appeal process provided in PCXE Rule 10.13 (Hearings and Review of Decisions by the Corporation).

In addition, the Exchange proposes several other minor changes, as well as several organizational and stylistic changes, to PCXE's rules governing CEE, including combining PCXE Rules 7.10 and 7.11 into one rule, PCXE Rule 7.10, entitled ''Clearly Erroneous Executions.'' [9]

III. Commission Findings and Order Granting Approval

The Commission finds that the proposed rule change, as amended, is consistent with the requirements of the Act and the rules and regulations thereunder that are applicable to a national securities exchange. In particular, the Commission finds that the proposed rule change is consistent with the requirements of Section 6(b)(5) of the Act,[10] which requires that the rules of a national securities exchange be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism for a free and open market and a national market system, and, in general, to protect investors and the public interest.[11] The proposed rule changes provide for a revised appeals process for CEE on the Archipelago Exchange that is faster in comparison to the Exchange's general appeal process for disputes among members, which previously governed such disputes.[12] The Commission believes that this revised appeals procedure for CEE is designed to help ensure that the Exchange's rules are exercised in a fair and reasonable manner.

The Commission finds good cause for approving Amendment No. 3 to the proposed rule change prior to the thirtieth day after its publication in the **Federal Register**, pursuant to Section 19(b)(2) of the Act.[13] Amendment No. 3 revises the proposal to specify an implementation date of May 16, 2005. Amendment No. 3 does not propose any substantive changes to the proposal as published for notice and comment, and thus the Commission believes it is appropriate to accelerate approval of Amendment No. 3.

[7] The Exchange represents that the designee of the CRO will be an employee of the Corporation with similar stature as the CRO, such as the VP of Equities Regulation. *See* Notice, *supra* note 5.

[8] The Exchange shall designate at least ten (10) ETP Holder representatives to be called upon to serve on the CEE Panel. In no case shall the CEE Panel include a person related to a party to the trade in question. To the extent reasonably possible, the Exchange shall call upon the designated representatives to participate in a CEE Panel on an equally frequent basis.

[9] For a full description of the proposed rule changes, *see* the Notice, *supra* note 5.

[10] 15 U.S.C. 78f(b)(5).

[11] In approving this proposal, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[12] *See* PCXE Rule 10.13 (Hearings and Review of Decisions by the Corporation).

[13] 15 U.S.C. 78s(b)(2).

IV. Solicitation of Comments Concerning Amendment No. 3

Interested persons are invited to submit written data, views, and arguments concerning Amendment No. 3, including whether it is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to *rule-comments@sec.gov*. Please include File Number SR–PCX–2004–72 on the subject line.

Paper Comments

- Send paper comments in triplicate to Jonathan G. Katz, Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549–0609.

All submissions should refer to File Number SR–PCX–2004–72. 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–PCX–2004–72 and should be submitted on or before June 3, 2005.

V. Conclusion

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,[14] that the proposed rule change (File No. SR–PCX–2004–72), as amended, be approved, and that Amendment No. 3 thereto be approved on an accelerated basis.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[15]

Jill M. Peterson,

Assistant Secretary.

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[14] 15 U.S.C. 78s(b)(2).

[15] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–51664; File No. SR–Phlx–2005–24]

Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change by the Philadelphia Stock Exchange, Inc. Relating to Disclaimer of Warranties by SIG Indices, LLLP and by Standard and Poor's

May 6, 2005.

Pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'')[1], and Rule 19b–4[2] thereunder, notice is hereby given that on April 20, 2005, the Philadelphia Stock Exchange, Inc. (''Phlx'' or ''Exchange'') filed with the Securities and Exchange Commission (''SEC'' or ''Commission'') the proposed rule change as described in items I and II below, which items have been prepared by the Phlx. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Phlx proposes to amend Phlx Rule 1104A (Susquehanna Indices, LLLP Indexes), regarding disclaimer of express or implied warranties, to add the new SIG Coal Producers Index™ licensed by Susquehanna Indices, LLLP (''SI'') to Phlx. The Exchange also proposes to adopt Phlx Rule 1105A (Standard and Poor's® Index), regarding disclaimer of express or implied warranties, with respect to the Standard & Poor's 500 Index (''S&P 500® Index'') that S&P® licensed to the Exchange.

The text of the proposed rule change is available on Phlx's Web site (*http://www.phlx.com*), the Phlx'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, the Phlx included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in item IV below. The Phlx has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The purpose of the proposed rule change is to amend Exchange Rule 1104A, which applies to indexes maintained by SI, to include a new index that was recently licensed by SI to the Exchange.[3] The purpose of the proposed rule change is also to adopt new Phlx Rule 1105A, which is similar to existing rule 1104A but applies to the Index developed and maintained by S&P®, that was recently licensed to the Exchange and indicates that S&P® does not make specified express or implied warranties.[4]

Phlx Rule 1104A currently provides that SI makes no warranty, express or implied, as to results to be obtained by any person or entity from the use of the SIG Investment Managers Index™, the SIG Cable, Media & Entertainment Index™, the SIG Casino Gaming Index™, the SIG Semiconductor Equipment Index™, the SIG Semiconductor Device Index™, the SIG Steel Producers Index™, the SIG Specialty Retail Index™, the SIG Footwear & Athletic Index™, the SIG Education Index™, and the SIG Restaurant Index™, and that SI makes no express or implied warranties of merchantability or fitness for a particular purpose for use with respect to any of the named indexes or any data included therein.[5] The Exchange is now proposing to amend Rule 1104A to expand the coverage of the rule to include the newly-licensed and listed index—the SIG Coal Producers Index™ as required by the license agreement issued to the Exchange.[6]

The Exchange is proposing to establish new Phlx Rule 1105A essentially based on current Phlx Rule 1104A, as required by a licensing agreement between S&P® and the

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] The Exchange currently lists options on the SIG Investment Managers Index™, the SIG Cable, Media & Entertainment Index™, the SIG Casino Gaming Index™, the SIG Semiconductor Equipment Index™, the SIG Semiconductor Device Index™, the SIG Steel Producers Index™, the SIG Specialty Retail Index™, the SIG Footwear & Athletic Index™, the SIG Education Index™, and the SIG Restaurant Index™, and on newly-licensed index, the SIG Coal Producers Index™, pursuant to a license agreement with SI and Exchange Rule 1009A(b). The indexes are trademarks of SIG Indices, LLLP.

[4] The Exchange currently lists options on Standard and Poor's Depository Receipts (''SPDRs''), pursuant to a license agreement with Standard & Poor's, a division of McGraw-Hill Companies, Inc. ''Standard & Poor's®'', ''S&P®'', ''S&P 500®'', ''Standard & Poor's 500'', and ''500'' are trademarks of McGraw-Hill Companies, Inc.

[5] The Exchange noted in its filing to adopt Rule 1104A that the proposed disclaimer was appropriate given that it was similar to disclaimer provisions of American Stock Exchange Rule 902C relating to indexes underlying options listed on that exchange. *See* Securities Exchange Act Release No. 48135 (July 7, 2003), 68 FR 42154 (July 16, 2003) (approving SR–Phlx–2003–21). The Exchange recently amended Rule 1104A to include the SIG Specialty Retail Index™, the SIG Steel Producers Index™, the SIG Footwear & Athletic Index™, the SIG Education Index™, and the SIG Restaurant Index™, as required by the license agreement between SI and the Exchange. *See* Securities Exchange Act Release No. 51239 (February 22, 2005), 70 FR 10015 (March 1, 2005) (SR–Phlx–2005–13).

[6] The SIG Coal Producers Index™ was listed pursuant to Sec. 19b–4(e) on March 23, 2005.

Exchange licensing it to trade options on SPDRs and products based on the Index maintained by S&P® and licensed to the Exchange.[7] The purpose of proposed Rule 1105A is to indicate that S&P® makes no express or implied warranties regarding merchantability or fitness for a particular purpose or use with respect to the S&P 500® Index or any data included therein, in connection with the trading of options contracts thereon.

The Exchange believes that proposed Phlx Rule 1105A is similar in concept to current Rule 1104A, would provide S&P® with a disclaimer of any implied or express warranties of merchantability or fitness for a particular purpose in respect of an option on an index that S&P® licensed to the Exchange, and would put S&P® on similar footing with the licensor of other options on indexes to the Exchange.

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act[8] in general, and furthers the objectives of Section 6(b)(5) of the Act[9] in particular, in that it is designed 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. The Exchange believes that the proposed rule should encourage SIG Indices, LLLP and S&P® to continue to maintain indexes so that options on the respective indexes may be traded on the Exchange, thereby providing investors with enhanced investment opportunities.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any inappropriate burden on competition.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were either solicited or received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The proposed rule change is being designated by the Exchange as ''non-controversial'' pursuant to section 19(b)(3)(A) of the Act[10] and subparagraph (f)(6) of Rule 19b–4[11] thereunder, because the proposed rule change (1) does not significantly affect the protection of investors or the public interest; (2) does not impose any significant burden on competition; and (3) does not become operative for thirty days from the date on which it was filed, or such shorter time as the Commission may designate if consistent with the protection of investors and the public interest.[12] Consequently, the proposed rule change has become effective pursuant to section 19(b)(3)(A) of the Act[13] and Rule 19b–4(f)(6) thereunder.[14]

Pursuant to Rule 19b–4(f)(6)(iii), a proposed ''non-controversial'' rule change does not become operative for 30 days after the date of filing, or such shorter time as the Commission may designate, if consistent with the protection of investors and the public interest, and the Phlx gave the Commission written notice of its intent to file the proposed rule change, along with a brief description and text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission.[15] The Phlx has requested that the Commission waive the 30-day operative delay. The Commission has determined that it is consistent with the protection of investors and the public interest to waive the 30-day operative delay.[16] The Commission believes that accelerating the operative date will help to ensure that all options traded on the indexes are treated uniformly.

At any time within 60 days of the filing of the proposed rule change, the Commission may summarily abrogate such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the Act.

Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to *rule-comments@sec.gov.* Please include File Number SR–Phlx–2005–24 on the subject line.

Paper Comments

- Send paper comments in triplicate to Jonathan G. Katz, Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549–0609.

All submissions should refer to File Number SR–Phlx–2005–24. 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 Phlx. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File

[7] The Exchange has been listing options on SPDRs since on or about January 10, 2005, pursuant to a provisional license with S&P®. The Exchange has subsequently entered into a permanent license agreement with S&P® that supersedes the provisional license and is proposing new Rule 1105A pursuant to the permanent license agreement.

[8] 15 U.S.C. 78f(b).

[9] 15 U.S.C. 78f(b)(5).

[10] 15 U.S.C. 78s(b)(3)(A).

[11] 17 CFR 240.19b–4.

[12] As required under Rule 19b–4(f)(6)(iii), the Exchange has provided the Commission with written notice of its intent to file the proposed rule change at least five business days prior to the filing date of this proposal.

[13] 15 U.S.C. 78s(b)(3)(A).

[14] 17 CFR 240.19b–4(f)(6).

[15] 17 CFR 240.19b–4(f)(6)(iii).

[16] For the purposes only of accelerating the operative date of this proposal, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

Number SR–Phlx–2005–24 and should be submitted on or before June 6, 2005.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[17]

Jill M. Peterson,

Assistant Secretary.

[FR Doc. E5–2382 Filed 5–12–05; 8:45 am]

BILLING CODE 8010–01–P

SOCIAL SECURITY ADMINISTRATION

Agency Information Collection Activities: Proposed Request and Comment Request

The Social Security Administration (SSA) publishes a list of information collection packages that will require clearance by the Office of Management and Budget (OMB) in compliance with Pub. L. 104–13, the Paperwork Reduction Act of 1995, effective October 1, 1995. The information collection packages that may be included in this notice are for new and revised information collections and extensions (no change) of OMB-approved information collections.

SSA is soliciting comments on the accuracy of the agency's burden estimate; the need for the information; its practical utility; ways to enhance its quality, utility, and clarity; and on ways to minimize burden on respondents, including the use of automated collection techniques or other forms of information technology. Written comments and recommendations regarding the information collection(s) should be submitted to the OMB Desk Officer and the SSA Reports Clearance Officer. The information can be mailed and/or faxed to the individuals at the addresses and fax numbers listed below:

(OMB), Office of Management and Budget, Attn: Desk Officer for SSA, Fax: (202) 395–6974.

(SSA), Social Security Administration, DCFAM, Attn: Reports Clearance Officer, 1338 Annex Building, 6401 Security Blvd., Baltimore, MD 21235, Fax: (410) 965–6400.

I. The information collection listed below is pending at SSA and will be submitted to OMB within 60 days from the date of this notice. Therefore, your comments should be submitted to SSA within 60 days from the date of this publication. You can obtain copies of the collection instrument by calling the SSA Reports Clearance Officer at (410) 965–0454 or by writing to the address listed above.

National Direct Deposit Initiative—31 CFR 210—0960–NEW. Many recipients of SSA's benefits choose to receive their payments via the Direct Deposit Program, in which funds are transferred directly into recipients' accounts at a financial institution (FI). However, 8 million Title II payment recipients still receive their payments through traditional paper checks. In an effort to encourage these beneficiaries to change from paper checks to the Direct Deposit Program, SSA is collaborating with the Department of the Treasury and several FIs to implement the National Direct Deposit Initiative. In this program, SSA will work with FIs to determine which of the target 8 million Title II beneficiaries have accounts at the participating banks. The banks will then send forms to these beneficiaries encouraging them to enroll in the Direct Deposit Program. The respondents are the participating FIs and Title II beneficiaries currently receiving their payments via check.

Type of Request: New information collection.

Respondents	Title II payment recipients	Financial institutions (banks)	Totals
Information Collection Requirements	Direct Deposit Enrollment Form.	Data screening/matching; SSA's data management requirements.	
Number of Respondents	500,000	12	512,000
Frequency of Response	1	1.	
Average Burden per Response (minutes)	2	240.	
Estimated Annual Burden (hours)	16,667	48	16,715
Cost Requirement	N/A	Printing and mailing of 300,000 enrollment forms.	
Estimated Cost Burden per Respondent	N/A	$2,462.	
Total Annual Cost Burden	N/A	$29,544	$29,544

II. The information collections listed below have been submitted to OMB for clearance. Your comments on the information collections would be most useful if received by OMB and SSA within 30 days from the date of this publication. You can obtain a copy of the OMB clearance packages by calling the SSA Reports Clearance Officer at 410–965–0454, or by writing to the address listed above.

Note: Please note that this collection was erroneously published as a 60-day **Federal Register** Notice on Monday, April 25, 2005, at 70 FR 8125. It should have been published as a 30-day **Federal Register** Notice. Comments should be submitted within 30 days of publication.

The Ticket To Work and Self-Sufficiency Program—20 CFR 411.160–.730—0960–0644

The Ticket to Work and Self-Sufficiency program allows individuals with disabilities who are receiving disability payments to work towards decreased dependence on government cash benefits programs without jeopardizing their benefits during the transition period to employment. The program allows disability payment recipients to choose a provider from an employment network (EN), who will guide these beneficiaries in obtaining, regaining, and maintaining self-supporting employment. 20 CFR 411.160–.730 of the Code of Federal Regulations discusses the rules governing this program. The respondents are individuals entitled to Social Security benefits based on disability or individuals entitled to SSI based on disability; program managers; EN contractors; and State vocational rehabilitation agencies.

Type of Request: Extension of an OMB-approved information collection.

[17] 17 CFR 200.30–3(a)(12).

CFR sections	Number of respondents	Frequency of response	Average burden per response (minutes)	Estimated annual burden (hours)
411.140(c)	70,000	2/year	60	140,000
[X-refer sections 411.145, 411.150, 411.325(a), (b), (c), & (d), 411.320(f)]				
411.325(e)	70,000	12/year	60	840,000
[X-refer section 411.395(b)]				
411.325(f)	60,000	1/year	5	5,000
[X-refer section 411.395(a)]				
411.190(a)	250	1/year	30	125
[X-refer section 411.195]				
411.220(a)(1)	55	Varies	30	28
441.245(b)(1)	12,000	1	1	200
411.325(d)	25	1	480	200
411.365	82	1	240	328
411.575	6,000	1	30	3,000
[X-refer section 411.500]				
411.605(b)	27,000	Varies	5	2,250
[X-refer section 411.610]				
411.435(c)	100	Once	60	100
411.615	1,000	Once	60	1,000
411.625	50	Once	60	50
411.210(b)	2,000	Once	30	1,000
411.590(b)	100	Once	60	100
411.655	1	Once/year	120	2
411.200	150	1/monthly	15	450
Total annual respondents	248,813		Total Annual Burden Hours.	993,833

Dated: May 6, 2005.

James Craig Hartson,

Reports Clearance Officer, Social Security Administration.

[FR Doc. 05–9461 Filed 5–12–05; 8:45 am]

BILLING CODE 4191–02–P

DEPARTMENT OF STATE

[Public Notice 4740]

Shipping Coordinating Committee—Notice of Meeting

The Shipping Coordinating Committee (SHC) will conduct an open meeting at 9 a.m. on Wednesday, June 15, 2005, in Room 6319 of the United States Coast Guard Headquarters Building, 2100 2nd Street, SW., Washington, DC 20593–0001. The primary purpose of the meeting is to continue our preparations for the 48th Session of the International Maritime Organization (IMO) Sub-Committee on Stability and Load Lines and on Fishing Vessels Safety to be held at IMO Headquarters in London, England from September 12th to 16th.

The primary matters to be considered include:

—Development of explanatory notes for harmonized SOLAS Chapter II–1;
—Passenger ship safety;
—Review of the Intact Stability Code;
—Review of the Offshore Supply Vessel Guidelines;
—Harmonization of damage stability provisions in other IMO instruments;
—Revision of technical regulations of the 1966 LL Convention;
—Tonnage measurement of open-top containerships.

Members of the public may attend this meeting up to the seating capacity of the room. Interested persons may seek information by writing to Mr. Paul Cojeen, Commandant (G–MSE), U.S. Coast Guard Headquarters, 2100 Second Street, SW., Room 1308, Washington, DC 20593–0001 or by calling (202) 267–2988.

Dated: May 4, 2005.

Clay L. Diamond,

Executive Secretary, Shipping Coordinating Committee, Department of State.

[FR Doc. 05–9598 Filed 5–12–05; 8:45 am]

BILLING CODE 4710–07–P

DEPARTMENT OF STATE

[Public Notice 4738]

Shipping Coordinating Committee—Notice of Meeting

The Shipping Coordinating Committee's Subcommittee on IMO Technical Co-operation Committee (TC) will conduct an open meeting at 10 a.m. on June 9th, 2005, in Room 4420 of the United States Coast Guard Headquarters building, 2100 Second Street SW., Washington, DC 20593–0001. The primary purpose of the meeting is to prepare for the 55th session of the International Maritime Organization's (IMO) Technical Co-operation Committee (TC), to be held at IMO Headquarters in London, England from June 14th to 16th, and to prepare for the 94th session of the IMO Council (C), to be held at IMO Headquarters in London, England from June 20th to 24th.

The primary matters to be considered for the Technical Co-operation Committee include:

—Work of other bodies and organizations
—Integrated Technical Co-operation Programme (ITCP)
—Long-term financing for the ITCP by the Member States
—Global Programme on Maritime Security
—Partnerships for Progress Programme
—Institutional Development and Fellowships
—Programme on the Integration of Women in the Maritime Sector
—Access to IMO Instruments in Electric Format
—Future Work Programme of the Committee
—Other matters
—Election of the Chairman and the Vice-Chairman for 2006

The primary matters to be considered for Council include:

—Resource management

—Programme for change: ERP, HQ building Refurbishment
—Voluntary IMO Member State Audit Scheme
—Work programme and budget for the 24th financial period 2006–2007
—Technical Co-operation Fund–biennial allocation to support the ITCP Programme for 2006–2007
—Protection of vital shipping lanes
—Consideration of the reports of the Maritime Safety Committee, the Legal Committee, and the Technical Co-operation Committee
—International Technical Co-operation Special Purpose Funds: International Maritime Security Fund; International SAR Fund
—Consideration of the World Maritime University and the IMO International Maritime Law Institute; Reports of the Board of Governors and Budgets
—Assembly matters
—Review of the Organization's financial framework in accordance with Assembly resolution A.942(23)
—External relations
—Report of the status of the Convention and membership of the Organization
—Report on the status of conventions and other multilateral instruments in respect of which the Organization performs functions

Members of the public may attend this meeting up to the seating capacity of the room. Interested persons may seek information by writing to Ms. Eleanor Thompson, Commandant (G–CI), U.S. Coast Guard Headquarters, 2100 Second Street, SW., Room 2114, Washington, DC 20593–0001 or by calling (202) 267–2246.

Dated: May 4, 2005.

Clay Diamond,

Executive Secretary, Shipping Coordinating Committee, Department of State.

[FR Doc. 05–9599 Filed 5–12–05; 8:45 am]

BILLING CODE 4710–07–P

DEPARTMENT OF STATE

[Public Notice 5025]

Shipping Coordinating Committee—Notice of Meeting

The Shipping Coordinating Committee (SHC) will conduct an open meeting at 9:30 a.m. on Wednesday May 25, 2005, in room 3317, U.S. Coast Guard Headquarters, 2100 Second Street, SW., Washington, DC. The purpose of the meeting is to prepare for the 51st session of the Subcommittee on Safety of Navigation (NAV) of the International Maritime Organization (IMO) which is scheduled for June 6–10, 2005, at the IMO Headquarters in London.

Items of principal interest on the agenda are:

—Routing of ships, ship reporting and related matters
—Revision of the performance standards for integrated navigation systems (INS) and integrated bridge systems (IBS)
—Review of the 2000 High Speed Craft (HSC) Code and amendment to the Dynamically Supported Craft (DSC) Code and the 1994 HSC Code
—Evaluation of the use of Electronic Chart Display and Information System (ECDIS) and Electronic Navigational Chart (ENC) development
—Review of the offshore supply vessel (OSV) guidelines
—Review of the Special Purpose Ships (SPS) Code
—International Telecommunication Union (TTU) matters, including Radiocommunication ITU–R Study Group 8
—Passenger ship safety: Effective voyage planning for passenger ships
—Measures to enhance maritime security
—Worldwide radio navigation system (WWRNS)
—Casualty analysis
—Consideration of International Association of Classification Societies unified interpretations
—Revision of the performance standards for voyage data recorders (VDR) and simplified VDR (S–VDR)

Members of the public may attend these meetings up to the seating capacity of the room. Interested persons may seek information by writing: Mr. Edward J. LaRue, Jr., U.S. Coast Guard (G–MWV–2), Room 1407, 2100 Second Street SW., Washington, DC 20593–0001 or by calling: (202) 267–0416.

Dated: May 4, 2005.

Clayton L. Diamond,

Executive Secretary, Shipping Coordinating Committee, Department of State.

[FR Doc. 05–9600 Filed 5–12–05; 8:45 am]

BILLING CODE 4710–07–M

OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE

Identification of Countries That Deny Adequate Protection, or Market Access, for Intellectual Property Rights Under Section 182 of the Trade Act of 1974

AGENCY: Office of the United States Trade Representative.

ACTION: Notice.

SUMMARY: Notice is hereby given that the United States Trade Representative (USTR) has submitted its annual report on the identification of those foreign countries that deny adequate and effective protection of intellectual property rights or deny fair and equitable market access to United States persons that rely upon intellectual property protection, and those foreign countries determined to be priority foreign countries, to the Committee on Finance of the United States Senate and the Committee on Ways and Means of the United States House of Representatives, pursuant to section 182 of the Trade Act of 1974, as amended (the Trade Act) (19 U.S.C. 2242).

DATES: This report was submitted on April 29, 2005 and is available on USTR's Web site at *http://www.ustr.gov.*

ADDRESSES: Office of the United States Trade Representative, 600 17th Street, NW., Washington, DC 20508.

FOR FURTHER INFORMATION CONTACT: Jennifer Choe Groves, Director for Intellectual Property at (202) 395–6864, or Stan McCoy, Assistant General Counsel, or Dan Mullaney, Associate General Counsel at (202) 395–7305.

SUPPLEMENTARY INFORMATION: Section 182 of the Trade Act requires USTR to identify within 30 days of the publication of the National Trade Estimates Report all trading partners that deny adequate and effective protection of intellectual property rights or deny fair and equitable market access to U.S. persons who rely on intellectual property protection. Those countries that have the most onerous or egregious acts, policies, or practices that have the greatest adverse impact (actual or potential) on the relevant U.S. products are to be identified as priority foreign countries, unless they are entering into good faith negotiations or are making significant progress in bilateral or multilateral negotiations to provide adequate and effective protection for intellectual property rights. In identifying countries in this manner, the USTR is directed to take into account the history of intellectual property laws and practices of the foreign country, including any previous identifications as a priority foreign country, and the history of efforts of the United States, and the response of the foreign country, to achieve adequate and effective protection and enforcement of intellectual property rights. In making these determinations, the USTR must consult with the Register of Copyrights, the Commissioner of Patents and Trademarks, and other appropriate officials of the Federal Government, and take into account information from other sources such as information submitted by interested persons. The

Special 301 Report is available on USTR's Web site at *http://www.ustr.gov.*

On April 29, 2005, USTR identified 52 trading partners that deny adequate and effective protection of intellectual property or deny fair and equitable market access to United States artists and industries that rely upon intellectual property protection.

USTR announced the results of the out-of-cycle review for China, and stated that it is making a determination on China with multiple elements. First, USTR will work with U.S. industry and other stakeholders with an eye toward utilizing WTO procedures to bring China into compliance with its WTO TRIPS obligations, particularly those requiring transparency and a criminal IPR enforcement system with deterrent effect. Second, USTR will invoke the transparency provisions of the WTO TRIPS Agreement, which will require China to produce detailed documentation on certain aspects of IPR enforcement that affects U.S. rights under the TRIPS Agreement. Third, USTR is elevating China to the Priority Watch List on the basis of serious concerns about China's compliance with its WTO TRIPS obligations and commitments China made at the April 2004 meeting of the Joint Commission on Commerce and Trade (''JCCT'') to achieve a significant reduction in IPR infringement throughout China, and make progress in other areas. Fourth, USTR will maintain Section 306 monitoring of China's implementation of its 1992 and 1995 bilateral agreements with the United States (including additional commitments made in 1996). And finally, USTR will use the JCCT, including the IPR Working Group, to secure new, specific commitments concerning additional actions that China will take to significantly improve IPR protection and enforcement, particularly over the next quarter. China's fulfillment of these commitments will be a centerpiece of the 2005 JCCT.

In addition, USTR maintained Ukraine's designation as a Priority Foreign Country, and again designated Paraguay for Section 306 monitoring of its commitments under the 2004 Memorandum of Understanding.

USTR also announced the placement of 14 trading partners on the Priority Watch List: Argentina, Brazil, China, Egypt, India, Indonesia, Israel, Kuwait, Lebanon, Pakistan, the Philippines, Russia, Turkey, and Venezuela. In addition, USTR placed 36 trading partners on the Watch List: Azerbaijan, Bahamas, Belarus, Belize, Bolivia, Bulgaria, Canada, Chile, Colombia, Costa Rica, Croatia, Dominican Republic, Ecuador, European Union, Guatemala, Hungary, Italy, Jamaica, Kazakhstan, Korea, Latvia, Lithuania, Malaysia, Mexico, Peru, Poland, Romania, Saudi Arabia, Slovakia, Taiwan, Tajikistan, Thailand, Turkmenistan, Uruguay, Uzbekistan, and Vietnam. USTR will conduct out-of-cycle reviews of Ukraine, Russia, Indonesia, the Philippines, Canada, and Saudi Arabia.

Jennifer Choe Groves,

Director for Intellectual Property.

[FR Doc. 05–9534 Filed 5–12–05; 8:45 am]

BILLING CODE 3190–W5–P

DEPARTMENT OF TRANSPORTATION

Surface Transportation Board

[STB Docket No. AB–646X]

Atlantic & Western Railway, L.P.—Abandonment Exemption—in Lee County, NC

Atlantic & Western Railway, L.P. (ATW), has filed a notice of exemption under 49 CFR 1152 subpart F—*Exempt Abandonments* to abandon a 0.74-mile line of railroad extending from milepost 3.76 (V.S. 198+37) to milepost 4.50 (V.S. 237+47) in Jonesboro, Lee County, NC, constituting the easternmost portion of ATW's approximately 10-mile line between Cumnock and Jonesboro, NC. The line traverses United States Postal Service Zip Code 27330.

ATW has certified that: (1) No local traffic has moved over the line for at least 2 years; (2) no overhead traffic has moved over the line for at least 2 years; (3) no formal complaint filed by a user of rail service on the line (or by a State or local government entity acting on behalf of such user) regarding cessation of service over the line either is pending with the Surface Transportation Board or with any U.S. District Court or has been decided in favor of complainant within the 2-year period; and (4) the requirements at 49 CFR 1105.7 (environmental reports), 49 CFR 1105.8 (historic reports), 49 CFR 1105.11 (transmittal letter), 49 CFR 1105.12 (newspaper publication), and 49 CFR 1152.50(d)(1) (notice to governmental agencies) have been met.

As a condition to this exemption, any employee adversely affected by the abandonment shall be protected under *Oregon Short Line R. Co.—Abandonment—Goshen,* 360 I.C.C. 91 (1979). To address whether this condition adequately protects affected employees, a petition for partial revocation under 49 U.S.C. 10502(d) must be filed.

Provided no formal expression of intent to file an offer of financial assistance (OFA) has been received, this exemption will be effective on June 14, 2005, unless stayed pending reconsideration. Petitions to stay that do not involve environmental issues,[1] formal expressions of intent to file an OFA under 49 CFR 1152.27(c)(2),[2] and trail use/rail banking requests under 49 CFR 1152.29 must be filed by May 23, 2005. Petitions to reopen or requests for public use conditions under 49 CFR 1152.28 must be filed by June 2, 2005, with the Surface Transportation Board, 1925 K Street, NW., Washington, DC 20423–0001.

A copy of any petition filed with the Board should be sent to ATW's representative: Andrew B. Kolesar III, Slover & Loftus, 1224 Seventeenth Street, NW., Washington, DC 20036.

If the verified notice contains false or misleading information, the exemption is void *ab initio.*

ATW has filed an environmental and historic report which addresses the effects, if any, of the abandonment on the environment and historic resources. SEA will issue an environmental assessment (EA) by May 20, 2005. Interested persons may obtain a copy of the EA by writing to SEA (Room 500, Surface Transportation Board, Washington, DC 20423–0001) or by calling SEA, at (202) 565–1539. [Assistance for the hearing impaired is available through the Federal Information Relay Service (FIRS) at 1–800–877–8339.] Comments on environmental and historic preservation matters must be file within 15 days after the EA becomes available to the public.

Environmental, historic preservation, public use, or trail use/rail banking conditions will be imposed, where appropriate, in a subsequent decision.

Pursuant to the provisions of 49 CFR 1152.29(e)(2), ATW shall filed a notice of consummation with the Board to signify that it has exercised the authority granted and fully abandoned the line. If consummation has not been effected by ATW's filing of a notice of consummation by May 13, 2006, and there are no legal or regulatory barriers

[1] The Board will grant a stay if an informed decision on environmental issues (whether raised by a party or by the Board's Section of Environmental Analysis (SEA) in its independent investigation) cannot be made before the exemption's effective date. *See Exemption of Out-of-Service Rail Lines,* 5 I.C.C.2d 377 (1989). Any request for a stay should be filed as soon as possible so that the Board may take appropriate action before the exemption's effective date.

[2] Each OFA must be accompanied by the filing fee, which currently is set at $1,200. *See* 49 CFR 1002.2(f)(25).

to consummation, the authority to abandon will automatically expire.

Board decisions and notices are available on our Web site at ''*http://www.stb.dot.gov.*''

Decided: May 9, 2005.

By the Board, David M. Konschnik, Director, Office of Proceedings.

Vernon A. Williams,

Secretary.

[FR Doc. 05–9597 Filed 5–12–05; 8:45 am]

BILLING CODE 4915–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Proposed Collection; Comment Request for Form W–4P

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, Public Law 104–13(44 U.S.C. 3506(c)(2)(A)). Currently, the IRS is soliciting comments concerning Form W–4P, Withholding Certificate for Pension or Annuity Payments.

DATES: Written comments should be received on or before July 12, 2005, to be assured of consideration.

ADDRESSES: Direct all written comments to Glenn P. Kirkland, Internal Revenue Service, room 6516, 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 R. Joseph Durbala, (202) 622–3634, Internal Revenue Service, room 6516, 1111 Constitution Avenue, NW., Washington, DC 20224, or through the Internet at *RJoseph.Durbala@irs.gov.*

SUPPLEMENTARY INFORMATION:

Title: Withholding Certificate for Pension or Annuity Payments.

OMB Number: 1545–0415.

Form Number: Form W–4P.

Abstract: Form W–4P is used by the recipient of pension or annuity payments to designate the number of withholding allowances he or she is claiming, an additional amount to be withheld, so that the payer can withhold the proper amount.

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: Individuals and households.

Estimated Number of Respondents: 12,000,000.

Estimated Time Per Respondent: 1 hr., 49 min.

Estimated Total Annual Burden Hours: 21,880,000.

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: May 6, 2005.

Glenn P. Kirkland,

IRS Reports Clearance Officer.

[FR Doc. E5–2386 Filed 5–12–05; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

[GL–238–88]

Proposed Collection; Comment Request for Regulation Project

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, Public Law 104–13 (44 U.S.C. 3506(c)(2)(A)). Currently, the IRS is soliciting comments concerning an existing final regulation, GL–238–88 (TD 8549), Preparer Penalties—Manual Signature Requirement (§ 1.6695–1(B)).

DATES: Written comments should be received on or before July 12, 2005 to be assured of consideration.

ADDRESSES: Direct all written comments to Glenn P. Kirkland, Internal Revenue Service, room 6516, 1111 Constitution Avenue NW., Washington, DC 20224.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the regulation should be directed to R. Joseph Durbala, (202) 622–3634, Internal Revenue Service, room 6516, 1111 Constitution Avenue NW., Washington, DC 20224, or through the Internet at *RJoseph.Durbala@irs.gov.*

SUPPLEMENTARY INFORMATION:

Title: Preparer Penalties—Manual Signature Requirement (§ 1.6695–1(B)).

OMB Number: 1545–1385.

Regulation Project Numbers: GL–238–88.

Abstract: This regulation provides that persons who prepare U.S. Fiduciary income tax returns for compensation may, under certain conditions, satisfy the manual signature requirements by using a facsimile signature. However, they will be required to submit to the IRS a list of the names and identifying numbers of all fiduciary returns which are being filed with a facsimile signature.

Current Actions: There is no change to this existing regulation.

Type of Review: Extension of a currently approved collection.

Affected Public: Business or other for-profit organizations.

Estimated Number of Respondents: 20,000.

Estimated Time per Respondent: 1 hour, 17 minutes.

Estimated Total Annual Burden Hours: 25,825.

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: May 4, 2005.

Glenn P. Kirkland,

IRS Reports Clearance Officer

[FR Doc. E5–2389 Filed 5–12–05; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Proposed Collection; Comment Request for Form 990–BL; Schedule A (Form 990–BL), Form 6069

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, Public Law 104–13 (44 U.S.C. 3506(c)(2)(A)). Currently, the IRS is soliciting comments concerning Form 990–BL, Information and Initial Excise Tax Return for Black Lung Benefit Trusts and Certain Related Persons, and Form 6069, Return of Excise Tax on Excess Contributions to Black Lung Benefit Trust Under Section 4953 and Computation of Section 192 Deduction.

DATES: Written comments should be received on or before July 12, 2005 to be assured of consideration.

ADDRESSES: Direct all written comments to Glenn P. Kirkland, Internal Revenue Service, room 6516, 1111 Constitution Avenue NW., Washington, DC 20224.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the forms and instructions should be directed to R. Joseph Durbala, (202) 622–3634, Internal Revenue Service, room 6516, 1111 Constitution Avenue NW., Washington, DC 20224, or through the Internet at *RJoseph.Durbala@irs.gov*.

SUPPLEMENTARY INFORMATION:

Title: Form 990–BL, Information and Initial Excise Tax Return for Black Lung Benefit Trusts and Certain Related Persons, and Form 6069, Return of Excise Tax on Excess Contributions to Black Lung Benefit Trust Under Section 4953 and Computation of Section 192 Deduction.

OMB Number: 1545–0049.

Form Number: Form 990–BL; Schedule A (Form 990–BL), and Form 6069.

Abstract: IRS uses Form 990–BL to monitor activities of black lung benefit trusts, and to collect excise taxes on these trusts and certain related persons if they engage in proscribed activities. The tax is figured on Schedule A and attached to Form 990–BL. Form 6069 is used by coal mine operators to figure the maximum deduction to a black lung benefit trust. If excess contributions are made, IRS uses the form to figure and collect the tax on excess contributions.

Current Actions: There are no changes being made to these forms at this time.

Type of Review: Extension of a currently approved collection.

Affected Public: Business or other for-profit organizations, individuals, and not-for-profit institutions.

Estimated Number of Respondents: 22—Form 990–BL; 1—Form 6069.

Estimated Time Per Respondent: 31 hours, 34 minutes—Form 990–BL; 9 Hours, 56 minutes—Form 6069.

Estimated Total Annual Burden Hours: 563.

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: May 5, 2005.

Glenn P. Kirkland,

IRS Reports Clearance Officer.

[FR Doc. E5–2391 Filed 5–12–05; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Proposed Collection; Comment Request for Form 4684

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, Public Law 104–13 (44 U.S.C. 3506(c)(2)(A)). Currently, the IRS is soliciting comments concerning Form 4684, Casualties and Thefts.

DATES: Written comments should be received on or before July 12, 2005 to be assured of consideration.

ADDRESSES: Direct all written comments to Glenn P. Kirkland, Internal Revenue Service, room 6516, 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 R. Joseph Durbala, (202) 622–3634, Internal Revenue Service, room 6516, 1111 Constitution Avenue NW., Washington, DC 20224 or through the Internet at *RJoseph.Durbala@irs.gov.*

SUPPLEMENTARY INFORMATION:

Title: Casualties and Thefts.

OMB Number: 1545–0177.

Form Number: 4684.

Abstract: Form 4684 is used by taxpayers to compute their gain or loss from casualties or thefts, and to summarize such gains and losses. The data is used to verify that the correct gain or loss has been computed.

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: Individuals or households and business or other for-profit organizations.

Estimated Number of Respondents: 170,000.

Estimated Time per Respondent: 4 hr., 3 min.

Estimated Total Annual Burden Hours: 688,500.

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: May 6, 2005.

Glenn P. Kirkland,

IRS Reports Clearance Officer.

[FR Doc. E5–2393 Filed 5–12–05; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Proposed Collection; Comment Request for Form 730

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, Public Law 104–13 (44 U.S.C. 3506(c)(2)(A)). Currently, the IRS is soliciting comments concerning Form 730, Tax on Wagering.

DATES: Written comments should be received on or before July 12, 2005 to be assured of consideration.

ADDRESSES: Direct all written comments to Glenn P. Kirkland, Internal Revenue Service, room 6516, 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 R. Joseph Durbala, (202) 622–3634, Internal Revenue Service, room 6407, 1111 Constitution Avenue, NW., Washington, DC 20224 or through the Internet at *RJoseph.Durbala@irs.gov.*

SUPPLEMENTARY INFORMATION:

Title: Tax on Wagering.

OMB Number: 1545–0235.

Form Number: Form 730.

Abstract: Form 730 is used to identify taxable wagers under Internal Revenue Code section 4401 and collect the tax monthly. The information is used to determine if persons accepting wagers are correctly reporting the amount of wagers and paying the required tax.

Current Actions: Form 730 has been reformatted to be scannable. New entry boxes have been added for a daytime telephone number, and to indicate a final return. Lines 4a and 4b each have a new entry to allow for the separate computation of tax amounts for wagers authorized under state law (line 4a) and for all other wagers (line 4b).

Type of Review: Revision of a currently approved collection.

Affected Public: Businesses or other for-profit organizations and individuals.

Estimated Number of Respondents: 102,164.

Estimated Time Per Response: 8 hrs., 25 min.

Estimated Total Annual Burden Hours: 384,291.

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: May 6, 2005.

Glenn Kirkland,

IRS Reports Clearance Officer.

[FR Doc. E5–2395 Filed 5–12–05; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

[FI–28–96]

Proposed Collection; Comment Request for Regulation Project

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, Public Law 104–13 (44 U.S.C. 3506(c)(2)(A)). Currently, the IRS is soliciting comments concerning an existing final regulation, FI–28–96 (TD 8801), Arbitrage Restrictions on Tax-Exempt Bonds (§ 1.148–5).

DATES: Written comments should be received on or before July 12, 2005 to be assured of consideration.

ADDRESSES: Direct all written comments to Glenn Kirkland, Internal Revenue Service, room 6516, 1111 Constitution Avenue NW., Washington, DC 20224.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the regulation should be directed to R. Joseph Durbala, (202) 622–3634, Internal Revenue Service, room 6516, 1111 Constitution Avenue NW., Washington, DC 20224, or through the Internet at *RJoseph.Durbala@irs.gov*.

SUPPLEMENTARY INFORMATION:

Title: Arbitrage Restrictions on Tax-Exempt Bonds.

OMB Number: 1545–1490.

Regulation Project Number: FI–28–96.

Abstract: This regulation provides guidance concerning the arbitrage restrictions applicable to tax-exempt bonds issued by state and local governments and contains rules regarding the use of proceeds of state and local bonds to acquire higher yielding investments. The regulation provides safe harbors for establishing the fair market value of all investments purchased for yield restricted defeasance escrows. Further, the regulation requires that issuers must retain certain records and information with the bond documents. The recordkeeping requirements are necessary for the IRS to determine that an issuer of tax-exempt bonds has not paid more than fair market value for nonpurpose investments under section 148 of the Internal Revenue Code.

Current Actions: There is no change to this existing regulation.

Type of Review: Extension of currently approved collection.

Affected Public: State, local, or tribal governments, and not-for-profit institutions.

Estimated Number of Respondents: 1,400.

Estimated Time Per Respondent: 1 hour.

Estimated Total Annual Burden Hours: 1,425.

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: May 4, 2005.

Glenn Kirkland,

IRS Reports Clearance Officer.

[FR Doc. E5–2397 Filed 5–12–05; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Proposed Collection; Comment Request for Notice 2005–32

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, Public Law 104–13 (44 U.S.C. 3506(c)(2)(A)). Currently, the IRS is soliciting comments concerning Notice 2005–32, Notification requirement for transfer of partnership interest in Electing Investment Partnership (EIP).

DATES: Written comments should be received on or before July 12, 2005, to be assured of consideration.

ADDRESSES: Direct all written comments to Glenn P. Kirkland, Internal Revenue Service, room 6516, 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 R. Joseph Durbala, (202) 622–3634, Internal Revenue Service, room 6516, 1111 Constitution Avenue, NW., Washington, DC 20224, or through the Internet at *RJoseph.Durbala@irs.gov.*

SUPPLEMENTARY INFORMATION:

Title: Notification requirement for transfer of partnership interest in Electing Investment Partnership (EIP).

OMB Number: 1545–1939.

Notice Number: Notice 2005–32.

Abstract: The American Jobs Creation Act of 2004 amended §§ 734, 743, and 6031 of the Internal Revenue Code. The amendment necessitated the creation of new reporting requirements and procedures for the mandatory basis adjustment provisions of §§ 734 and 743, the procedures for making an electing investment partnership election under § 743(e), and the reporting requirements for electing investment partnerships and their partners. This notice provides interim procedures for partnerships and partners to comply with the mandatory basis adjustment provisions of sections 734 and 743. This notice also provides interim procedures for electing investment partnerships and their partners to comply with sections 743(e) and 6031(f).

Current Actions: There are no changes being made to the notice at this time.

Type of Review: Extension of a currently approved collection.

Affected Public: Business or other for-profit organization, individuals, or households.

Estimated Number of Respondents: 266,400.

Estimated Time Per Respondent: 2 Hours, 4 minutes.

Estimated Total Annual Burden Hours: 522,100.

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: May 5, 2005.

Glenn P. Kirkland,

IRS Reports Clearance Officer.

[FR Doc. E5–2398 Filed 5–12–05; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

United States Mint

Request for Citizens Coinage Advisory Committee Membership Applications

SUMMARY: Pursuant to United States Code, Title 31, section 5135 (b), the United States Mint is accepting applications for appointment to the Citizens Coinage Advisory Committee (CCAC) for a member specially qualified to serve by virtue of his or her education, training or experience in *American History.* The CCAC was established to:

• Advise the Secretary of the Treasury on any theme or design proposals relating to circulating coinage, bullion coinage, Congressional Gold Medals, and national and other medals produced by the United States Mint.

• Advise the Secretary of the Treasury with regard to the events, persons, or places that the CCAC recommends to be commemorated by the issuance of commemorative coins in each of the five calendar years succeeding the year in which a commemorative coin designation is made.

• Make recommendations with respect to the mintage level for any commemorative coin recommended.

Total membership consists of eleven voting members appointed by the Secretary of the Treasury:

• One person specially qualified by virtue of his or her education, training or experience as nationally or internationally recognized curator in the United States of a numismatic collection;

• One person specially qualified by virtue of his or her experience in the medallic arts or sculpture;

• One person specially qualified by virtue of his or her education, training, or experience in American history;

• One person specially qualified by virtue of his or her education, training, or experience in numismatics;

• Three persons who can represent the interests of the general public in the coinage of the United States; and

• Four persons appointed by the Secretary of the Treasury on the basis of the recommendations by the House and Senate leadership.

Members are appointed for a term of four years. No individual may be appointed to the CCAC while serving as an officer or employee of the Federal Government.

The CCAC is subject to the direction of the Secretary of the Treasury. Meetings of the CCAC are open to the public and are held approximately six to eight times per year. The United States Mint is responsible for providing the necessary support, technical services and advice to the CCAC. CCAC members are not paid for their time or services, but, consistent with Federal Travel Regulations, members are reimbursed for their travel and lodging expenses to attend meetings. Members are Special Government Employees and are subject to the Standards of Ethical Conduct for Employees of the Executive Branch (5 CFR part 2653).

The United States Mint will review all submissions and will forward its recommendations to the Secretary of the Treasury for appointment consideration. Candidates should include specific skills, abilities, talents, and credentials to support their applications. The United States Mint is also interested in candidates who have demonstrated leadership skills, who have received recognition by their peers in their field of interest, who have a record of participation in public service or activities, and who are willing to commit the time and effort to participate in the CCAC meetings and related activities.

Application Deadline: May 27, 2005.

Receipt of Applications: Any member of the public wishing to be considered for participation on the CCAC should submit a resume and cover letter describing qualifications for membership, by fax to (202) 756–6830, or by mail to the United States Mint, 801 9th Street, NW., Washington, DC 20220, Attn: Madelyn Simmons Marchessault. Submissions must be postmarked no later than May 27, 2005.

Notice Concerning Delivery of First-Class and Priority Mail: The delivery of first-class mail to the United States Mint has been delayed since mid-October 2001, and delays are expected to continue. Until normal mail service resumes, please consider using alternate delivery services when sending time-sensitive material.

Some or all of the first-class and priority mail we receive may be put through an irradiation process to protect against biological contamination. Support materials put through this process may suffer irreversible damage. We encourage you to consider using alternate delivery services.

FOR FURTHER INFORMATION CONTACT: Madelyn Simmons Marchessault, United States Mint Liaison to the CCAC; 801 9th Street, NW., Washington, DC 20220; or call (202) 354–7200.

Dated: May 9, 2005.

Henrietta Holsman Fore,

Director, United States Mint.

[FR Doc. 05–9543 Filed 5–12–05; 8:45 am]

BILLING CODE 4810–37–P

Corrections

Federal Register
Vol. 70, No. 92
Friday, May 13, 2005

This section of the FEDERAL REGISTER contains editorial corrections of previously published Presidential, Rule, Proposed Rule, and Notice documents. These corrections are prepared by the Office of the Federal Register. Agency prepared corrections are issued as signed documents and appear in the appropriate document categories elsewhere in the issue.

DEPARTMENT OF LABOR

Employment Standards Administration

Proposed Collection; Comment Request

Correction

In notice document 05–8844 beginning on page 23230 in the issue of Wednesday, May 4, 2005, make the following correction:

On page 23231, in the first column, under **DATES**, in the fourth line ''[insert date 60 days from the date of publication]'' should read ''July 5, 2005''.

[FR Doc. C5–8844 Filed 5–12–05; 8:45 am]

BILLING CODE 1505–01–D

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

29 CFR Part 2200

Revisions to Procedural Rules Governing Practice Before the Occupational Safety and Health Review Commission

Correction

In rule document 05–8744 beginning on page 22785 in the issue of Tuesday, May 3, 2005, make the following corrections:

§2200.7 [Corrected]

1. On page 22787, in §2200.7, in the second column, in the first line of paragraph (c), ''(C)'' should read ''(c)''.

2. On the same page, in the same section, in the same paragraph, in the 18th line, ''se3rved'' should read ''served''.

3. On the same page, in the same section, in paragraph (g), in the second line, ''vent'' should read ''event''.

4. On the same page, in the same section, in the third column, in the 14th line of the first full paragraph, ''rules'' should read ''Rules''.

5. On the same page, in the same section, in the same column, in the 18th line of the first full paragraph, ''Health, Review'' should read ''Health Review''.

§2200.8 [Corrected]

6. On page 22788, in §2200.8, in the first column, in paragraph (g)(2), in the second line, ''with the these'' should read ''with these''.

7. On the same page, in the same section, in paragraph (g)(6), in the fourth line,

''(i) The transmittal of a document.

(ii) The inclusion of an attachment:'' should read:

''(i) The transmittal of a document;

(ii) The inclusion of an attachment;''.

§2200.32 [Corrected]

8. On page 22788, in §2200.32, in the third column, in the 15th line from the top, ''that is'' should read ''that it is''.

9. On the same page, in the same section, in the same column, in the 21st line from the top, ''part'' should read ''party''.

§2200.51 [Corrected]

10. On page 22788, in §2200.51, in the third column, the section heading **§2200.51 Prehearing conferences and others** should read **§2200.51 Prehearing conferences and orders.**

§2200.52 [Corrected]

11. On page 22789, in §2200.52, in the third column, in paragraph (h)(1)(ii), in the second line, ''classed'' should read ''called''.

12. On the same page, in the same section, in the same column, in paragraph (j), in the first line, ''request'' should read ''requests''.

13. On the same page, in the same section, in the same column, in the same paragraph, in the third line, ''request'' should read ''requests''.

14. On page 22790, in the same section, in the first column, in paragraph (m), in the third line, ''fro'' should read ''for''.

§2200.54 [Corrected]

15. On page 22790, in §2200.54(b), in the first column, in the 13th line, ''stating the'' should read ''stating in''.

§2200.120 [Corrected]

16. On page 22791, in §2200.120(b)(2), in the first column, in the third line, ''Nothwithstanding'' should read ''Notwithstanding''.

17. On the same page, in the same section, in the second column, in paragraph (c)(2), in the fifth line, ''my'' should read ''may''.

18. On the same page, in the same section, in the same column, in paragraph (d)(2), in the 16th line, ''other wise'' should read ''otherwise''.

[FR Doc. C5–8744 Filed 5–12–05; 8:45 am]

BILLING CODE 1505–01–D

Federal Register

Friday,
May 13, 2005

Part II

Department of Agriculture

Forest Service
Office of the Secretary

36 CFR Part 294
Special Areas; State Petitions for Inventoried Roadless Area Management; Roadless Area Conservation National Advisory Committee; Final Rule and Notice

DEPARTMENT OF AGRICULTURE

Forest Service

36 CFR Part 294

RIN 0596–AC10

Special Areas; State Petitions for Inventoried Roadless Area Management

AGENCY: Forest Service, USDA.

ACTION: Final rule and decision memo.

SUMMARY: The Department of Agriculture is revising Subpart B of Title 36, Code of Federal Regulations, Protection of Inventoried Roadless Areas, by adopting a new rule that establishes a petitioning process that will provide Governors an opportunity to seek establishment of or adjustment to management requirements for National Forest System inventoried roadless areas within their States. The opportunity for submitting State petitions is available for 18 months following the effective date of this final rule.

Under this final rule, submission of a petition is strictly voluntary, and management requirements for inventoried roadless areas would be guided by individual land management plans until and unless these management requirements are changed through a State-specific rulemaking. Elsewhere in this part of today's **Federal Register**, the Department is announcing the establishment of a national advisory committee in accordance with the Federal Advisory Committee Act (5 U.S.C. App. II) to assist the Secretary with the implementation of this rule.

The preamble of this rule includes a discussion of the public comments received on the proposed rule published July 16, 2004 (69 FR 42636) and the Department's responses to the comments.

DATES: This rule is effective May 13, 2005.

FOR FURTHER INFORMATION CONTACT: Dave Barone, Planning Specialist, Ecosystem Management Coordination Staff, Forest Service, USDA, (202) 205–1019.

SUPPLEMENTARY INFORMATION:

Background

The U.S. Department of Agriculture (USDA) Forest Service commitment to land stewardship and public service is the framework within which the agency manages natural resources as provided by law, regulation, and other legal authorities. Implicit in this is the agency's collaboration with public, private, and nonprofit partners. As a leader in natural resource conservation, the USDA Forest Service provides leadership in the conservation, management, and use of the Nation's forests, rangeland, and aquatic ecosystems.

The USDA Forest Service manages National Forest System (NFS) lands to maintain and enhance the quality of the environment to meet the Nation's current and future needs. Agency land management assures sustainable resources by providing for diversity of plant and animal communities and ecological productivity that supports recreation, water, timber, minerals, fish, wildlife, wilderness, and aesthetic values for current and future generations.

State governments are important partners in management of the Nation's land and natural resources. States, particularly in the West, own and manage large tracts of land with tremendous social and biological value. State governments have frequently pioneered innovative land management programs and policies. State governments exert considerable influence over statewide economic development and private land use, both of which significantly affect natural resource management. In addition, State conservation agencies' relationships with others offer additional partnership opportunities. Strong State and Federal cooperation regarding management of inventoried roadless areas can facilitate long-term, community-oriented solutions.

On January 12, 2001, the Department promulgated the roadless rule at 36 CFR part 294 (66 FR 3244), which fundamentally changed the Forest Service's longstanding approach to management of inventoried roadless areas by establishing nationwide prohibitions generally limiting, with some exceptions, timber harvest, road construction, and road reconstruction within inventoried roadless areas on NFS lands.

Concerns were immediately expressed by those most impacted by the roadless rule's prohibitions. These concerns included the sufficiency and the accuracy of the information available for public review during the rulemaking process; the inclusion of an estimated 2.8 million acres of roaded lands in the inventoried roadless area land base; the denial of requests to lengthen the public review period; the denial of cooperating agency status requested by several Western States; the sufficiency of the range of alternatives considered in the rulemaking process; the need for flexibility and exceptions to allow for needed resource management activities; and the changes made in the final rule after the closure of the public comment period. Concerns were also expressed about applying one set of standards uniformly to every inventoried roadless area.

On May 4, 2001, the Secretary of Agriculture expressed the Administration's commitment to the objective of conserving inventoried roadless area values in the NFS, and also acknowledged concerns raised by local communities, Tribes, and States impacted by the roadless rule. At that time, the Secretary indicated that USDA would move forward with a responsible and balanced approach to re-examining the roadless rule in an effort to address those concerns while enhancing roadless area values and characteristics. To meet this objective, management of inventoried roadless areas must address those activities having the greatest likelihood of altering, fragmenting, or otherwise degrading roadless area values and characteristics. Appropriate management of inventoried roadless areas must also address reasonable and legitimate concerns about how the agency provides for the conservation of roadless areas. For example, providing for outdoor recreation opportunities for fishing and hunting in remote areas may at times require access and active management activities to restore or maintain habitat conditions for the management of some fish and wildlife species.

On July 10, 2001, the Forest Service published an advance notice of proposed rulemaking (ANPR) (66 FR 35918) seeking public comment concerning how best to proceed with long-term conservation and management of inventoried roadless areas. The ANPR acknowledged that the future management of inventoried roadless areas would depend on a number of factors, such as court decisions, public comments, and the consideration of practical options and other administrative tools for amending the 2001 roadless rule to address inventoried roadless area protection.

The responses received on the ANPR represented two main points of view on natural resource management and perspectives on resource decisionmaking: (1) Emphasis on environmental protection and preservation, and support for making national decisions; and (2) emphasis on responsible active management, and support for local conservation decisions made through the land management planning process. A summary of the public comment on the ANPR was prepared in May of 2002, and is

available on the World Wide Web/Internet on the Forest Service Web site for Roadless Area Conservation at: *http://www.roadless.fs.fed.us*.

Until promulgation of the 2001 roadless rule, the Forest Service managed inventoried roadless areas based on individual land management plans. These plans have been developed for each unit of the NFS through a public notice and comment process, building on years of scientific findings, analyses, and extensive public involvement. Land management plans typically identify and recommend areas that would be appropriate for designation as wilderness by the Congress, and provide guidance on activities and uses in these areas.

Litigation History

The 2001 roadless rule has been the subject of nine lawsuits in Federal district courts in Idaho, Utah, North Dakota, Wyoming, Alaska, and the District of Columbia. In one of these lawsuits, the U.S. District Court for the District of Idaho issued a preliminary injunction prohibiting implementation of the roadless rule on May 10, 2001. The preliminary injunction was reversed by the U.S. Court of Appeals for the Ninth Circuit.

On June 10, 2003, a settlement agreement was reached in the *State of Alaska* v. *USDA* litigation. As discussed in more detail below, this settlement agreement led to the adoption of a final rule on December 30, 2003, that temporarily withdrew the Tongass National Forest from the prohibitions of the roadless rule.

In still another lawsuit, on July 14, 2003, the U.S. District Court for the District of Wyoming found the roadless rule to be unlawful and ordered that the rule ''be permanently enjoined.'' That ruling has been appealed to the Tenth Circuit by intervenors.

Overview

USDA is committed to conserving and managing inventoried roadless areas and considers these areas an important component of the NFS. The Department believes that revising 36 CFR part 294 by adopting a new rule that establishes a State petitioning process that will allow State-specific consideration of the needs of these areas is an appropriate solution to address the challenges of inventoried roadless area management on NFS lands.

States affected by the roadless rule have been keenly interested in inventoried roadless area management, especially the Western States where most of the agency's inventoried roadless areas are located. Collaborating and cooperating with States on the long-term strategy for the conservation and management or inventoried roadless areas on NFS lands allows for the recognition of local situations and resolutions of unique resource management challenges within a specific State. Collaboration with others who have strong interest in the conservation and management of inventoried roadless areas also helps ensure balanced management decisions that maintain the most important characteristics and values of those areas.

The State petitions under this final rule must include specific information and recommendations on the management requirements for individual inventoried roadless areas within that particular State. If an inventoried roadless area boundary extends into another State, the petitioning Governor should coordinate with the Governor of the adjacent State. Petitions must be submitted to the Secretary of Agriculture within 18 months of the effective date of this final rule. Petitions will be evaluated, and if accepted, the Secretary would initiate subsequent rulemaking for inventoried roadless area conservation and management within that State. The Department's general petitioning process for the approval, amendment or repeal of rules (7 CFR 1.28) will remain available after expiration of the 18-month petitioning period.

The Secretary has decided to establish a national advisory committee to provide advice and recommendations on the implementation of this State-specific petition for rulemaking process (§ 294.15). This committee is being established in response to comments received that roadless area management has national aspects that need to be considered. This point is well taken and a national advisory committee can fulfill this function. The advisory committee will consist of members who represent diverse national organizations interested in the conservation and management of National Forest System inventoried roadless areas. Elsewhere in today's **Federal Register** the Department is announcing the establishment of this committee and requesting nominations for membership.

Changes Between Proposed Rule and Final Rule

There were some adjustments made to the final rule based in part on comments received on the proposed rule. Highlights of these changes are discussed below.

Definition

The final rule definition section (§ 294.11) has been changed because the agency has more up-to-date information on inventoried roadless areas today available through the land management planning process than it had in 2000. The 58.5 million acres of inventoried roadless areas used as the basis for the roadless rule's analysis were identified from the then most recent analysis for each national forest or grassland, including the second Roadless Area Review and Evaluation (RARE II) which was documented in a final environmental impact statement dated January of 1979, land management plans, and other large-scale assessments such as the 1996 Southern Appalachian Assessment. Since publication of the 2001 roadless rule, 22 land management plans have been revised and 43 are currently in the plan revision process. These revisions have provided more accurate and current information regarding inventoried roadless areas.

Advisory Committee

Sections 294.15 and 294.16 of the proposed rule are now sections 294.16 and 294.17, respectively in the final rule in order to introduce a new section 294.15 in the final rule. This new section recognizes the Department's decision to establish an advisory committee to provide advice and recommendations on the implementation of the rule. The preamble of the proposed rule informed the public that the Secretary was considering the establishment of such an advisory committee and requested public comment regarding the establishment of the committee.

Severability

The Department has chosen to add a new section (§ 294.18) concerning the issue of severability to address the possibility that the rule, or portions of the rule, may be challenged in litigation. It is the Department's intent that the individual provisions of this rule be severable from each other. If any provision or the application of any provision of this regulation to any circumstance is held invalid, it is the Department's intent that the remainder shall not be affected and would continue to be operative.

Further, the severability provision also responds to public comment expressing concerns and confusion regarding the status of the prior roadless rule that was set aside by the Federal District Court in Wyoming. The Department believes that adopting this new rule resolves the matter by

establishing a new process for addressing inventoried roadless area management.

The 2001 rulemaking was immediately challenged in multiple lawsuits, was preliminarily and permanently enjoined, and continues to be the subject of litigation and divisive argument. Regardless of these lawsuits, the Department has concluded that the 2001 rule's inflexible ''one-size-fits-all'' nationwide rulemaking approach is flawed and there are better means to achieve protection of roadless area values. The Department wishes to make its intent clear that should all or any part of this regulation be set aside, the Department does not intend that the prior rule be reinstated, in whole or in part.

Summary of Public Comments and the Department's Responses

The proposed rule was published in the **Federal Register** on July 16, 2004, for a 60-day public comment period (69 FR 42636). Due to public requests for additional time, the comment period was extended by 62 days for a total of 122 days. The Forest Service received approximately 1.8 million comments from a wide variety of respondents on the proposed rule. All comments were considered in reaching a decision on the final rule. A narrative document containing a summary of the substantive issues raised by respondents is posted at the Forest Service World Wide Web/Internet Web site *http://www.roadless.fs.fed.us*. A summary of comments and the Department's responses to them follows.

Desirability of a National Standard for Roadless Area Conservation: Some respondents, including a number of members of Congress and Governors, expressed strong support for implementing the roadless rule as adopted in January, 2001, which these respondents regard as essential to ensure the long-term protection of roadless areas from harmful road construction and commercial logging. Other respondents, including some Governors, voiced their strong support for the proposed rule stating that taking a more localized and collaborative approach to developing management requirements for roadless areas is more appropriate than taking a national approach.

Response: Many concerns were expressed about applying the national prohibitions of the 2001 roadless rule. Many of these concerns are represented by those raised in the various lawsuits that challenged the 2001 roadless rule. Consistent with these concerns, the U.S. District Court for the District of Wyoming permanently enjoined the 2001 roadless rule. The Department remains committed to providing a responsible and balanced approach to address the concerns raised in litigation and elsewhere while enhancing roadless area values and characteristics. The Department believes that the petitioning opportunity in this final rule represents such a balanced approach.

Management Requirements and the Status Quo: Some respondents felt that the proposed rule was not clear and thought that unless a Governor submitted a petition there would be no protections for inventoried roadless areas.

Response: The base line management requirements for inventoried roadless areas are those that exist in currently approved land management plans. These plans, and required revisions to these plans, are developed with extensive public involvement and collaboration, using the best available local information about resource conditions, trends, and issues. It would be these management requirements that Governors could petition to adjust. If no petition was submitted, these management plan requirements would remain unchanged subject to amendment or revision under the National Forest Management Act (NFMA) planning procedures at 36 CFR part 219.

Compliance with Executive Order 13175 and Finding of No ''Tribal Implications'': Some Tribal officials commented that the Forest Service failed to comply with Executive Order 13175 by not consulting and coordinating with Tribes prior to publication of the proposed rule. They stated that since consultation had taken place when the 2001 roadless rule was developed, it should also have taken place with a rulemaking that proposed to replace the 2001 roadless rule. In addition, some Tribal officials felt that Tribes should be afforded the same petitioning opportunities as Governors.

Response: The 2001 roadless rule established on-the-ground management prohibitions that actually superceded management requirements in land management plans. In that case, it was appropriate to seek advance consultation with Tribes. The State petitioning process does not propose any on-the-ground changes to existing management requirements. If a petition is accepted by the Secretary and State-specific rulemaking is undertaken to adjust on-the-ground management requirements, consultation with Tribes will take place at that time.

It is important to note that Congressional reviews of inventoried roadless areas for consideration as potential wilderness primarily has been conducted on a state-by-state basis for the past 25 years. In addition, the Department envisions that before the Secretary would approve a petition submitted by a Governor, that the petition would have to have been developed in collaboration with local governments, Tribes, stakeholders, and other interested parties.

Volume of Public Comments and Support for the 2001 Roadless Rule: Many respondents discussed the volume of public comment received over the past 5 years in support of the 2001 roadless rule and that the proposed rule goes against the wishes of the American public.

Response: Every comment received is considered for its substance and contribution to informed decisionmaking, whether it is one comment repeated by tens of thousands of people or a comment submitted by only one person. The public comment process is not intended to serve as a scientifically valid survey process to determine public opinion. The emphasis in reviewing public comment is on the content of the comment rather than on the number of times a comment was received. The comment analysis process is intended to identify unique substantive comments relative to the proposal to facilitate their consideration in the decisionmaking process. All comments are considered, including comments that support and that oppose the proposal. That people do not agree on how public lands should be managed is a historical, as well as modern dilemma faced by resource managers. However, public comment processes, while imperfect, do provide a vital avenue for engaging a wide array of the public in resource management processes and outcomes.

Burden to States and Management Responsibility: Some respondents, including several Governors, commented that the proposed rule would put an undue burden on the States since they do not have the resources to engage in this kind of a process. Other respondents felt that the Federal government was abandoning its responsibilities in managing inventoried roadless areas and disagreed with turning the responsibilities over to State government.

Response: Nothing in the proposed or final rule transfers any responsibility for the management of federal lands to the States. These are federal lands administered by the USDA Forest Service, and will continue to be managed as such. Existing management requirements for inventoried roadless

areas have been put in place by agency land management planning procedures and approved by Forest Service officials. If, after reviewing these existing management requirements in a collaborative process, a Governor submits a petition, as required by the final rule, that is accepted by the Secretary, a State-specific rulemaking process would be conducted by the Forest Service with the final decision reserved to the Secretary. This rulemaking process will include public notice and comment procedures and the appropriate level of environmental analysis.

The Department envisions that Governors considering submitting a petition to the Secretary for State-specific rulemaking would request the Forest Service to provide the State with existing information and management requirements for their review. After collaborating with local and Tribal governments, stakeholders, and other interested parties, the Governor may or may not then decide to submit a petition. If a petition is submitted and accepted, the rulemaking process would be conducted by the Forest Service with the State playing a cooperating agency role in the environmental analysis. The Department does not feel that this process would pose an undue burden on a State and does not constitute an unfunded mandate.

Local Decisionmaking in Land Management Planning Process: Some respondents felt that any rulemaking to establish management requirements for units of the National Forest System was inappropriate, and that these requirements should only be established through the National Forest Management Act (NFMA) land management planning process. Responses received from several States, in some cases supporting the proposed State-petitioning rule and in other cases opposing it, also indicated that it was their intent to work closely with the Forest Service as land management plans were revised to provide input on management requirements for inventoried roadless areas.

Response: The Department believes that in most cases the land management planning process represents the best approach for addressing the challenges of natural resource management on units of the National Forest System. Land management plans are developed, amended, and revised using a collaborative process that considers the integrated management requirements of the entire unit and the role it plays in the surrounding area. Some State and local governments actually participate in the land management plan revision process as cooperating agencies and the Department encourages and supports this level of involvement. The Department also believes, however, that in some cases it is appropriate to allow other approaches, and that the National Forest Management Act (NFMA) and other statues provide the necessary legal authority to implement the final rule. This final rule provides an opportunity to take another approach allowing both national perspectives and community-level support to accomplish a long-term solution to roadless area conservation.

Establishment of an Advisory Committee: Some respondents felt that an advisory committee was needed to assist in the implementation of the rule, and one group recommended a broader set of responsibilities for the advisory committee that would include the review of all proposed management activities in inventoried roadless areas and all management requirements in proposed plan revisions and amendments. Other respondents commented that a national advisory committee was not necessary. Some State responses included comments that such a committee would duplicate efforts the State would have gone through to develop a petition in an open public process, and that it would not be appropriate for such a committee to pass judgment on a State's petition.

Response: The Department has decided that establishing a national advisory committee to provide the Secretary with advice and recommendations would be helpful in implementing this rule. The scope of the committee's duties would be to review each petition submitted in light of the rule requirements, and provide the Secretary with advice and recommendations on each petition, as well as on any subsequent State-specific rulemaking. The Department believes that a third-party review of petitions by an advisory committee composed of members representing national organizations with diverse points of view and knowledge of contemporary issues involving the conservation and management of inventoried roadless areas, would be very helpful to the Secretary.

Local Government Participation: Several respondents commented that local governments should be a part of the petitioning process, and should also play a role in any environmental analysis conducted for a State-specific rulemaking effort.

Response: The Department agrees that local governments should be included in any collaborative process a Governor conducts in preparation of submitting a petition. We envision a Governor involving all interested parties in such a process, including Tribal governments and adjacent States if some inventoried roadless areas happen to be located in more than one State. Any subsequent State-specific rulemaking undertaken by the Forest Service could also include local government participation in the environmental analysis required by that rulemaking effort.

Adequacy of the 18-Month Timeframe to Submit a Petition: Some respondents felt that the 18-month timeframe to submit a petition was more than adequate. Others commented that more time was needed or that no time limits should be imposed since this would offer future Governors an opportunity to submit petitions. One Governor commented that the reason the State did not support the proposed rule was that they would rather work with the Forest Service through the land management planning process. The commenter stated that in the absence of management requirements established through rulemaking, the opportunity to adjust these requirements through subsequent plan revisions and amendments would still be available to Governors in the future. This Governor was concerned that establishing management requirements through rulemaking would just represent one Governor's perspective in one point in time. Several Governors and other respondents stated that there was no need for such a rule since Governors already have the right to petition for rulemaking.

Response: Submitting a petition under this final rule would strictly be voluntary on the part of any State. The Department believes that 18 months is an adequate amount of time for a State to collaborate effectively with local and Tribal governments, stakeholders, and other interested parties to develop a proposal that would consider the full range of public input. While the petitioning opportunity afforded to Governors under this final rule would only be available for 18 months, the Department's general petitioning process for the approval, amendment, or repeal of rules (7 CFR 1.28) would remain available after expiration of the 18-month petitioning period. Management requirements established through the land management planning process would always be available for review and adjustment through subsequent plan revisions or amendments.

Adjusting Existing Management Requirements for Inventoried Roadless Areas: Some respondents opposed the proposed rule because they agreed with the management requirements that were in place for specific NFS units and were

concerned that these would be changed. One respondent stated that changing management requirements established through the land management planning process would be a breach of public trust. One group commented that the proposed petitioning process would conflict with the land management planning process; would only look at inventoried roadless areas instead of the entire NFS unit; and may reduce the perceived need by Governors, State agencies, and the public to participate in the land management planning process. One Governor commented that the State had just worked for many years with the Forest Service on a recent plan revision effort and did not want to have anything happen that would change that outcome. Other respondents felt that establishing or adjusting management requirements for inventoried roadless areas through rulemaking would make these requirements more permanent and also make them less likely to be changed in the future.

Response: Management requirements established through the land management planning process represent the results of a collaborative process that included many groups and individuals, and also represent a balanced approach for the integrated management for that NFS unit. Not everyone necessarily agrees with every management requirement that is approved, however. The responsible official who approves a land management plan, plan revision, or plan amendment does so through an informed decisionmaking process that seeks, but does not always attain, consensus. In any process used to adjust existing management requirements, be it through a State-specific rulemaking process put in place with this final rule, or through future plan revisions or amendments, some individuals or groups will agree with the changes and some will not. In addition, since any State-specific rulemaking envisioned by the final rule will include public notice and comment procedures and appropriate National Environmental Policy Act (NEPA) environmental analysis procedures, the Secretary will be making an informed decision when adopting any final State-specific rule. There is no guarantee that the management requirements the Secretary adopts through a State-specific rulemaking effort will look exactly like those recommended and proposed in a petition submitted by a Governor.

Relationship of State-specific Rules and Land Management Plans: Some respondents raised questions about the relationship of post-petition rules and existing land management plans.

Response: First, when a petition is accepted and rulemaking is directed, it is crucial to recognize that the subsequent rulemaking will be undertaken with full public participation. The Department will ensure that the same kinds of considerations that guide development of land management plans will be taken into account during such rulemakings.

Second, the Department envisions that petitions and subsequent rulemakings may be far more flexible and creative than a simplistic prohibition or moratorium. The goal is to improve protection and accomplishment of management objectives, but there may be a broad range of reasonable alternative variations in context, procedures, duration, and structure as to how that goal is achieved. For example, an agreement to improve coordination by providing notice when actions will be taken within roadless lands on adjoining National Forest System and State Forests (whether done by memorandum of understanding or rulemaking) would not necessitate adjustment of land management plans. Where a rulemaking is undertaken that would alter management direction of land management plans, such a rule must be developed with site-specific information and the same kinds of considerations that apply when amending land management plans. This represents a significant difference between this final rule and the approach taken in the 2001 rulemaking. Finally, any rule established pursuant to this system will be subject to the Department's general petitioning process set out in 7 CFR 1.28.

The Petitioning Process and Public Input: Some respondents felt that unless they lived in the State where a petition was submitted to the Secretary and a subsequent State-specific rulemaking was undertaken that they would not be able to comment on any proposed changes to management requirements.

Response: If the Secretary directs a State-specific rulemaking, a proposed rule would be published in the **Federal Register** for public review and comment. As is the case in all rulemaking, public responses will be evaluated, considered, and used to inform the decisionmaking process for any final rule developed. In addition, individual units of the National Forest System have Internet Web sites and mailing lists that will also provide notice to interested individuals, whether local or not.

Criteria for Reviewing Petitions: Some comments were received requesting that the final rule include a specific standard or criteria that the Secretary will apply when reviewing petitions.

Response: The Department believes this would not be a valuable addition. The Department's goal has been to design an improved system for protecting roadless areas. There is no single factor that can assess how to best accomplish this goal and no one criteria can be identified given the diverse circumstances that apply across the National Forest System. The Department believes that the overall design of the regulation and the required elements of the petition adequately reflect what will be considered. Ultimately, the Department will consider petitions within the context of Congress' charge that National Forest System lands be managed for the multiple use and sustained yield of the several goods and services and that due consideration shall be given to the relative values of the various resources in particular areas. The authority vested by Congress is broad, as is the discretion in how such authority is applied.

Ongoing Management and the Petitioning Process: Some respondents sought clarification of how lands would be managed during review of a petition and how the petitioning process would operate in conjunction with ongoing land management plan revision efforts.

Response: As noted in § 294.14(a)(4), petitions must describe how the proposed changes ''differ from existing applicable land management plan(s) or policies related to inventoried roadless area management * * *.'' The Department wishes to be clear that its intention is that applicable land management plans and policies will govern during the pendency of a review of a petition and subsequent rulemaking. Further, the Department notes that the July 16, 2004, interim directive for the management of inventoried roadless areas (69 FR 42648) will remain in place until January 16, 2006, and the Forest Service may renew the interim directive for an additional 18 months. Finally, it is imperative that land management must continue forward on a day-to-day basis, even in the midst of land management plan revisions and the petitioning process. The agency cannot simply stop making decisions. The petitioning process, like land management plan revision, must accommodate the fact that land management is an ongoing and dynamic process. Indeed, it is possible that some States will elect to pursue addressing shared concerns for inventoried roadless area management via the plan revision

process rather than the petitioning process.

Adequate Protection of Inventoried Roadless Areas: Several respondents suggested that the absence of the court-voided roadless rule left inventoried roadless areas unprotected.

Response: That assertion is not correct. The November 2000 final environmental impact statement (FEIS) for the roadless rule estimated a total of 58.5 million acres of inventoried roadless areas, with some percentage of those lands actually having been developed to at least some extent. The FEIS also identified that over 24 million of those acres were already ''off limits'' to road construction under existing forest plan management direction (along with another 42 million acres of National Forest System (NFS) lands that are ''off limits'' to road construction by Congressional designation). Additionally, the remaining inventoried roadless area acres were subject to the local forest plan forestwide and area-specific management direction. Finally, it should be noted that the agency issued an interim directive for the management of inventoried roadless areas in December of 2001 for 18 months, and reinstated it again in July of 2004 for another 18 months. This interim directive reserves to the Chief, except in specific circumstances that are generally consistent with the prohibition exceptions in the roadless rule, the authority to make decisions in inventoried roadless areas regarding: (1) Road construction or road reconstruction on any NFS unit until a forest-scale roads analysis is completed and incorporated into a forest plan, or a determination is made that an amendment is not necessary; and (2) timber harvesting on any NFS unit until a revision of a forest plan or adoption of a plan amendment that has considered the protection and management of inventoried roadless areas. Any suggestion that no protections exist for inventoried roadless areas is simply inaccurate.

Roadless Areas on the Tongass National Forest: Some comments received indicate that there remains much interest and confusion regarding roadless areas on the Tongass National Forest.

Response: As background, on June 10, 2003, a settlement agreement was reached in the *State of Alaska* v. *USDA* litigation. In that settlement, the Department agreed to propose an amendment to the roadless rule to temporarily withdraw the Tongass National Forest in Alaska from the provisions of the rule, as well as to issue an advance notice of proposed rulemaking to seek public comment on permanently withdrawing both the Tongass and the Chugach National Forests from the provisions of the roadless rule. On December 30, 2003, the Department adopted a final rule that temporarily withdrew the Tongass National Forest. Management of inventoried roadless areas on the Tongass is now governed by the existing forest plan. The roadless lands on the Tongass National Forest have been repeatedly studied and the relative values and resources associated with those lands are well appreciated and understood. Pursuant to the current forest plans for the Tongass and the Chugach National Forests, road construction will not occur on approximately 90 percent of roadless area lands and timber management will not occur on over 95 percent of roadless area lands. Under the approach established in this final rule, management of inventoried roadless areas on the Tongass will continue to be governed by the existing forest plan. This rule thus negates the need for the further Tongass-specific rulemaking anticipated by the 2003 rule.

Petition's Compliance with Applicable Federal Law: Concerns were expressed that petitions might be submitted that do not conform to applicable Federal laws. Some respondents worried that petitions would seek to impose restrictions beyond those permissible under the law, while others expressed concern that petitions would seek to waive mandatory requirements. Several respondents were concerned that petitions would not respect existing rights to access private property.

Response: The proposed regulation at § 294.14(a)(4) required that petitions identify how the recommended management requirements differ from existing management direction while still complying with applicable laws and regulations. This requirement has been retained. Additionally, the Department is required, under these and any circumstances, to assure that rulemakings conform to all applicable Federal laws. In addition, the Department has added a new regulatory provision at § 294.17(c) identifying that nothing in this rule, nor any rule promulgated pursuant to this petitioning process, shall prohibit the exercise of any valid existing rights.

Regulatory Certifications

Regulatory Impact

This final rule has been reviewed under USDA procedures and Executive Order 12866 issued September 30, 1993 (E.O. 12866) on Regulatory Planning and Review. It has been determined that this is not an economically significant rule. This final rule will not have an annual effect of $100 million or more on the economy nor adversely affect productivity, competition, jobs, the environment, public health or safety, nor State or local governments. This final rule will neither interfere with an action taken or planned by another agency. Finally, this final rule will not alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients of such programs. However, because this rule raises novel legal or policy issues arising from legal mandates or the President's priorities, it has been designated as significant and, therefore, has been reviewed by the Office of Management and Budget under E.O. 12866.

Moreover, this final rule has been considered in light of Executive Order 13272 regarding proper consideration of small entities and the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), which amended the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). It has been determined that this action will not have a significant economic impact on a substantial number of small business entities as defined by the Regulatory Flexibility Act. Therefore, a regulatory flexibility analysis is not required for this final rule. This rule will not impose record keeping requirements; will not affect small entities' competitive position in relation to large entities; and will not affect small entities' cash flow, liquidity, or ability to remain in the market.

A cost-benefit analysis has been prepared for this final rule that incorporates by reference the November 2000 detailed regulatory impact analysis prepared for the roadless rule promulgated in January of 2001. A quantitative analysis of costs and benefits associated with this final rule is not feasible, however, because there is no experience with implementing the roadless rule, and thus there are no data available. In addition, many of the effects of this final rule are not readily quantifiable in financial terms because they would be based on future State-specific rulemaking. For these reasons, the cost-benefit analysis prepared for this final rule focuses on the qualitative aspects of implementing a State petition process. Detailed quantitative analysis would be conducted in the future if and when any State-specific rulemaking proposals are made.

The range of potential costs and benefits of this final rule has been

estimated by comparing selected effects of managing 58.5 million acres of inventoried roadless areas following the prohibitions for road construction and timber management activities in the 2001 roadless rule, with managing these same areas in accordance with the existing management requirements contained in land management plans. Approximately 25 percent of the total acres of inventoried roadless areas are in the State of Alaska. About 72 percent of the total is in the 11 Western States of Montana, Idaho, Wyoming, Washington, Utah, Oregon, New Mexico, Nevada, Colorado, California, and Arizona. The remaining 3 percent is scattered among the remaining 26 States and Puerto Rico. While it is currently unknown which States may choose to submit a petition for State-specific rulemaking, the Department assumes that all 38 States and Puerto Rico will do so in the first year the rule is implemented. The costs to the Forest Service and the Department to evaluate and make a determination on a petition are estimated to range from $75,000 to $150,000. Costs could range from $25,000 to $100,000 for an individual State submitting a petition. Total costs to the States for 39 petitions would range from $975,000 to $3,900,000; and total costs to the Government would range from $2,925,000 to $5,850,000. The total cost to the Government includes the costs associated with an advisory committee that will be established to assist the Secretary with implementation of this rule. Total costs of the rule are, therefore, estimated to range from $3,900,000 to $9,750,000.

Environmental Impacts

The Department prepared a draft environmental impact statement (EIS) (May 2000) and a final EIS (November 2000) in association with promulgation of the 2001 roadless rule. The DEIS and FEIS examined in detail the no action alternative in which no rule prohibiting activities in inventoried roadless areas would be issued, and management of these areas would be governed by existing land management plans. The environmental impacts associated with not implementing the enjoined 2001 roadless rule are essentially those disclosed and discussed for the no action alternative displayed in the FEIS. The FEIS is available in the document archives section of the Roadless Area Conservation World Wide Web/Internet site at *http://www.roadless.fs.fed.us.*

This final rule has been reviewed under the National Environmental Policy Act (NEPA), 42 U.S.C. 4321–4370f. The Department's publication of the proposed rule included notice of its expectation that the final rule would be designated for categorical exclusion.

Categorical exclusions (CEs) are an integral part of the NEPA scheme and in no way evade compliance with NEPA. In 1983, the Council on Environmental Quality (CEQ) explained that the use of CEs avoids unnecessary documentation of minor environmental effects in environmental assessments (EAs) and allows agencies to focus their environmental review effort on the major actions that will have a significant effect on the environment and which are the primary focus of NEPA (*see* 48 FR 34, 265–66 (July 28, 1983); *see also* 40 CFR 1500.4(p) (noting that establishment and use of CEs can reduce excessive paperwork by eliminating unnecessary preparation of EAs). CEQ regulations do not require that an agency provide for public comment when it approves an action under categorical exclusion (*see* 40 CFR part 1503).

This final rule establishes administrative procedures to allow a Governor to petition the Secretary of Agriculture to undertake future rulemaking for the management of inventoried roadless areas within a specific State. Thus, subsequent State-specific inventoried roadless area rulemaking may be proposed in the future, at which time, the Forest Service would fully consider the environmental effects of that rulemaking in compliance with National Environmental Policy Act (NEPA) procedures. This final rule is merely procedural in nature and scope and, as such, has no direct, indirect, or cumulative effect on the environment. Section 31.1b of Forest Service Handbook (FSH) 1909.15 (57 FR 43208; September 18, 1992) excludes from documentation in an environmental assessment or impact statement ''rules, regulations, or policies to establish Service-wide administrative procedures, program processes, or instructions.''

To be clear, this regulation neither prohibits nor requires any action that would fund, authorize, or carry out activities on National Forest System (NFS) lands. As such, the regulation will not force specific identifiable resource outcomes on NFS lands, and thus, will not have any discernable effects on the various classes of resources listed in the agency's NEPA Policy and Procedures that can constitute extraordinary circumstances. Effectively, the final regulation, in and of itself, is environmentally neutral and constitutes ''no effect'' to the environment. Thus, the Department's assessment is that this final rule falls within FSH 1909.15, Section 31.1b and no extraordinary circumstances exist which would require preparation of an environmental assessment or environmental impact statement.

Energy Effects

This final rule has been reviewed under Executive Order 13211, issued May 18, 2001 (E.O. 13211), ''Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use.'' It has been determined that this final rule does not constitute a significant energy action as defined in the Executive order.

Controlling Paperwork Burdens on the Public

Section 294.14 of this final rule sets out what must be included in a petition submitted to the Secretary requesting State-specific rulemaking. The requirements in this section constitute an information collection as defined by the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*) and implementing regulations at 5 CFR part 1320. These information collection requirements have been reviewed and approved by the Office of Management and Budget (OMB). The OMB control number is displayed in § 294.14, paragraph (b).

Government Paperwork Elimination Act Compliance

The Department is committed to compliance with the Government Paperwork Elimination Act (44 U.S.C. 3504), which requires Government agencies to provide the public the option of submitting information or transacting business electronically to the maximum extent possible.

Federalism

The Department has considered this final rule under the requirements of Executive Order 13132 issued August 4, 1999 (E.O. 13132), ''Federalism.'' The Department has made an assessment that the final rule conforms with the Federalism principles set out in this Executive order; would not impose any significant compliance costs on the States; and would not have substantial direct effects on the States, on the relationship between the national government and the States, nor on the distribution of power and responsibilities among the various levels of government. Therefore, the Department concludes that the final rule does not have Federalism implications.

Consultation With Indian Tribal Governments

Pursuant to Executive Order 13175 of November 6, 2000, ''Consultation and Coordination with Indian Tribal

Governments,'' the Department has assessed the impact of this final rule on Indian Tribal governments and has determined that the final rule does not significantly or uniquely affect communities of Indian Tribal governments. The final rule deals with the establishment of administrative procedures only and does not make any recommendations for changes to on-the-ground management of any lands in the National Forest System. Once a State-specific rulemaking is proposed to establish or adjust management requirements for inventoried roadless areas, appropriate consultation and coordination with Indian Trial Governments will take place at that time.

No Takings Implications

This final rule has been analyzed in accordance with the principles and criteria contained in Executive Order 12630, issued March 15, 1988, and it has been determined that the rule does not pose the risk of a taking of private property as the final rule is limited to the establishment of administrative procedures.

Civil Justice Reform

This final rule has been reviewed under Executive Order 12988 of February 7, 1996, ''Civil Justice Reform.'' The Department has not identified any State or local laws or regulations that are in conflict with this regulation or that would impede full implementation of this final rule. After adoption of this final rule: (1) All State and local laws or regulations that conflict with this rule or that would impede full implementation would be preempted; (2) no retroactive effect would be given to this final rule; and (3) the final rule would not require the use of administrative proceedings before parties could file suit in court challenging its provisions.

Unfunded Mandates

Pursuant to Title II of the Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531-1538), the Department has assessed the effects of this final rule on State, local, and Tribal governments and the private sector. This final rule does not compel the expenditure of $100 million or more by any State, local, or Tribal governments or anyone in the private sector. Therefore, a statement under section 202 of the act is not required.

List of Subjects in 36 CFR Part 294

National Forests, Navigation (air), Recreation and recreation areas, Wilderness areas, Recordkeeping and reporting requirements.

■ Therefore, for the reasons set forth in the preamble, the Department of Agriculture amends part 294 of title 36 of the Code of Federal Regulations as follows:

PART 294—SPECIAL AREAS

■ 1. Subpart B is revised to read as follows:

Subpart B—State Petitions for Inventoried Roadless Area Management

Sec.

294.10 Purpose.
294.11 Definition.
294.12 State petitions.
294.13 Petition process.
294.14 Petition contents.
294.15 Advisory committee review.
294.16 State-specific rulemaking.
294.17 Scope and applicability.
294.18 Severability.

Subpart B—State Petitions for Inventoried Roadless Area Management

Authority: 16 U.S.C. 472, 529, 551, 1608, 1613; 23 U.S.C. 201, 205.

§ 294.10 Purpose.

The purpose of these administrative procedures is to set forth a process for State-specific rulemaking to address the management of inventoried roadless areas in areas where the Secretary determines that regulatory direction is appropriate based on a petition from the affected Governor.

§ 294.11 Definition.

Inventoried roadless areas—Areas identified in a set of inventoried roadless area maps, contained in the Forest Service Roadless Area Conservation, Final Environmental Impact Statement, Volume 2, dated November 2000, and any subsequent update or revision of those maps through the land management planning process.

§ 294.12 State petitions.

The Governor of any State or territory that contains National Forest System lands may petition the Secretary of Agriculture to promulgate regulations establishing management requirements for all or any portion of National Forest System inventoried roadless areas within that State or territory. Any such petition must be submitted to the Secretary of Agriculture not later than November 13, 2006.

§ 294.13 Petition process.

(a) Review and consideration of petitions made pursuant to § 294.12 shall be accomplished as follows:

(1) *Review.* The Secretary shall review petitions and may request additional information from a petitioner before deciding whether to accept the petition. If the Secretary requests additional information from a petitioner, the petition will be considered complete when the petitioner provides the additional information.

(2) *Disposition.* The Secretary or the Secretary's designee shall respond to the petition within 180 days of receipt of a completed petition. The response shall accept or decline the petition to initiate a State-specific rulemaking.

§ 294.14 Petition contents.

(a) Any petition made pursuant to § 294.12 shall provide the following:

(1) The location and description of the particular lands for which the petition is being made, including maps and other appropriate resources in sufficient detail to enable consideration of the petition;

(2) The particular management requirements recommended for the lands and any exceptions;

(3) The identification of the circumstances and needs intended to be addressed by the petition, including conserving roadless area values and characteristics; protecting human health and safety; reducing hazardous fuels and restoring essential wildlife habitats; maintaining existing facilities such as dams, or providing reasonable access to public and private property or public and privately owned facilities; and technical corrections to existing maps such as boundary adjustments to remove existing roaded areas;

(4) A description of how the recommended management requirements identified in paragraph (a)(2) of this section differ from existing applicable land management plan(s) or policies related to inventoried roadless area management, and how they would comply with applicable laws and regulations;

(5) A description of how the recommended management requirements identified in paragraph (a)(2) of this section compare to existing State or local land conservation policies and direction set forth in any applicable State or local land and resource management plan(s);

(6) A description of how the recommended management requirements identified in paragraph (a)(2) of this section would affect the fish and wildlife that utilize the particular lands in question and their habitat;

(7) A description of any public involvement efforts undertaken by the petitioner during development of the

petition, including efforts to engage Tribal and local governments, and persons with expertise in fish and wildlife biology, fish and wildlife management, forest management, outdoor recreation, and other important disciplines; and

(8) A commitment by the petitioner to participate as a cooperating agency in any environmental analysis for a rulemaking process.

(b) The petition contents described in paragraphs (a)(1) through (a)(8) of this section constitute an information collection requirement as defined by 5 CFR part 1320 and have been assigned Office of Management and Budget control number 0596–0178.

§ 294.15 Advisory committee review.

A National Advisory Committee shall review each petition and provide advice and recommendations to the Secretary within 90 days of receipt of a completed petition. The committee will also provide advice and recommendations to the Secretary on any subsequent State-specific rulemakings.

§ 294.16 State-specific rulemaking.

If the Secretary or the Secretary's designee accepts a petition, the Forest Service shall be directed to initiate notice and comment rulemaking to address the petition. The Forest Service shall coordinate development of the proposed rule with the petitioner. The Secretary or the Secretary's designee shall make the final decision for any State-specific inventoried roadless area management rule.

§ 294.17 Scope and applicability.

(a) The provisions of this subpart apply exclusively to the development and review of petitions made pursuant to this subpart.

(b) Nothing in this subpart shall be construed to provide for the transfer to, or administration by, a State or local authority of any Federally owned lands.

(c) Nothing in this subpart, nor any regulation promulgated pursuant to this petitioning process, shall prohibit the exercise of any valid existing rights.

§ 294.18 Severability.

In the event that any provision, section, subsection, or phrase of this subpart is determined by a court or body of competent jurisdiction to be invalid, unconstitutional, or unenforceable, the remaining provisions, sections, subsections, or phrases shall remain in full force and effect.

Dated: May 5, 2005.

Mark Rey,

Under Secretary, Natural Resources and Environment.

[FR Doc. 05–9349 Filed 5–12–05; 8:45 am]

BILLING CODE 3410–11–P

DEPARTMENT OF AGRICULTURE

Office of the Secretary

Roadless Area Conservation National Advisory Committee

AGENCY: Office of the Secretary, USDA.

ACTION: Notice; establishment and request for nominations.

SUMMARY: The Secretary of Agriculture is establishing a Roadless Area Conservation National Advisory Committee, under the Federal Advisory Committee Act, to provide advice and recommendations on the implementation of the State Petitions for Inventoried Roadless Area Management final rule set out at 36 CFR part 294, subpart B, published elsewhere in this part of today's **Federal Register**. Nominations of persons to serve on this committee are invited.

DATES: Nomination packages should include a signed and dated copy of the AD–755 form (Advisory Committee Membership Background Information) that may be obtained at the World Wide Web/internet site *http://www.ocio.usda.gov/forms/ocio_forms.html*. Nominations for membership on the Roadless Area Conservation National Advisory Committee must be received in writing by June 27, 2005.

ADDRESSES: Nominations for membership on the Roadless Area Conservation National Advisory Committee may be sent via telefax to the Director, Ecosystem Management Coordination at (202) 205–1012, or via mail to the Director, Ecosystem Management Coordination, USDA Forest Service, 1400 Independence Ave., SW., Mail Stop 1104, Washington, DC 20250–1104.

FOR FURTHER INFORMATION CONTACT: Dave Barone, Planning Specialist, Ecosystem Management Coordination Staff, Forest Service, USDA, (202) 205–1019.

SUPPLEMENTARY INFORMATION: Pursuant to the Federal Advisory Committee Act (5 U.S.C. App. II), notice is hereby given that the Secretary of Agriculture intends to establish a Roadless Area Conservation National Advisory Committee. The Secretary has determined the work of this committee is in the public interest and relevant to the duties of the Department of Agriculture. The purpose of this committee is to provide advice and recommendations to the Secretary of Agriculture on the implementation of the State Petitions for Inventoried Roadless Area Management final rule set out at 36 CFR part 294, subpart B. This rule establishes administrative procedures to allow a Governor to petition the Secretary to undertake future rulemaking for the management of inventoried roadless areas within a specific State.

Petitions have to be submitted within 18 months of the effective date of the final rule set out at 36 CFR part 294, subpart B. The Secretary will respond to each petition within 180 days of receipt of a completed petition. The Roadless Area Conservation National Advisory Committee shall review each petition submitted to the Secretary in light of the requirements of the rule, and provide advice and recommendations to the Secretary within 90 days of receipt of a completed petition. The Advisory Committee will also provide advice and recommendations to the Secretary on any subsequent State-specific rulemakings.

The Roadless Area Conservation National Advisory Committee shall consist of 12 members appointed by the Secretary of Agriculture. Officers or employees of the Forest Service may not serve as members of the Committee. The Advisory Committee chair shall be elected by the members. The Committee shall be composed of a balanced group of representatives of diverse national organizations who can provide insights into the major contemporary issues associated with the conservation and management of inventoried roadless areas. Members of the Advisory Committee will operate in a manner designed to establish a consensus of opinion in order to develop recommendations that reflect relevant needs and perspectives. Members of the Committee will seek to reach mutual agreement on a course of action on issues. Collectively, the members should represent a diversity of organizations and perspectives. They will work together to draft recommendations that are representative of the diverse values and interests represented on the Committee. Nominations to the Committee should describe and document the proposed member's qualifications for membership.

Appointments to the Committee will be made by the Secretary of Agriculture. Equal opportunity practices will be followed in all appointments to the Roadless Area Conservation National Advisory Committee. To ensure the recommendations of the Committee have taken into account the needs of the diverse groups served by the Department, membership will include, to the extent practicable, individuals with demonstrated ability to represent minorities, women, and persons with disabilities.

Dated: April 15, 2005.

Michael J. Harrison,

Assistant Secretary for Administration.

[FR Doc. 05–9348 Filed 5–12–05; 8:45 am]

BILLING CODE 3410–11–P

Federal Register

Friday,
May 13, 2005

Part III

Environmental Protection Agency

40 CFR Part 63
National Emission Standards for Pharmaceuticals Production; Final Rule and Proposed Rule

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 63

[OAR–2004–0023; FRL–7911–3]

RIN 2060–AM52

National Emission Standards for Pharmaceuticals Production

AGENCY: Environmental Protection Agency (EPA).

ACTION: Direct final rule; amendments.

SUMMARY: EPA is taking direct final action to amend the national emission standards for pharmaceuticals production. The direct final rule amendments include provisions for planned routine maintenance of wastewater tanks, alternative monitoring provisions for caustic scrubbers and condensers, and references general standards for containers. We are making the amendments by direct final rule, without prior proposal, because we view the revisions as noncontroversial and anticipate no adverse comments.

DATES: The direct final rule amendments are effective on July 12, 2005, without further notice, unless EPA receives adverse written comment by June 13, 2005, or if a public hearing is requested by May 23, 2005. If EPA receives such comments, it will publish a timely withdrawal in the **Federal Register** indicating which provisions will become effective and which provisions are being withdrawn due to adverse comment.

ADDRESSES: Submit your comments, identified by Docket ID No. OAR–2004–0023, by one of the following methods:

- Federal eRulemaking Portal: *http://www.regulations.gov*. Follow the on-line instructions for submitting comments.
- Agency Web site: *http://www.epa.gov/edocket*. EDOCKET, EPA's electronic public docket and comment system, is EPA's preferred method for receiving comments. Follow the on-line instructions for submitting comments.
- E-mail: *air-and-r-docket@epa.gov*.
- Fax: (202) 566–1741.
- Mail: EPA Docket Center, Environmental Protection Agency, Mailcode: 6102T, 1200 Pennsylvania Avenue, NW., Washington, DC 20460. Please include a duplicate copy, if possible.
- Hand Delivery: Air and Radiation Docket, Environmental Protection Agency, 1301 Constitution Avenue, NW., Room B–108, Washington, DC 20460. Such deliveries are only accepted during the Docket's normal hours of operation, and special arrangements should be made for deliveries of boxed information.

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

Instructions: Direct your comments to Docket ID No. OAR–2004–0023. EPA's *policy* is that all comments received will be included in the public docket without change and may be made available online at *http://www.epa.gov/edocket,* including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through EDOCKET, regulations.gov, or e-mail. The EPA EDOCKET and the federal regulations.gov websites are ''anonymous access'' systems, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through EDOCKET or regulations.gov, your e-mail address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD–ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses. For additional information about EPA's public docket visit EDOCKET on-line or see the **Federal Register** of May 31, 2002 (67 FR 38102).

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

FOR FURTHER INFORMATION CONTACT: Mr. Randy McDonald, Organic Chemicals Group, Emission Standards Division (Mail Code C504–04), U.S. EPA, Research Triangle Park, North Carolina 27711, telephone number (919) 541–5402, electronic mail address *mcdonald.randy@epa.gov*.

SUPPLEMENTARY INFORMATION: *Regulated Entities*. The regulated category and entities affected by this action include:

Category	NAICS codes	SIC codes	Examples of regulated entities
Industry	325411 and 325412 Typically 325199	2833 and 2834 Typically 2869	• Producers of finished dosage forms of drugs (*e.g.,* tablets, capsules, and solutions), active ingredients, or precursors. • Producers of material whose primary use is as an active ingredient of precursor.

This table is not intended to be exhaustive, but rather provides a guide for readers likely to be interested in the revisions to the regulation affected by this action. To determine whether your facility, company, business, organization, etc., is regulated by this action, you should carefully examine all of the applicability criteria in 40 CFR 63.1250. If you have questions regarding the applicability of the direct final rule amendments to a particular entity, consult the person listed in the preceding **FOR FURTHER INFORMATION CONTACT** section. *Worldwide Web (WWW).* In addition to being available in the docket, an electronic copy of the direct final rule amendments will also be available on the WWW through EPA's Technology Transfer Network (TTN). Following signature by the EPA Administrator, a copy of the direct final rule amendments will be posted on the TTN's policy and guidance page for

newly proposed or promulgated rules at *http://www.epa.gov/ttn/oarpg*. The TTN provides information and technology exchange in various areas of air pollution control.

Comments. We are publishing the direct final rule amendments without prior proposal because we view the amendments as noncontroversial and do not anticipate adverse comments. We consider the changes to be noncontroversial because the only effect is to provide alternative monitoring requirements and extend planned routine maintenance provisions for storage tanks to wastewater tanks. In the Proposed Rules section of this **Federal Register**, we are publishing a separate document that will serve as the proposal in the event that timely adverse comments are received.

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

Judicial Review. Under section 307(b)(1) of the Clean Air Act (CAA), judicial review of the direct final rule amendments is available only by filing a petition for review in the U.S. Court of Appeals for the District of Columbia by July 12, 2005. Under section 307(d)(7)(B) of the CAA, only an objection to the direct final rule amendments that was raised with reasonable specificity during the period for public comment can be raised during judicial review. Moreover, under section 307(b)(2) of the CAA, the requirements established by the direct final rule amendments may not be challenged separately in any civil or criminal proceedings brought by EPA to enforce these requirements.

Outline. The information presented in this preamble is organized as follows:

I. Why are we publishing the amendments as a direct final rule?
II. What amendments are we making to the rule?
III. Statutory and Executive Order Reviews
A. Executive Order 12866: Regulatory Planning and Review
B. Paperwork Reduction Act
C. Regulatory Flexibility Act
D. Unfunded Mandates Reform Act
E. Executive Order 13132: Federalism
F. Executive Order 13175: Consultation and Coordination with Indian Tribal Governments
G. Executive Order 13045: Protection of Children from Environmental Health and Safety Risks
H. Executive Order 13211: Actions that Significantly Affect Energy Supply, Distribution, or Use
I. National Technology Transfer Advancement Act
J. Congressional Review Act

I. Why Are We Publishing the Amendments as a Direct Final Rule?

We are publishing the amendments without prior proposal because we view the changes as noncontroversial and anticipate no adverse comment. The amendments to the final rule improve consistency with other standards by referencing generic type standards for containers; extending the planned routine maintenance provisions from storage tanks to wastewater tanks; and allowing alternative monitoring for scrubbers and condensers. The amendments do not alter the stringency of the standards, have no adverse health or environmental impacts, and will not increase costs.

II. What Amendments Are We Making to the Rule?

The direct final rule makes four amendments to the final rule. One amendment adds a reference to an existing generic standard as a compliance alternative for large wastewater containers. A second amendment applies the same planned routine maintenance provisions for storage tanks to wastewater tanks. A third amendment is to allow monitoring of the condenser product side temperature in lieu of the exit gas temperature. The fourth amendment is to allow monitoring of caustic strength of the scrubber effluent as an alternative to measuring pH. In addition to the amendments, we are correcting a citation error.

The National Emission Standards for Containers in subpart PP to 40 CFR part 63 were developed for administrative convenience and consistency and apply when other subparts reference subpart PP. The level of control required by subparts PP and GGG to 40 CFR part 63 are equivalent as both standards require vapor-tight containers. We are aware that there are some facilities subject to subpart GGG to 40 CFR part 63 that have containers subject to other maximum achievable control technology (MACT) standards that are permitted to meet subpart PP to 40 CFR part 63 with respect to those containers. Therefore, we are amending the wastewater provisions in the final rule to reference subpart PP to 40 CFR part 63 as a compliance option for large containers to allow such sources the option of complying with a single subpart for containers otherwise subject to different MACT standards.

The final rule allows for 240 hours per year for use of storage tanks during periods of planned routine maintenance when the requirements for control devices do not apply. This provision allows for maintenance of the control device without emptying and cleaning the storage tank. During the initial implementation phase of the final rule, we became aware that the same problems of material management apply to wastewater tanks as well as storage tanks. Applying the planned routine maintenance provisions to storage of wastewater eliminates the need to empty and clean wastewater tanks with each downtime. This also eliminates emissions associated with cleaning and degassing the wastewater tank. Therefore, we are extending the planned routine maintenance provisions for storage tanks to wastewater tanks. The same issue of material management for stored wastewater was addressed in subpart FFFF to 40 CFR part 63 by providing the same planned routine maintenance provisions.

Also, we are including provisions for alternative monitoring for condensers and scrubbers. The new provisions allow for monitoring of the product side temperature for condensers and provisions for monitoring the caustic strength of the effluent for scrubbers. Again, in the initial implementation phase of the final rule, we were informed by several affected sources that alternative monitoring for condensers and scrubbers should be allowed. Those alternative monitoring provisions have been approved in precompliance reports for the final rule and are also included in subpart FFFF to 40 CFR part 63.

Finally, we are clarifying that for the final rule, a process change means the startup of a new process. As clarification in the preamble to the proposed national emission standards for hazardous air pollutants (NESHAP) for Pesticide Active Ingredient Production (PAI) (67 FR 17503), we stated that a process change means the startup of a new operating scenario associated with a new process. As in the proposed PAI rule, the final rule requires the owner or operator to prepare operating scenarios that describe the equipment, emissions, controls, and monitoring for each process. A new operating scenario must

be prepared each time the owner or operator makes a change to produce a new product. A new operating scenario must also be prepared for any change to an existing process that is not within the scope of a current operating scenario. As in the proposed PAI rule, we are clarifying that for the final rule, a process change means the startup of a new process.

III. Statutory and Executive Order Reviews

A. Executive Order 12866: Regulatory Planning and Review

Under Executive Order 12866 (58 FR 51735, October 4, 1993), the Agency must determine whether the regulatory action is ''significant'' and, therefore, subject to Office of Management and Budget (OMB) review and the requirements of the Executive Order. The Executive Order defines ''significant regulatory action'' as one that is likely to result in a rule that may:

(1) Have an annual effect on the economy of $100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities;

(2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency;

(3) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or

(4) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order.

It has been determined that the final rule amendments are not a ''significant regulatory action'' under the terms of Executive Order 12866 and are, therefore, not subject to OMB review.

B. Paperwork Reduction Act

This action does not impose any new information collection burden. This action gives a source owner or operator the option of using vapor balancing to comply with the standards. Since it is only an option, this action will not increase the information collection burden. The OMB has previously approved the information collection requirements contained in the existing regulations under the provisions of the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.*, and has assigned OMB control number 2060–0358 (EPA ICR No. 1781.01).

Copies of the Information Collection Request (ICR) document(s) may be obtained from Susan Auby, by mail at the Office of Environmental Information, Collection Strategies Division; U.S. EPA (2822T); 1200 Pennsylvania Ave., NW., Washington, DC 20460, by e-mail at *auby.susan@epa.gov,* or by calling (202) 566–1672. A copy may also be downloaded off the Internet at *http://www.epa.gov/icr.* Include the ICR or OMB number in any correspondence.

Burden means the total time, effort, or financial resources expended by persons to generate, maintain, retain, or disclose or provide information to or for a Federal agency. This includes the time needed to review instructions; develop, acquire, install, and utilize technology and systems for the purposes of collecting, validating, and verifying information, processing and maintaining information, and disclosing and providing information; adjust the existing ways to comply with any previously applicable instructions and requirements; train personnel to be able to respond to a collection of information; search data sources; complete and review the collection of information; and transmit or otherwise disclose the information.

An Agency may not conduct or sponsor, and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number. The OMB control numbers for EPA's regulations are listed in 40 CFR part 9 and 48 CFR chapter 15.

C. Regulatory Flexibility Act

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

For purposes of assessing the impacts of today's amendments on small entities, a small entity is defined as: (1) A small business as defined by the Small Business Administration's regulations at 13 CFR 121.201; (2) a small governmental jurisdiction that is a government of a city, county, town, school district or special district with a population of less than 50,000; and (3) a small organization that is any not-for-profit enterprise which is independently owned and operated and is not dominant in its field.

After considering the economic impacts of today's direct final rule amendments on small entities, EPA has concluded that this action will not have a significant economic impact on a substantial number of small entities. In determining whether a rule has a significant economic impact on a substantial number of small entities, the impact of concern is any significant adverse economic impact on small entities, since the primary purpose of the regulatory flexibility analyses is to identify and address regulatory alternatives ''which minimize any significant economic impact of the proposed rule on small entities.'' 5 U.S.C. 603 and 604. Thus, an agency may conclude that a rule will not have a significant economic impact on a substantial number of small entities if the rule relieves regulatory burden, or otherwise has a positive economic effect on all of the small entities subject to the rule. The final rule amendments add several compliance options granting greater flexibility to small entities subject to the final rule that may result in a more efficient use of resources for them and, therefore, impose no additional regulatory costs or requirements on owners or operators of affected sources.

D. Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), Public Law 104–4, establishes requirements for Federal agencies to assess the effects of their regulatory actions on State, local, and tribal governments and the private sector. Under section 202 of the UMRA, the EPA generally must prepare a written statement, including a cost-benefit analysis, for proposed and final rules with ''Federal mandates'' that may result in expenditures by State, local, and tribal governments, in the aggregate, or by the private sector, of $100 million or more in any 1 year. Before promulgating an EPA rule for which a written statement is needed, section 205 of the UMRA generally requires the EPA to identify and consider a reasonable number of regulatory alternatives and adopt the least-costly, most cost-effective, or least burdensome alternative that achieves the objectives of the rule. The provisions of section 205 do not apply when they are inconsistent with applicable law. Moreover, section 205 allows the EPA to adopt an alternative other than the least-costly, most cost effective, or least-burdensome alternative if the Administrator publishes with the final rule an explanation why that alternative was not adopted. Before the EPA establishes any regulatory requirements that may significantly or uniquely affect small governments, including tribal governments, it must have developed under section 203 of the UMRA a small government agency plan. The plan must provide for notifying potentially affected small governments to have meaningful and timely input in the development of EPA regulatory proposals with significant Federal intergovernmental mandates, and

informing, educating, and advising small governments on compliance with the regulatory requirements.

The EPA has determined that the final rule amendments do not contain a Federal mandate that may result in expenditures of $100 million or more for State, local, and tribal governments, in the aggregate, or the private sector in any 1 year. The final rule amendments provide a source owner or operator with additional options to comply with the standards. Therefore, the final rule amendments are not subject to the requirements of sections 202 and 205 of the UMRA.

E. Executive Order 13132: Federalism

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

The final rule amendments do not have federalism implications. They will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132. The final rule amendments provide a source owner or operator with another option to comply with the standards and, therefore, impose no additional burden on sources. Thus, Executive Order 13132 does not apply to the final rule amendments.

In the spirit of Executive Order 13132 and consistent with EPA policy to promote communications between the EPA and State and local governments, the EPA specifically solicits comment on the final rule amendments from State and local officials.

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

Executive Order 13175 (65 FR 67249, November 9, 2000) requires the EPA to develop an accountable process to ensure ''meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications.'' The final rule amendments do not have tribal implications, as specified in Executive Order 13175. The final rule amendments provide a source owner or operator with another option to comply with the standards and, therefore, impose no additional burden on sources. Thus, Executive Order 13175 does not apply to the final rule amendments.

The EPA specifically solicits additional comment on the final rule amendments from tribal officials.

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

Executive Order 13045 (62 FR 19885, April 23, 1997) applies to any rule that: (1) Is determined to be ''economically significant'' as defined under Executive Order 12866, and (2) concerns an environmental health or safety risk that the EPA has reason to believe may have a disproportionate effect on children. If the regulatory action meets both criteria, the EPA must evaluate the environmental health or safety effects of the planned rule on children, and explain why the planned regulation is preferable to other potentially effective and reasonably feasible alternatives considered by the EPA.

The EPA interprets Executive Order 13045 as applying only to those regulatory actions that are based on health or safety risks, such that the analysis required under section 5–501 of the Executive Order has the potential to influence the regulation. Today's final rule amendments are not subject to Executive Order 13045 because they are based on technology performance, not health or safety risks. Furthermore, the final rule amendments have been determined not to be ''economically significant'' as defined under Executive Order 12866.

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

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

I. National Technology Transfer and Advancement Act

Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (NTTAA), Public Law 104–113, 12(d) (15 U.S.C. 272 note), directs the EPA to use voluntary consensus standards in its regulatory activities unless to do so would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (*e.g.*, materials specifications, test methods, sampling procedures, and business practices) that are developed or adopted by voluntary consensus standards bodies. The NTTAA directs the EPA to provide Congress, through OMB, explanations when the Agency decides not to use available and applicable voluntary consensus standards.

No new standard requirements are cited in the direct final rule amendments. Therefore, the EPA is not proposing or adopting any voluntary consensus standards in the direct final rule amendments.

J. Congressional Review Act

The Congressional Review Act, 5 U.S.C. 801 *et seq.*, as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. The EPA will submit a report containing the direct final 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 direct final rule in the **Federal Register**. The direct final rule is not a ''major rule'' as defined by 5 U.S.C. 804(2). The direct final rule amendments are effective on July 12, 2005.

List of Subjects in 40 CFR Part 63

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

Dated: May 6, 2005.

Stephen L. Johnson,

Administrator.

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

PART 63—[AMENDED]

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

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

Subpart GGG—[Amended]

■ 1. Section 63.1253 is amended by adding two sentences to the end of paragraph (e) to read as follows:

§ 63.1253 Standards: Storage tanks.

* * * * *

(e) * * * The owner or operator may submit an application to the Administrator requesting an extension of this time limit to a total of 360 hours in any 365-day period. The application must explain why the extension is needed, it must specify that no material will be added to the storage tank between the time the 240-hour limit is exceeded and the control device is again operational, and it must be submitted at least 60 days before the 240-hour limit will be exceeded.

* * * * *

■ 2. Section 63.1256 is amended by:
■ a. Adding paragraph (b)(10); and
■ b. Revising paragraph (d)(1)(i).

The revisions and addition read as follows:

§ 63.1256 Standards: Wastewater.

* * * * *

(b) * * *

(10) The emission limits specified in § 63.1256 (b)(2) and (h) for control devices used to control emissions from wastewater tanks do not apply during periods of planned routine maintenance of the control device(s) of no more than 240 hours in any 365-day period. The owner or operator may submit an application to the Administrator requesting an extension of this time limit to a total of 360 hours in any 365-day period. The application must explain why the extension is needed, it must specify that no affected wastewater will be added to the tank between the time the 240-hour limit is exceeded and the control device is again operational, and it must be submitted at least 60 days before the 240-hour limit will be exceeded. Wastewater tanks shall not be sparged with air or other gases without an operational control device.

* * * * *

(d) * * *

(1) * * *

(i) Except as provided in paragraph (d)(3)(iv) of this section, if the capacity of the container is greater than 0.42 m^3, the cover and all openings (*e.g.*, bungs, hatches, sampling points, and pressure relief valves) shall be controlled in accordance with the requirements of either paragraph (d)(1)(i)(A) or (d)(1)(i)(B) of this section.

(A) The requirements specified in § 63.1258(h); or

(B) The requirements of subpart PP of this part for containers using level 2 controls that meet the definitions in § 63.923(b)(1) or (2).

* * * * *

■ 3. Section 63.1258 is amended by:
■ a. Amending paragraph (b)(1)(ii) introductory text to add a sentence before the last sentence; and
■ b. Revising paragraph (b)(1)(iii) introductory text.

The revisions read as follows:

§ 63.1258 Monitoring requirements.

* * * * *

(b) * * *

(1) * * *

(ii) * * * As an alternative to measuring pH, you may elect to continuously monitor the caustic strength of the scrubber effluent. * * *

* * * * *

(iii) *Condensers.* For each condenser, the owner or operator shall establish the maximum condenser outlet gas temperature or product side temperature as a site specific operating parameter which much be measured and recorded at least every 15 minutes during the period in which the condenser is functioning in achieving the HAP removal required by this subpart.

* * * * *

■ 4. Section 63.1259 is amended by revising the last two sentences in paragraph (a)(3) introductory text to read as follows:

§ 63.1259 Recordkeeping requirements.

(a) * * *

(3) * * * The owner or operator shall keep the startup, shutdown, and malfunction records specified in paragraphs (a)(3)(i) through (iii) of this section. Reports related to the plan shall be submitted as specified in § 63.1260(i).

* * * * *

[FR Doc. 05–9477 Filed 5–12–05; 8:45 am]
BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 63

[OAR–2004–0023; FRL–7911–4]

RIN 2060–AM52

National Emission Standards for Pharmaceuticals Production

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule; amendments.

SUMMARY: On September 21, 1998, EPA promulgated national emission standards for pharmaceuticals production (40 CFR part 63, subpart GGG). This action proposes to amend the national emission standards for pharmaceuticals production to include provisions for planned routine maintenance of wastewater tanks and alternative monitoring for condensers and scrubbers. The proposed amendments also reference general standards for containers.

In the Rules and Regulations section of this **Federal Register**, we are taking direct final action on the proposed amendments because we view the amendments as noncontroversial and anticipate no adverse comments. We have explained our reasons for the amendments in the preamble to the direct final rule. If we receive no adverse comments, we will take no further action on the proposed amendments. If we receive adverse comments, we will withdraw those provisions on which we received adverse comments. We will publish a timely withdrawal in the **Federal Register** indicating which provisions will become effective and which provisions are being withdrawn. If part or all of the direct final rule in the Rules and Regulations section of today's **Federal Register** is withdrawn, all comments pertaining to those provisions will be addressed in a subsequent final rule based on the proposed amendments. We will not institute a second comment period on the subsequent final action. Any parties interested in commenting must do so at this time.

DATES: *Comments.* Written comments must be received on or before June 13, 2005, unless a hearing is requested by May 23, 2005. If a hearing is requested, written comments must be received on or before June 27, 2005.

Public Hearing. If anyone contacts the EPA requesting to speak at a public hearing, a public hearing will be held on May 27, 2005.

ADDRESSES: Submit your comments, identified by Docket ID No. OAR–2004–0023, by one of the following methods:

- Federal eRulemaking Portal: *http://www.regulations.gov.* Follow the on-line instructions for submitting comments.
- Agency Web site: *http://www.epa.gov/edocket.* EDOCKET, EPA's electronic public docket and comment system, is EPA's preferred method for receiving comments. Follow the on-line instructions for submitting comments.
- E-mail: *air-and-r-docket@epa.gov.*
- Fax: (202) 566–1741.
- Mail: EPA Docket Center, Environmental Protection Agency, Mailcode: 6102T, 1200 Pennsylvania Avenue, NW., Washington, DC 20460. Please include a duplicate copy, if possible.
- Hand Delivery: Air and Radiation Docket, Environmental Protection Agency, 1301 Constitution Avenue, NW, Room B–108, Washington, DC 20460. Such deliveries are only accepted during the Docket's normal hours of operation, and special arrangements should be made for deliveries of boxed information.

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

Instructions: Direct your comments to Docket ID No. OAR–2004–0023. EPA's policy is that all comments received will be included in the public docket without change and may be made available online at *http://www.epa.gov/edocket,* including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through EDOCKET, regulations.gov, or e-mail. The EPA EDOCKET and the federal regulations.gov Web sites are ''anonymous access'' systems, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through EDOCKET or regulations.gov, your e-mail address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD–ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses. For additional information about EPA's public docket visit EDOCKET on-line or see the **Federal Register** of May 31, 2002 (67 FR 38102).

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

Public Hearing. If a public hearing is held, it will be held at 10 a.m. at the EPA's Environmental Research Center Auditorium, Research Triangle Park, North Carolina or at an alternate site nearby.

FOR FURTHER INFORMATION CONTACT: Mr. Randy McDonald, Organic Chemicals Group, Emission Standards Division (C504–04), Office of Air Planning and Standards, U.S. EPA, Research Triangle Park, North Carolina 27711, telephone number (919) 541–5402, electronic mail address *mcdonald.randy@epa.gov.*

SUPPLEMENTARY INFORMATION: *Regulated Entities.* The regulated category and entities affected by this action include:

Category	NAICS codes	SIC codes	Examples of regulated entities
Industry	325411 and 325412	2833 and 2834	• Producers of finished dosage forms of drugs (*e.g.*, tablets, capsules, and solutions), active ingredients, or precursors.

Category	NAICS codes	SIC codes	Examples of regulated entities
	Typically 325199	Typically 2869	• Producers of material whose primary use is as an active ingredient of precursor.

This table is not intended to be exhaustive, but rather provides a guide for readers likely to be interested in the revisions to the regulation affected by this action. To determine whether your facility, company, business, organization, etc., is regulated by this action, you should carefully examine all of the applicability criteria in 40 CFR 63.1250. If you have questions regarding the applicability of the amendments to a particular entity, consult the person listed in the preceding **FOR FURTHER INFORMATION CONTACT** section.

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

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

- Identify the rulemaking by docket number and other identifying information (subject heading, **Federal Register** date and page number).
- Follow directions—The agency may ask you to respond to specific questions or organize comments by referencing a Code of Federal Regulations (CFR) part or section number.
- Explain why you agree or disagree; suggest alternatives and substitute language for your requested changes.
- Describe any assumptions and provide any technical information and/or data that you used.
- If you estimate potential costs or burdens, explain how you arrived at your estimate in sufficient detail to allow for it to be reproduced.
- Provide specific examples to illustrate your concerns, and suggest alternatives.
- Explain your views as clearly as possible, avoiding the use of profanity or personal threats.
- Make sure to submit your comments by the comment period deadline identified.

Public Hearing. Persons interested in presenting oral testimony or inquiring as to whether a hearing is to be held should contact Mr. Randy McDonald, Organic Chemicals Group, Emission Standards Division (Mail Code C504–04), U.S. EPA, Research Triangle Park, North Carolina 27711, telephone number (919) 541–5402, electronic mail address *mcdonald.randy@epa.gov.,* at least 2 days in advance of the potential date of the public hearing. Persons interested in attending the public hearing must also call Mr. Randy McDonald to verify the time, date, and location of the hearing. The public hearing will provide interested parties the opportunity to present data, views, or arguments concerning these proposed emission standards.

Worldwide Web (WWW). In addition to being available in the docket, an electronic copy of today's proposal will also be available through the WWW. Following the Administrator's signature, a copy of this action will be posted on EPA's Technology Transfer Network (TTN) policy and guidance page for newly proposed or promulgated rules at *http://www.epa.gov/ttn/oarpg.* The TTN at EPA's Web site provides information and technology exchange in various areas of air pollution control. If more information regarding the TTN is needed, call the TTN HELP line at (919) 541–5384.

Direct Final Rule. A direct final rule identical to the proposal is published in the Rules and Regulations section of today's **Federal Register**. If we receive any adverse comment pertaining to the amendments in the proposal, we will publish a timely notice in the **Federal Register** informing the public that the amendments are being withdrawn due to adverse comment. We will address all public comments concerning the withdrawn amendments in a subsequent final rule. If no relevant adverse comments are received, no further action will be taken on the proposal, and the direct final rule will become effective as provided in that action.

The regulatory text for the proposal is identical to that for the direct final rule published in the Rules and Regulations section of today's **Federal Register**. For further supplementary information, the detailed rationale for the proposal and the regulatory revisions, see the direct final rule published in a separate part of this **Federal Register**.

Statutory and Executive Order Reviews

For a complete discussion of all of the administrative requirements applicable to this action, see the direct final rule in the Rules and Regulations section of today's **Federal Register**.

Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) generally requires an agency to prepare a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements under the Administrative Procedure Act or any other statute unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. Small entities include small businesses, small organizations, and small governmental jurisdictions.

For purposes of assessing the impacts of today's proposed amendments on small entities, a small entity is defined as: (1) A small business having up to 500 employees; (2) a small governmental jurisdiction that is a government of a city, county, town, school district or special district with a population of less than 50,000; and (3) a small organization that is any not-for-profit enterprise which is independently owned and operated and is not dominant in its field.

After considering the economic impacts of today's proposed amendments on small entities, EPA has certified that this action will not have a significant economic impact on a substantial number of small entities. In determining whether a proposed rule has a significant economic impact on a substantial number of small entities, the impact of concern is any significant adverse economic impact, since the primary purpose of the regulatory flexibility analysis is to identify and address regulatory alternatives ''which minimize any significant economic impact of the proposed rule on small entities' (5 U.S.C. 603 and 604). Thus, any agency may certify that a rule will not have a significant economic impact on a substantial number of small entities if the rule relieves regulatory burden or otherwise has a positive economic effect on all of the small entities subject to the rule. The proposed amendments grant greater flexibility to small entities

subject to the final rule that may result in a more efficient use of resources for them and, therefore, impose no additional regulatory costs or requirements on owners or operators of affected sources. The EPA continues to be interested in the potential impacts of the proposed rule on small entities and welcomes comments on issues related to such impacts.

List of Subjects in 40 CFR Part 63

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

Dated: May 6, 3005.

Stephen L. Johnson,

Administrator.

[FR Doc. 05–9476 Filed 5–12–05; 8:45 am]

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Federal Register

Friday,
May 13, 2005

Part IV

Environmental Protection Agency

40 CFR Part 63

National Emission Standards for Hazardous Air Pollutants: Miscellaneous Coating Manufacturing; Direct Final Rule and Proposed Rule

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 63

[OAR–2003–0178; FRL–7911–1]

RIN 2060–AM72

National Emission Standards for Hazardous Air Pollutants: Miscellaneous Coating Manufacturing

AGENCY: Environmental Protection Agency (EPA).

ACTION: Direct final rule; amendments.

SUMMARY: On December 11, 2003, EPA published national emission standards for hazardous air pollutants (NESHAP) for Miscellaneous Coating Manufacturing. The direct final rule amends the NESHAP by providing additional compliance options and clarifications. Specifically, the direct final rule amendments specify that compliance with a percent reduction emission limit may be demonstrated by measuring total organic compounds (TOC), compliance with the weight percent hazardous air pollutant (HAP) limit in coatings products may be demonstrated based on formulation data, and the cover or lid on a process vessel may be opened for material additions and sampling. The direct final rule amendments also clarify the requirements for cleaning operations, the compliance date for equipment that is added to an existing source, the conditions under which you must determine whether an emission stream is a halogenated vent stream, and the terminology used to describe the emission limits for process vessels. The direct final rule amendments also revise the definition of Group 2 transfer operations to clarify that all product loading operations are part of the miscellaneous coating manufacturing affected source and, thus, are not subject to the organic liquid distribution (OLD) NESHAP. We are making the amendments by direct final rule, without prior proposal, because we view the revisions as noncontroversial and anticipate no adverse comments.

DATES: The direct final rule amendments are effective on July 12, 2005 without further notice, unless EPA receives adverse written comment by June 13, 2005 or if a public hearing is requested by May 23, 2005. If EPA receives such comments, it will publish a timely withdrawal in the **Federal Register** indicating which provisions will become effective and which provisions are being withdrawn due to adverse comment.

ADDRESSES: Submit your comments, identified by Docket ID No. OAR–2003–0178, by one of the following methods:

- Federal eRulemaking Portal: *http://www.regulations.gov.* Follow the on-line instructions for submitting comments.
- Agency Web site: *http://www.epa.gov/edocket.* EDOCKET, EPA's electronic public docket and comment system, is EPA's preferred method for receiving comments. Follow the on-line instructions for submitting comments.
- E-mail: *air-and-r-docket@epa.gov.*
- Fax: (202) 566–1741.
- Mail: EPA Docket Center, Environmental Protection Agency, Mailcode: 6102T, 1200 Pennsylvania Avenue, NW., Washington, DC 20460. Please include a duplicate copy, if possible.
- Hand Delivery: Air and Radiation Docket, Environmental Protection Agency, 1301 Constitution Avenue, NW., Room B–108, Washington, DC 20460. Such deliveries are only accepted during the Docket's normal hours of operation, and special arrangements should be made for deliveries of boxed information.

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

Instructions: Direct your comments to Docket ID No. OAR–2003–0178. EPA's policy is that all comments received will be included in the public docket without change and may be made available online at *http://www.epa.gov/edocket*, including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through EDOCKET, regulations.gov, or e-mail. The EPA EDOCKET and the federal regulations.gov websites are ''anonymous access'' systems, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through EDOCKET or regulations.gov, your e-mail address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD-ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses. For additional information about EPA's public docket visit EDOCKET on-line or see the **Federal Register** of May 31, 2002 (67 FR 38102).

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

FOR FURTHER INFORMATION CONTACT: Mr. Randy McDonald, Organic Chemicals Group, Emission Standards Division (Mail Code C504–04), Office of Air Planning and Standards, U.S. EPA, Research Triangle Park, North Carolina 27711, telephone number (919) 541–5402, electronic mail address *mcdonald.randy@epa.gov.*

SUPPLEMENTARY INFORMATION: *Regulated Entities.* The regulated category and entities affected by this action include:

Category	NAICS *	Examples of regulated entities
Industry ..	3255	Manufacturers of coatings, including inks, paints, or adhesives.

* North American Industrial Classification System.

This table is not intended to be exhaustive, but rather provides a guide for readers likely to be interested in the revisions to the rule affected by this action. To determine whether your facility, company, business, organization, etc., is regulated by this action, you should carefully examine all of the applicability criteria in 40 CFR 63.7985 of the rule, as well as in today's amendments to the applicability sections. If you have questions regarding the applicability of the amendments to a particular entity, consult the person

listed in the preceding **FOR FURTHER INFORMATION CONTACT** section.

Worldwide Web (WWW). In addition to being available in the docket, an electronic copy of the direct final rule amendments will also be available on the WWW through EPA's Technology Transfer Network (TTN). Following signature by the EPA Administrator, a copy of the direct final rule amendments will be posted on the TTN's policy and guidance page for newly proposed or promulgated rules at *http://www.epa.gov/ttn/oarpg.* The TTN provides information and technology exchange in various areas of air pollution control. If more information regarding the TTN is needed, call the TTN HELP line at (919) 541–5384.

Comments. We are publishing the direct final rule amendments without prior proposal because we view the amendments as noncontroversial and do not anticipate adverse comments. In the Proposed Rules section of this **Federal Register**, we are publishing a separate document that will serve as the proposal in the event that timely adverse comments are received.

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

Judicial Review. Under section 307(b)(1) of the Clean Air Act (CAA), judicial review of the direct final rule is available only by filing a petition for review in the U.S. Court of Appeals for the District of Columbia Circuit by July 12, 2005. Under section 307(d)(7)(B) of the CAA, only an objection to the direct final rule that was raised with reasonable specificity during the period for public comment can be raised during judicial review. Moreover, under section 307(b)(2) of the CAA, the requirements established by the direct final rule may not be challenged separately in any civil or criminal proceedings brought by the EPA to enforce these requirements.

Outline. The information presented in this preamble is organized as follows:

I. Why Are We Amending the Rule?
II. What Amendments Are We Making to the Rule?
III. Statutory and Executive Order Reviews
A. Executive Order 12866: Regulatory Planning and Review
B. Paperwork Reduction Act
C. Regulatory Flexibility Act
D. Unfunded Mandates Reform Act
E. Executive Order 13132: Federalism
F. Executive Order 13175: Consultation and Coordination With Indian Tribal Governments
G. Executive Order 13045: Protection of Children From Environmental Health and Safety Risks
H. Executive Order 13211: Actions That Significantly Affect Energy Supply, Distribution, or Use
I. National Technology Transfer and Advancement Act
J. Congressional Review Act

I. Why Are We Amending the Rule?

On December 11, 2003, we published NESHAP for Miscellaneous Coating Manufacturing as subpart HHHHH in 40 CFR part 63 (68 FR 69164). Since publication of the final rule, we concluded that additional means of demonstrating compliance with the percent reduction emission limits and the weight percent HAP limit in coating products would be as effective as the options specified in the final rule. We also realized that the standards for process vessels needed to allow opening of covers and lids for material addition and sampling, or significantly more complex and costly processing equipment than we intended would be needed to comply with the final rule. Finally, we determined that several minor amendments to regulatory provisions were necessary to clearly convey our intent.

II. What Amendments Are We Making to the Rule?

Amendments to Requirements for Cleaning Operations. The direct final rule revises § 63.8005(a) to clarify that you must meet the emission limits and work practice standards in Table 1 to subpart HHHHH for cleaning operations only if the cleaning operations are performed automatically; no control is required for cleaning operations that are performed manually. This amendment is needed to make the final rule consistent with our intent as stated in the preamble to the final rule (68 FR 69164, 69172) that control is required for automatic cleaning operations, but not required for manual cleaning operations.

Amendments to Compliance Date for Equipment Added to an Existing Source. Section 63.7995(c) was intended to clarify that equipment added to an existing affected source would be subject to existing source requirements immediately upon startup, if installed after the compliance date. However, the final rule mistakenly referred to the publication date rather than the compliance date. We have also determined that this statement is not needed in the final rule because it is redundant with §§ 63.5(b)(6) and 63.6(c) of the General Provisions to 40 CFR part 63. Therefore, this direct final rule removes and reserves § 63.7995(c). To be clear, under §§ 63.5(b)(6) and 63.6(c), and Table 10 to subpart HHHHH, any equipment added to an existing affected source between December 11, 2003 and the compliance date does not have to comply until the compliance date.

Amendments to Requirements for Performance Tests. The final rule (see § 63.8000(c)) specifies that the performance testing procedures in § 63.997 of 40 CFR part 63, subpart SS, are to be used to demonstrate compliance with the emission limits. However, the option in § 63.997(e)(2)(iv) of demonstrating compliance with a percent reduction emission limit by measuring TOC is prohibited by § 63.8000(d)(1)(v) of the final rule. Since promulgation, we have determined that this restriction is unwarranted because § 63.997(e)(2)(iv)(G) and (H) describe procedures for using Methods 25 and 25A of 40 CFR part 60, appendix A, for measuring TOC. Therefore, the direct final rule removes § 63.8000(d)(1)(v). As a result of this change, the amended rule allows compliance with a percent reduction emission limit to be demonstrated by measuring either total organic HAP or TOC as specified in § 63.997(e)(2)(iv).

Amendments to Procedures for Demonstrating Compliance with the Weight Percent HAP Limit in Coatings. The direct final rule allows formulation data of the ingredients used to manufacture a coating to be used as an alternative to test data for demonstrating compliance with the 5 weight percent HAP limit in § 63.8055. This provision states that as an alternative to complying with the requirements in Table 1 to subpart HHHHH for each individual stationary process vessel at an existing source, you may comply with a 5 weight percent HAP limit for process vessels at your affected source that are used to manufacture coatings with a HAP content of less than 0.05 kg per kg product, as specified in § 63.8055(b). We are issuing this amendment to make the compliance options for subpart HHHHH consistent with options for surface coating rules. For example, 40 CFR part 63, subpart MMMM, the NESHAP for surface coating of miscellaneous metal parts and products, has a compliant materials option that requires the owner or

operator of the surface coating operation to determine the mass fraction of organic HAP for each coating. One method of determining this mass fraction is to use formulation data from the manufacturer (*i.e.*, the source that is subject to subpart HHHHH). Including the formulation data option in subpart HHHHH also provides a less burdensome alternative to testing. However, if the formulation data and test data are inconsistent, there is a rebuttal presumption that the test data are accurate unless you can demonstrate that they are not, and that the formulation data are more appropriate for your unit(s). Also note that, unlike the option in the surface coating rules, the formulation data option in this direct final rule does not have mass cutoffs of 0.1 percent for OSHA-defined carcinogens or 1 percent for other HAP because subpart HHHHH does not establish cutoffs for trace materials or impurities.

Amendments to the Standards for Process Vessels. The direct final rule makes several amendments to the standards for portable and stationary process vessels in Table 1 to subpart HHHHH. One amendment in Table 1 is to allow the cover or lid to be opened for material additions and sampling. Sampling includes quality assurance inspections. Without this amendment, owners and operators would have to install costly materials handling equipment for solids that are added to the batch. Such equipment was not observed in the industry and not considered in our cost analysis, and we did not intend to require it. A second amendment was to clarify that the percent reduction in Table 1 applies to the collective HAP, not each individual HAP. In our database, the reported control efficiencies were not speciated. Thus, this amendment makes the final rule consistent with our analysis of the MACT floor and the regulatory alternative. A third amendment was to clarify that the emission limits in Table 1 apply to organic HAP, not total HAP. This clarification makes these items consistent with the other items in the table that already refer to total organic HAP.

Amendments to Definition of Group 2 Transfer Operations. The direct final rule expands the definition of Group 2 transfer operations to include filling of containers such as cans, drums, and totes. This amendment is needed to clarify that filling of these containers is part of the miscellaneous coating manufacturing affected source and, thus, is not subject to the OLD MACT.

Section 63.7985(b)(4) of subpart HHHHH specifies that transfer racks are part of the miscellaneous coating operations, and § 63.7990(b) specifies that the miscellaneous coating manufacturing operations are the affected source under subpart HHHHH. The definitions of ''Group 1 transfer operations'' and ''Group 2 transfer operations'' in the final rule make it clear that bulk loading (*i.e.*, filling tank trucks and railcars) is performed using transfer racks, but it is not clear if these definitions include transfer operations that involve filling of containers such as cans, drums, and totes. Thus, the final rule's silence might be interpreted to mean that filling of containers is not a transfer operation and is not part of the affected source under subpart HHHHH. Under this interpretation, filling of containers would then be subject to the OLD NESHAP because § 63.2338(c)(1) of the OLD NESHAP exempts transfer racks that transfer organic liquids only if they are part of an affected source under another NESHAP in 40 CFR part 63. We did not intend to regulate filling of containers with coating products under the OLD NESHAP.

The final rule defines Group 2 transfer operations as bulk loading (*i.e.*, filling of tank trucks or railcars) that does not meet the definition of Group 1 transfer operations. In our analysis of the MACT floor for transfer operations, we considered the filling of small containers as well as bulk loading. We determined the MACT floor for all loading was no emissions reduction. We then developed a regulatory alternative consisting of control for bulk loading when the coating products contain more than 3.0 million gallons per year of HAP with a weighted average HAP partial pressure greater than or equal to 1.5 psia. These were the only conditions under which the total impacts of control were considered reasonable. However, since we examined all product filling operations, those operations should be part of the affected source. Thus, this direct final rule revises the definition of Group 2 transfer operations to mean ''bulk loading of coating products that does not meet the definition of Group 1 transfer operations, and all loading of coating products from a loading rack to other types of containers such as cans, drums, and totes.'' This change makes it clear that containers are filled at a transfer rack. Since all transfer racks (both Group 1 and Group 2) are part of the affected source under subpart HHHHH, this change also clarifies that filling of containers with coating products will be exempt from the requirements of the OLD NESHAP.

Clarification of Requirement to Determine Halogenated Vent Streams. The direct final rule revises the language in § 63.8000(b)(1) to clarify the conditions under which you must determine if an emission stream is a halogenated vent stream. This clarification is needed to make the language in § 63.8000(b)(1) consistent with the language in Table 1 to subpart HHHHH.

To minimize combustion control device-generated emissions of hydrogen halide and halogen HAP, Table 1 to subpart HHHHH requires a halogen reduction device either before or after a combustion device that is used to control a halogenated vent stream (*i.e.*, an emission stream that contains halogen atoms in organic compounds at concentrations greater than or equal to 20 parts per million by volume (ppmv)). Section 63.8000(b)(1), however, currently requires you to determine if each vent stream is a halogenated vent stream. This is unnecessary because no hydrogen halide or halogen HAP would be formed if the halogenated organic compound is controlled using a noncombustion control device. Thus, this direct final rule revises the language in § 63.8000(b)(1) to specify that you must determine if an emission stream meets the definition of a halogenated vent stream if it contains halogen atoms, and the organic compounds in the emission stream are controlled using a combustion control device (excluding flares).

Clarification of Equipment Leak Inspection Requirements. One of the compliance options for equipment leaks is to inspect the equipment in accordance with the procedures described in 40 CFR part 63, subpart R (National Emission Standards for Gasoline Distribution Facilities), except as specified in § 63.8015(b). The intent of § 63.8015(b) is to clarify how language in § 63.424(a) that is specific to gasoline distribution operations should be interpreted for application to miscellaneous coating manufacturing operations. Since publication of the final rule, we realized that the language did not clearly describe when the inspections must be performed. Therefore, this direct final rule revises § 63.8015(b) to further clarify the language in § 63.424(a) to make it applicable to miscellaneous coating manufacturing sources.

Clarification of overlapping standards. EPA is taking this opportunity to clarify its discussion in the preamble to the final rule regarding how to determine whether 40 CFR part 63, subpart FFFF or subpart HHHHH, applies when equipment is used to produce both subpart FFFF and HHHHH products. In the preamble to the final rule, we stated:

In the event that equipment used to manufacture products in processes that are subject to 40 CFR part 63, subpart FFFF is also used for coating manufacturing operations that are subject to subpart HHHHH, then the primary use of the equipment determines applicability.

This explanation, however, is partially inconsistent with subpart FFFF. Pursuant to subpart FFFF, the primary use of nondedicated multipurpose equipment only dictates which regulation governs where a process unit group (PUG) has been developed under 40 CFR part 63, subpart FFFF, § 63.2535(l), and the primary product is a subpart FFFF, a subpart GGG, or a subpart MMM product. Where one of these products is the primary product, the primary product determines which regulation applies to each miscellaneous organic chemical process unit (MCPU). Where a subpart FFFF product is the primary product of the PUG, subpart FFFF may be complied with for all process units in the PUG in lieu of other 40 CFR part 63 rules.

Where the primary product of the PUG is subject to regulation under any 40 CFR part 63 regulation, other than subpart FFFF, MMM or GGG, then § 63.2535(l)(3)(ii)(C) dictates that subpart FFFF applies to ''each MCPU in the PUG.'' Otherwise, the regulation applicable to the other product (this would be the primary product if there are only two products) applies to the PUG. Accordingly, if a PUG has been developed, any process unit that is used to produce both a subpart FFFF and subpart HHHHH product must comply with subpart FFFF for the MCPU. Where a PUG has not been developed, the product of the process generally determines applicability, not primary use.

Miscellaneous Technical Corrections. The direct final rule includes several changes to correct references and typesetting errors. These changes are described in Table 1 in this preamble.

TABLE 1.—TECHNICAL CORRECTIONS TO SUBPART HHHHH

Section in subpart HHHHH	Description of correction
§ 63.8000(c)	Adds underlining to section heading.
§ 63.8000(d)(1)(iii)	Replaces reference to ''Tables 1 through 7'' with reference to ''Tables 1 through 6''.
§ 63.8050(c)(1)(ii)	Clarifies that the saturation factors must be calculated for condensable compounds, not noncondensable compounds.
§ 63.8050(c)(3) introductory text	Replaces the reference to paragraph (c)(2)(i) with a reference to paragraph (c)(3)(i).
Table 7 to subpart HHHHH	Replaces the incorrect CAS number with the correct CAS number for tetrachloroethylene.
Table 8 to subpart HHHHH	Revises the title to refer to subpart HHHHH rather than subpart FFFF, and replaces the incorrect CAS number with the correct CAS number for 1,1-dimethyl hydrazine.

III. Statutory and Executive Order Reviews

A. Executive Order 12866: Regulatory Planning and Review

Under Executive Order 12866 (58 FR 51735, October 4, 1993), the Agency must determine whether the regulatory action is ''significant'' and, therefore, subject to Office of Management and Budget (OMB) review and the requirements of the Executive Order. The Executive Order defines ''significant regulatory action'' as one that is likely to result in a rule that may:

(1) Have an annual effect on the economy of $100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities;

(2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency;

(3) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or

(4) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order.

It has been determined that the direct final rule amendments are not a ''significant regulatory action'' under the terms of Executive Order 12866 and are, therefore, not subject to OMB review.

B. Paperwork Reduction Act

This action does not impose any new information collection burden. This action gives a source owner or operator the option of using vapor balancing to comply with the standards. Since it is only an option, this action will not increase the information collection burden. The OMB has previously approved the information collection requirements contained in the existing regulations under the provisions of the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.*, and has assigned OMB control number 2060–0535 (EPA ICR No. 2115.01).

Copies of the information collection request (ICR) document(s) may be obtained from Susan Auby, by mail at the Office of Environmental Information, Collection Strategies Division; U.S. EPA (2822T); 1200 Pennsylvania Ave., NW., Washington, DC 20460, by e-mail at *auby.susan@epa.gov,* or by calling (202) 566–1672. A copy may also be downloaded off the internet at *http://www.epa.gov/icr.* Include the ICR or OMB number in any correspondence.

Burden means the total time, effort, or financial resources expended by persons to generate, maintain, retain, or disclose or provide information to or for a Federal agency. This includes the time needed to review instructions; develop, acquire, install, and utilize technology and systems for the purposes of collecting, validating, and verifying information, processing and maintaining information, and disclosing and providing information; adjust the existing ways to comply with any previously applicable instructions and requirements; train personnel to be able to respond to a collection of information; search data sources; complete and review the collection of information; and transmit or otherwise disclose the information.

An Agency may not conduct or sponsor, and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number. The OMB control numbers for EPA's regulations are listed in 40 CFR part 9 and 48 CFR chapter 15.

C. Regulatory Flexibility Act

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

For purposes of assessing the impacts of today's direct final rule amendments on small entities, a small entity is defined as: (1) A small business in the North American Industrial Classification System (NAICS) code 325 that has up to 500; (2) a small governmental jurisdiction that is a

government of a city, county, town, school district or special district with a population of less than 50,000; and (3) a small organization that is any not-for-profit enterprise which is independently owned and operated and is not dominant in its field.

After considering the economic impacts of today's amendments on small entities, EPA has concluded that this action will not have a significant economic impact on a substantial number of small entities. The direct final rule amendments will not impose any requirements on small entities. The final rule amendments add several compliance options granting greater flexibility to small entities subject to the final rule that may result in a more efficient use of resources for them and, therefore, impose no additional regulatory costs or requirements on owners or operators of affected sources.

D. Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), Public Law 104–4, establishes requirements for Federal agencies to assess the effects of their regulatory actions on State, local, and tribal governments and the private sector. Under section 202 of the UMRA, the EPA generally must prepare a written statement, including a cost-benefit analysis, for proposed and final rules with ''Federal mandates'' that may result in expenditures by State, local, and tribal governments, in the aggregate, or by the private sector, of $100 million or more in any 1 year. Before promulgating an EPA rule for which a written statement is needed, section 205 of the UMRA generally requires the EPA to identify and consider a reasonable number of regulatory alternatives and adopt the least-costly, most cost-effective, or least burdensome alternative that achieves the objectives of the rule. The provisions of section 205 do not apply when they are inconsistent with applicable law. Moreover, section 205 allows the EPA to adopt an alternative other than the least-costly, most cost effective, or least-burdensome alternative if the Administrator publishes with the final rule an explanation why that alternative was not adopted. Before the EPA establishes any regulatory requirements that may significantly or uniquely affect small governments, including tribal governments, it must have developed under section 203 of the UMRA a small government agency plan. The plan must provide for notifying potentially affected small governments to have meaningful and timely input in the development of EPA regulatory proposals with significant Federal intergovernmental mandates, and informing, educating, and advising small governments on compliance with the regulatory requirements.

The EPA has determined that the direct final rule amendments do not contain a Federal mandate that may result in expenditures of $100 million or more for State, local, and tribal governments, in the aggregate, or the private sector in any 1 year. The direct final rule amendments provide a source owner or operator with additional options to comply with the standards. Therefore, the direct final rule amendments are not subject to the requirements of sections 202 and 205 of the UMRA.

E. Executive Order 13132: Federalism

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

The direct final rule amendments do not have federalism implications. They will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132. The direct final rule amendments provide a source owner or operator with another option to comply with the standards and, therefore, impose no additional burden on sources. Thus, Executive Order 13132 does not apply to the direct final rule amendments.

In the spirit of Executive Order 13132 and consistent with EPA policy to promote communications between the EPA and State and local governments, the EPA specifically solicits comment on the direct final rule amendments from State and local officials.

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

Executive Order 13175 (65 FR 67249, November 9, 2000) requires the EPA to develop an accountable process to ensure ''meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications.'' The direct final rule amendments do not have tribal implications, as specified in Executive Order 13175. The direct final rule amendments provide a source owner or operator with another option to comply with the standards and, therefore, impose no additional burden on sources. Thus, Executive Order 13175 does not apply to the direct final rule amendments.

The EPA specifically solicits additional comment on the direct final rule amendments from tribal officials.

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

Executive Order 13045 (62 FR 19885, April 23, 1997) applies to any rule that: (1) Is determined to be ''economically significant'' as defined under Executive Order 12866, and (2) concerns an environmental health or safety risk that the EPA has reason to believe may have a disproportionate effect on children. If the regulatory action meets both criteria, the EPA must evaluate the environmental health or safety effects of the planned rule on children, and explain why the planned regulation is preferable to other potentially effective and reasonably feasible alternatives considered by the EPA.

The EPA interprets Executive Order 13045 as applying only to those regulatory actions that are based on health or safety risks, such that the analysis required under section 5–501 of the Executive Order has the potential to influence the regulation. Today's direct final rule amendments are not subject to Executive Order 13045 because they are based on technology performance, not health or safety risks. Furthermore, the direct final rule amendments have been determined not to be ''economically significant'' as defined under Executive Order 12866.

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

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

I. National Technology Transfer and Advancement Act

Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (NTTAA), Public Law No. 104–113, 12(d) (15 U.S.C. 272 note), directs the EPA to use voluntary consensus standards in its regulatory activities unless to do so would be inconsistent with applicable law or

otherwise impractical. Voluntary consensus standards are technical standards (*e.g.*, materials specifications, test methods, sampling procedures, and business practices) that are developed or adopted by voluntary consensus standards bodies. The NTTAA directs the EPA to provide Congress, through OMB, explanations when the Agency decides not to use available and applicable voluntary consensus standards.

No new standard requirements are cited in the direct final rule amendments. Therefore, the EPA is not proposing or adopting any voluntary consensus standards in the direct final rule amendments.

J. Congressional Review Act

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

List of Subjects in 40 CFR Part 63

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

Dated: May 6, 2005.

Stephen L. Johnson,

Administrator.

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

PART 63—[AMENDED]

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

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

Subpart HHHHH—[Amended]

■ 2. Section 63.7995 is amended by removing and reserving paragraph (c).

■ 3. Section 63.8000 is amended by:

■ a. Revising paragraph (b)(1);

■ b. Revising paragraph (c) heading; and

■ c. Revising paragraph (d)(1).

The revisions read as follows:

§ 63.8000 What are my general requirements for complying with this subpart?

* * * * *

(b) * * *

(1) If an emission stream contains halogen atoms, and you use a combustion-based control device (excluding a flare) to meet an organic HAP emission limit, you must determine whether the emission stream meets the definition of a halogenated stream by calculating the concentration of each organic compound that contains halogen atoms using the procedures specified in § 63.115(d)(2)(v), multiplying each concentration by the number of halogen atoms in the organic compound, and summing the resulting halogen atom concentrations for all of the organic compounds in the emission stream. Alternatively, you may elect to designate the emission stream as halogenated.

* * * * *

(c) *Compliance requirements for closed vent systems and control devices.* * * *

* * * * *

(d) *Exceptions to the requirements specified in other subparts of this part 63.* (1) *Requirements for performance tests.* The requirements specified in paragraphs (d)(1)(i) through (v) of this section apply instead of or in addition to the requirements for performance testing of control devices as specified in subpart SS of 40 CFR part 63.

(i) Conduct gas molecular weight analysis using Method 3, 3A, or 3B in appendix A to 40 CFR part 60.

(ii) Measure moisture content of the stack gas using Method 4 in appendix A to 40 CFR part 60.

(iii) As an alternative to using Method 18, Method 25/25A, or Method 26/26A of 40 CFR part 60, appendix A, to comply with any of the emission limits specified in Tables 1 through 6 to this subpart, you may use Method 320 of 40 CFR part 60, appendix A. When using Method 320, you must follow the analyte spiking procedures of section 13 of Method 320, unless you demonstrate that the complete spiking procedure has been conducted at a similar source.

(iv) Section 63.997(c)(1) does not apply. For the purposes of this subpart, results of all initial compliance demonstrations must be included in the notification of compliance status report, which is due 150 days after the compliance date, as specified in § 63.8075(d)(1).

(v) If you do not have a closed-vent system as defined in § 63.981, you must determine capture efficiency using Method 204 of appendix M to 40 CFR part 51 for all stationary process vessels subject to requirements of Table 1 to this subpart.

* * * * *

■ 4. Section 63.8005 is amended by revising paragraph (a) to read as follows:

§ 63.8005 What requirements apply to my process vessels?

(a) *General.* (1) You must meet each emission limit and work practice standard in Table 1 to this subpart that applies to you, and you must meet each applicable requirement specified in § 63.8000(b), except as specified in paragraphs (a)(1)(i) and (ii) of this section.

(i) You are not required to meet the emission limits and work practice standards in Table 1 to this subpart if you comply with § 63.8050 or § 63.8055.

(ii) You must meet the emission limits and work practice standards in Table 1 to this subpart for emissions from automatic cleaning operations. You are not required to meet the emission limits and work practice standards in Table 1 to this subpart for emissions from cleaning operations that are conducted manually.

(2) For each control device used to comply with Table 1 to this subpart, you must comply with subpart SS of this part 63 as specified in § 63.8000(c), except as specified in § 63.8000(d) and paragraphs (b) through (g) of this section.

* * * * *

■ 5. Section 63.8015 is amended by revising paragraph (b) to read as follows:

§ 63.8015 What requirements apply to my equipment leaks?

* * * * *

(b) *Exceptions to requirements in § 63.424(a).* (1) When § 63.424(a) refers to ''a bulk gasoline terminal or pipeline breakout station subject to the provisions of this subpart,'' the phrase ''a miscellaneous coating manufacturing affected source subject to 40 CFR part 63, subpart HHHHH'' shall apply for the purposes of this subpart.

(2) When § 63.424(a) refers to ''equipment in gasoline service,'' the phrase ''equipment in organic HAP service'' shall apply for the purposes of this subpart.

(3) When § 63.424(a) specifies that ''each piece of equipment shall be inspected during loading of a gasoline cargo tank,'' the phrase ''each piece of equipment must be inspected when it is operating in organic HAP service'' shall apply for the purposes of this subpart.

(4) Equipment in service less than 300 hours per year, equipment in vacuum

service, or equipment contacting non-process fluids is excluded from this section.

* * * * *

■ 6. Section 63.8050 is amended by:

■ a. Revising the fifth sentence in paragraph (c)(1)(ii); and

■ b. Revising paragraph (c)(3) introductory text.

The revisions read as follows:

§ 63.8050 How do I comply with emissions averaging for stationary process vessels at existing sources?

* * * * *

(c) * * *

(1) * * *

(ii) * * * Note that for multi-component emission streams, saturation factors must be calculated for all condensable compounds, not just the HAP. * * *

* * * * *

(3) Determine actual emissions in pounds per batch for each vessel in accordance with paragraph (c)(3)(i), (ii), or (iii) of this section, as applicable.

* * * * *

■ 7. Section 63.8055 is amended by revising paragraph (b) to read as follows:

§ 63.8055 How do I comply with a weight percent HAP limit in coating products?

* * * * *

(b) You may only comply with the alternative during the production of coatings that contain less than 5 weight percent HAP, as determined using any of the procedures specified in paragraphs (b)(1) through (4) of this section.

(1) Method 311 (appendix A to 40 CFR part 63).

(2) Method 24 (appendix A to 40 CFR part 60). You may use Method 24 to determine the mass fraction of volatile matter and use that value as a substitute for the mass fraction of HAP.

(3) You may use an alternative test method for determining mass fraction of HAP if you obtain prior approval by the Administrator. You must follow the procedure in § 63.7(f) to submit an alternative test method for approval.

(4) You may rely on formulation data. If the HAP weight percent estimated based on formulation data conflicts with the results of a test conducted according to paragraphs (b)(1) through (3) of this section, then there is a rebuttal presumption that the test results are accurate unless, after consultation, you demonstrate to the satisfaction of the permitting authority that the test results are not accurate and that the formulation data are more appropriate.

* * * * *

■ 8. Section 63.8105 is amended by revising the definition in paragraph (g) for *Group 2 transfer operations* to read as follows:

§ 63.8105 What definitions apply to this subpart?

* * * * *

(g) * * *

Group 2 transfer operations means bulk loading of coating products that does not meet the definition of Group 1 transfer operations, and all loading of coating products from a loading rack to other types of containers such as cans, drums, and totes.

* * * * *

■ 9. Table 1 to subpart HHHHH is amended by revising entries ''1,'' ''2,'' and ''3'' to read as follows:

TABLE 1 TO SUBPART HHHHH OF PART 63.—EMISSION LIMITS AND WORK PRACTICE STANDARDS FOR PROCESS VESSELS

* * * * * * *

For each . . .	You must . . .	And you must . . .
1. Portable process vessel at an existing source.	a. Equip the vessel with a cover or lid that must be in place at all times when the vessel contains a HAP, except for material additions and sampling.	Nonapplicable.
2. Stationary process vessel at an existing source.	a. Equip the vessel with a cover or lid that must be in place at all times when the vessel contains a HAP, except for material additions and sampling; or	i. Considering both capture and any combination of control (except a flare), reduce emissions of organic HAP with a vapor existing pressure ≥0.6 kPa by ≥75 percent by weight, and reduce emissions of organic HAP with a vapor pressure <0.6 kPa by ≥60 percent by weight.
	b. Equip the vessel with a tightly fitting vented cover or lid that must be closed at all times when the vessel contains HAP, except for material additions and sampling.	i. Reduce emissions of organic HAP with a vapor pressure ≥0.6 kPa by ≥75 percent by weight, and reduce emissions of organic HAP with a vapor pressure <0.6 kPa by ≥60 percent by weight, by venting emissions through a closed-vent system to any combination of control devices (except a flare); or ii. Reduce emissions of total organic HAP by venting emissions from a non-halogenated vent stream through a closed-vent system to a flare; or iii. Reduce emissions of total organic HAP by venting emissions through a closed-vent system to a condenser that reduces the outlet gas temperature to: <10 °C if the process vessel contains HAP with a partial pressure <0.6 kPa, or <2 °C if the process vessel contains HAP with a partial pressure ≥0.6 kPa and <17.2 kPa, or < −5 °C if the process vessel contains HAP with a partial pressure ≥17.2 kPa.

TABLE 1 TO SUBPART HHHHH OF PART 63.—EMISSION LIMITS AND WORK PRACTICE STANDARDS FOR PROCESS VESSELS—Continued

For each . . .	You must . . .	And you must . . .
3. Portable and stationary process vessel at a new source.	a. Equip the vessel with a tightly fitting vented cover or lid that must be closed at all times when the vessel contains HAP, except for material additions and sampling.	i. Reduce emissions of total organic HAP by ≥95 percent by weight by venting emissions through a closed-vent system to any combination of control devices (except a flare); or ii. Reduce emissions of total organic HAP by venting emissions from a non-halogenated vent stream through a closed-vent system to a flare; or iii. Reduce emissions of total organic HAP by venting emissions through a closed-vent system to a condenser that reduces the outlet gas temperature to: < −4 °C if the process vessel contains HAP with a partial pressure <0.7 kPa, or < −20 °C if the process vessel contains HAP with a partial pressure ≥0.7 kPa and <17.2 kPa, or < −30 °C if the process vessel contains HAP with a partial pressure ≥17.2 kPa.

■ 10. Table 7 to subpart HHHHH is amended by revising entry ''51'' to read as follows:

TABLE 7 TO SUBPART HHHHH OF PART 63.—PARTIALLY SOLUBLE HAZARDOUS AIR POLLUTANTS

Chemical name . . .	CAS No.
51. Tetrachloroethylene (perchloroethylene)	127184

TABLE 7 TO SUBPART HHHHH OF PART 63.—PARTIALLY SOLUBLE HAZARDOUS AIR POLLUTANTS—Continued

Chemical name . . .	CAS No.

■ 11. Table 8 to subpart HHHHH is amended by revising the heading and entry ''4'' to read as follows:

TABLE 8 TO SUBPART HHHHH OF PART 63.—SOLUBLE HAZARDOUS AIR POLLUTANTS

Chemical name . . .	CAS No.
4. Dimethyl hydrazine (1,1)	57147

[FR Doc. 05–9485 Filed 5–12–05; 8:45 am]
BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 63

[OAR–2003–0178; FRL–7911–2]

RIN 2060–AM72

National Emission Standards for Hazardous Air Pollutants: Miscellaneous Coating Manufacturing

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule; amendments.

SUMMARY: On December 11, 2003, EPA promulgated national emission standards for hazardous air pollutants (NESHAP) for miscellaneous coating manufacturing. This action proposes amending the NESHAP by providing additional compliance options and clarifications. Specifically, this action proposes an option to demonstrate compliance with a percent reduction emission limit by measuring total organic compounds (TOC), an option to demonstrate compliance with the weight percent hazardous air pollutant (HAP) limit in coatings products based on formulation data, and a change to the process vessel standards to allow the cover or lid on a process vessel to be opened for material additions and sampling. Other proposed amendments are clarifications of the requirements for cleaning operations, the compliance date for equipment that is added to an existing source, the conditions under which you must determine whether an emission stream is a halogenated vent stream, and the terminology used to describe the emission limits for process vessels. This action also proposes a revised definition of Group 2 transfer operations to clarify that all product loading operations are part of the miscellaneous coating manufacturing affected source and, thus, are not subject to the organic liquid distribution (OLD) NESHAP.

In the Rules and Regulations section of this **Federal Register**, we are taking direct final action on the proposed amendments because we view the amendments as noncontroversial and anticipate no adverse comments. We have explained our reasons for the amendments in the preamble to the direct final rule. If we receive no adverse comments, we will take no further action on the proposed amendments. If we receive adverse comments, we will withdraw only those provisions on which we received adverse comments. We will publish a timely withdrawal in the **Federal Register** indicating which provisions will become effective and which provisions are being withdrawn. If part or all of the direct final rule in the Rules and Regulations section of today's **Federal Register** is withdrawn, all comments pertaining to the withdrawn provisions will be addressed in a subsequent final rule based on the proposed amendments. We will not institute a second comment period before taking the subsequent final action. Any parties interested in commenting must do so at this time.

DATES: *Comments.* Written comments must be received on or before June 13, 2005 unless a hearing is requested by May 23, 2005. If a hearing is requested, written comments must be received on or before June 27, 2005.

Public Hearing. If anyone contacts the EPA requesting to speak at a public hearing, a public hearing will be held on May 27, 2005.

ADDRESSES: Submit your comments, identified by Docket ID No. OAR–2003–0178, by one of the following methods:

- Federal eRulemaking Portal: *http://www.regulations.gov.* Follow the on-line instructions for submitting comments.
- Agency Web site: *http://www.epa.gov/edocket.* EDOCKET, EPA's electronic public docket and comment system, is EPA's preferred method for receiving comments. Follow the on-line instructions for submitting comments.
- E-mail: *air-and-r-docket@epa.gov.*
- Fax: (202) 566–1741.
- Mail: EPA Docket Center, Environmental Protection Agency, Mailcode: 6102T, 1200 Pennsylvania Avenue, NW., Washington, DC 20460. Please include a duplicate copy, if possible.
- Hand Delivery: Air and Radiation Docket, Environmental Protection Agency, 1301 Constitution Avenue, NW., Room B–108, Washington, DC 20460. Such deliveries are only accepted during the Docket's normal hours of operation, and special arrangements should be made for deliveries of boxed information.

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

Instructions: Direct your comments to Docket ID No. OAR–2003–0178. EPA's policy is that all comments received will be included in the public docket without change and may be made available online at *http://www.epa.gov/edocket*, including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through EDOCKET, regulations.gov, or e-mail. The EPA EDOCKET and the federal regulations.gov websites are ''anonymous access'' systems, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through EDOCKET or regulations.gov, your e-mail address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD–ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses. For additional information about EPA's public docket visit EDOCKET on-line or see the **Federal Register** of May 31, 2002 (67 FR 38102).

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

Public Hearing. If a public hearing is held, it will be held at 10 a.m. at the EPA's Environmental Research Center Auditorium, Research Triangle Park, North Carolina or at an alternate site nearby.

FOR FURTHER INFORMATION CONTACT: Mr. Randy McDonald, Organic Chemicals Group, Emission Standards Division (C504–04), Office of Air Planning and Standards, U.S. EPA, Research Triangle Park, North Carolina 27711, telephone

number (919) 541–5402, electronic mail address *mcdonald.randy@epa.gov*.

SUPPLEMENTARY INFORMATION: *Regulated Entities*. The regulated category and entities affected by this action include:

Category	NAICS*	Examples of regulated entities
Industry	3255	Manufacturers of coatings, including inks, paints, or adhesives.

*North American Industrial Classification System

This table is not intended to be exhaustive, but rather provides a guide for readers likely to be interested in the revisions to the rule affected by this action. To determine whether your facility, company, business, organization, etc., is regulated by this action, you should carefully examine all of the applicability criteria in 40 CFR 63.7985, as well as in today's proposed amendments to the applicability sections. If you have questions regarding the applicability of the amendments to a particular entity, consult the person listed in the preceding **FOR FURTHER INFORMATION CONTACT** section.

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

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

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

- Identify the rulemaking by docket number and other identifying information (subject heading, **Federal Register** date and page number).
- Follow directions—The agency may ask you to respond to specific questions or organize comments by referencing a Code of Federal Regulations (CFR) part or section number.
- Explain why you agree or disagree; suggest alternatives and substitute language for your requested changes.
- Describe any assumptions and provide any technical information and/or data that you used.
- If you estimate potential costs or burdens, explain how you arrived at your estimate in sufficient detail to allow for it to be reproduced.
- Provide specific examples to illustrate your concerns, and suggest alternatives.
- Explain your views as clearly as possible, avoiding the use of profanity or personal threats.
- Make sure to submit your comments by the comment period deadline identified.

Public Hearing. Persons interested in presenting oral testimony or inquiring as to whether a hearing is to be held should contact Mr. Randy McDonald, Organic Chemicals Group, Emission Standards Division (Mail Code C504–04), U.S. EPA, Research Triangle Park, North Carolina 27711, telephone number (919) 541–5402, electronic mail address mcdonald.randy@epa.gov., at least 2 days in advance of the potential date of the public hearing. Persons interested in attending the public hearing must also call Mr. Randy McDonald to verify the time, date, and location of the hearing. The public hearing will provide interested parties the opportunity to present data, views, or arguments concerning these proposed emission standards.

Worldwide Web (WWW). In addition to being available in the docket, an electronic copy of today's proposal will also be available through the WWW. Following the Administrator's signature, a copy of this action will be posted on EPA's Technology Transfer Network (TTN) policy and guidance page for newly proposed or promulgated rules *http://www.epa.gov/ttn/oarpg*. The TTN at EPA's web site provides information and technology exchange in various areas of air pollution control. If more information regarding the TTN is needed, call the TTN HELP line at (919) 541–5384.

Direct Final Rule. A direct final rule identical to the proposal is published in the Rules and Regulations section of today's **Federal Register**. If we receive any adverse comment pertaining to the amendments, we will publish a timely notice in the **Federal Register** informing the public that the amendments are being withdrawn due to adverse comment. We will address all public comments concerning the withdrawn amendments in a subsequent final rule. If no relevant adverse comments are received, no further action will be taken on the proposal and the direct final rule will become effective as provided in that action.

The regulatory text for the proposal is identical to that for the direct final rule published in the Rules and Regulations section of today's **Federal Register**. For further supplementary information, the detailed rationale for the proposal and the regulatory revisions, see the direct final rule published in the Rules and Regulations section of today's **Federal Register**.

Statutory and Executive Order Reviews

For a complete discussion of all administrative requirements applicable to this section, see the direct final rule in Rules and Regulations section of today's **Federal Register**.

Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) generally requires an agency to prepare a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements under the Administrative Procedure Act or any other statute unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. Small entities include small businesses, small organizations, and small governmental jurisdictions.

For purposes of assessing the impacts of today's proposed amendments on small entities, a small entity is defined as: (1) A small business having up to 500 employees; (2) a small governmental jurisdiction that is a government of a city, county, town, school district or special district with a population of less than 50,000; and (3) a small organization that is any not-for-profit enterprise which is independently owned and operated and is not dominant in its field.

After considering the economic impacts of today's proposed amendments on small entities, I certify that this action will not have a significant economic impact on a substantial number of small entities. In determining whether a proposed rule has a significant economic impact on a substantial number of small entities, the

impact of concern is any significant adverse economic impact, since the primary purpose of the regulatory flexibility analysis is to identify and address regulatory alternatives ''which minimize any significant economic impact of the proposed rule on small entities' (5 U.S.C. sections 603 and 604). Thus, any agency may certify that a rule will not have a significant economic impact on a substantial number of small entities if the rule relieves regulatory burden or otherwise has a positive economic effect on all of the small entities subject to the rule. The proposed amendments grant greater flexibility to small entities subject to the final rule that may result in a more efficient use of resources for them and, therefore, impose no additional regulatory costs or requirements on owners or operators of affected sources. The EPA continues to be interested in the potential impacts of the proposed rule on small entities and welcomes comments on issues related to such impacts.

List of Subjects in 40 CFR Part 63

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

Dated: May 6, 2005.

Stephen L. Johnson,

Administrator.

[FR Doc. 05–9486 Filed 5–12–05; 8:45 am]

BILLING CODE 6560–50–P

Federal Register

Friday,

May 13, 2005

Part V

Environmental Protection Agency

40 CFR Part 52

Approval and Promulgation of Air Quality Implementation Plans; Final Rules

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[RME NO. R03–OAR–2004–DC–0009, R03–OAR–2004–DC–0010; FRL–7910–3]

Approval and Promulgation of Air Quality Implementation Plans; District of Columbia, Maryland, Virginia; 1-Hour Ozone Attainment Plans, Rate-of-Progress Plans, Contingency Measures, Transportation Control Measures, VMT Offset, and 1990 Base Year Inventory

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: EPA is approving State Implementation Plan (SIP) revisions submitted by the District of Columbia (the District), the State of Maryland and the Commonwealth of Virginia. These revisions include the 1996–1999 and 1999–2005 rate-of-progress (ROP) plans, changes to the 1990 base year inventory, a contingency measures plan, certain transportation control measures (TCMs), and a demonstration that each SIP contains any necessary transportation control measures to offset any growth in emissions from growth in vehicle miles traveled (VMT) and to demonstrate ROP and attainment of the 1-hour national ambient air quality standard (NAAQS) for ozone. These revisions also include the District's and Virginia's attainment plan for the Washington, DC severe 1-hour ozone nonattainment area (the Washington area). The intended effect of this action with respect to the following SIP revisions, all of which were submitted to satisfy the SIP requirements of 1-hour ozone nonattainment areas classified as severe, is to: approve the District's, Maryland's and Virginia's modeling demonstration, which includes the analysis based upon photochemical grid modeling, that the Washington area will attain the 1-hour ozone NAAQS; approve the District's, Maryland's and Virginia's post-1996 ROP plans, 1990 base year inventory revisions, TCMs, VMT offset and contingency measures SIP revisions; approve the District's and Virginia's attainment plans for the Washington area; and, determine that Maryland's SIP for the Washington area contains adopted control measures and determine that these measures fully satisfy the emission reductions relevant to attainment of the 1-hour ozone NAAQS.

DATES: *Effective Date:* This final rule is effective on June 13, 2005.

ADDRESSES: EPA has established a docket for this action under Regional Material in EDocket (RME) ID Number R03–OAR–2004–DC–0010. All documents in the docket are listed in the RME index at *http://www.docket.epa.gov/rmepub/*. Once in the system, select ''quick search,'' then key in the appropriate RME identification number. Although listed in the electronic docket, some information is not publicly available, *i.e.*, confidential business information (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 RME or in hard copy for public inspection during normal business hours at the Air Protection Division, U.S. Environmental Protection Agency, Region III, 1650 Arch Street, Philadelphia, Pennsylvania 19103. Copies of the State submittal are available at the District of Columbia Department of Public Health, Air Quality Division, 51 N Street, NE., Washington, DC 20002; the Maryland Department of the Environment, 1800 Washington Boulevard, Suite 705, Baltimore, Maryland 21230; and the Virginia Department of Environmental Quality, 629 East Main Street, Richmond, Virginia 23219.

FOR FURTHER INFORMATION CONTACT: Christopher Cripps, (215) 814–2179, or by e-mail at *cripps.christopher@epa.gov*.

SUPPLEMENTARY INFORMATION:

I. Background

A. Summary

On January 12, 2005 (70 FR 2085), EPA published a notice of proposed rulemaking (NPR) for the District, the State of Maryland and the Commonwealth of Virginia (the States). The NPR proposed approval of the 1996–1999 and 1999–2005 ROP plans, changes to the 1990 base year inventory, a contingency measures plan, certain TCMs, and a demonstration that each SIP contains sufficient transportation control measures to offset any growth in emissions from growth in VMT as necessary to demonstrate ROP and attainment of the 1-hour NAAQS for ozone.

Tables 1 and 2 identify the initial submittal dates and the dates on which the States's submitted amendments for these plans and measures covered by our January 12, 2005 NPR:

TABLE 1.—POST 1996–1999 ROP PLANS FROM THE STATES

	DC	MD [1]	VA
Initial submittal dates	November 10, 1997	December 24, 1997	December 19, 1997.
Amended submittal dates	May 25, 1999	May 20, 1999	May 25, 1999.

The post 1996–1999 ROP Plan SIP revisions also include certain TCMs, specifically those TCMs identified in Appendix H of the States submittals.

TABLE 2.—ATTAINMENT PLAN, 1999–2005 ROP PLANS, CONTINGENCY MEASURES PLAN, AMENDMENTS TO THE 1990 BASE YEAR INVENTORY, AND VMT OFFSET PLANS

	DC	MD [2]	VA
Initial submittal dates	September 5, 2003	September 2, 2003	August 19, 2003.
Amended submittal dates	February 25, 2004	February 24, 2004	February 25, 2004.

[1] Maryland SIP revision submittals labeled as 97–04 and 99–12.

[2] Maryland's identifiers for these SIP revision submittals are SIP revisions numbers 03–05 and 04–01.

Hereafter, the SIP revisions listed in Table 2 of this document will be called the ''February 2004 SIP revisions.'' The States'' February 2004 SIP revisions include the post 1999–2005 ROP plans, the VMT Offset SIPs, revisions to the 1990 base year emissions inventory, and the contingency measures plans for ROP and attainment for the Washington area.[3] The February 2004 SIP revisions additionally include certain TCMs, namely those TCMs identified in Appendix J of the SIP revision submittals.

The February 2004 SIP revisions also included the States' revised attainment plans for the Washington area. The States had initially submitted an attainment plan for the Washington area in 1998 with later supplements. These initial attainment plans were the subject of two earlier rulemaking actions, 66 FR 586, January 3, 2001, and 68 FR 19106, April 17, 2003. The dates of submittal are shown in Table 3 which repeats the information found in Table 2 of both the January 3, 2001 and April 17, 2003 final rules.

TABLE 3.—PREVIOUS ATTAINMENT DEMONSTRATIONS SUBMISSIONS

	DC	MD[4]	VA
Initial submittal dates	April 24, 1998	April 29, 1998	April 29, 1998.
Amendment dates	October 27, 1998	August 17, 1998	August 18, 1998.
Supplemental dates	February 16, 2000	February 14, 2000	February 9, 2000.
Supplemental dates	March 22, 2000	March 31, 2000	March 31, 2000.

Hereafter those revisions listed in Table 3 will be called the ''pre-2001 SIP revisions'' attainment plan.''[5] Hereafter we refer to the collective grouping of those SIP revisions listed in Tables 1 and 3 of this document as the ''pre-2001 SIP revisions.''

In their February 2004 SIP revisions, each of the States resubmitted to EPA the attainment plan contained in its prior SIP revisions' attainment plan along with additional elements required for a severe area attainment plan, such as a post-1999 ROP plan and the VMT offset SIPs, a contingency measures plan to augment the previously submitted 1996–1999 ROP plan and contingency measures plan, respectively, as well as other SIP elements not included in the previous SIP revisions' attainment plan.

We proposed action on these attainment plans in a separate NPR published in the **Federal Register** on February 9, 2005 (70 FR 6796). In our February 9, 2005, NPR, we also proposed approval of the attainment plan SIP revisions submitted by the District and Virginia.

In our February 9, 2005, NPR, with respect to the State of Maryland's attainment plan for the Washington area, we proposed approval contingent upon the State submitting an approvable SIP revision for certain penalty fees, required by the Clean Air Act (the Act), prior to the time EPA would issue a final rule on Maryland's attainment plan. In the alternative, we proposed to disapprove the attainment plan SIP revision submitted by the State of Maryland for the Washington area and to issue a protective finding for the attainment plan which would allow the motor vehicle emissions budgets (MVEBs) identified in the attainment plan SIP to be used for demonstrating transportation conformity purposes. EPA has taken a final action on the Maryland's attainment plan for the Washington area in a separate final rule which is published elsewhere in today's **Federal Register**. In that final rule, EPA is disapproving the Maryland's attainment plan for the Washington area because Maryland failed to submit the required fee program, and, pursuant to 40 CFR 93.120(a), and issuing a protective finding to the February 2004 SIP revisions' attainment plan. As we explain in that rule, the protective finding will allow Maryland to use the MVEBs contained in the disapproved SIP for transportation conformity purposes pursuant to 40 CFR 93.120. In this rule we are approving the modeling demonstration, which includes an analysis based upon photochemical grid modeling (the modeled demonstration of attainment and adjunct weight-of-evidence (WOE) analysis), contained in the District's, Maryland's and Virginia's February 2004 SIP revisions. We also determine that based upon this modeled demonstration of attainment and adjunct WOE analysis Maryland's submitted SIP for the Washington area contains adopted control measures that fully satisfy the emission reduction requirements relevant to the Washington area attaining the 1-hour ozone NAAQS by November 15, 2005. This determination supports issuance of the protective finding for transportation conformity purposes pursuant to 40 CFR 93.120.

B. Relationship to Past SIP Revisions and Litigation

1. Prior SIP Revisions

During 1998, the States submitted an attainment plan for the Washington area and supplemented these submittals on the dates listed in Table 3 of this document. These 1998 and 2000 calendar year revisions cumulatively constituted the attainment plan for the Washington area which at the time was classified as being in ''serious'' nonattainment of the 1-hour ozone NAAQS. In the aggregate these attainment plans consisted of a photochemical modeling demonstration and adjunct WOE analyses that demonstrated attainment of the ozone NAAQS; projected emissions inventories showing that the States collectively had adopted sufficient measures to support the demonstration of attainment; attainment year MVEBs; and a commitment to conduct and submit a mid-course review to EPA by a date certain. As noted previously, the March 2000 SIP revisions consisted of a commitment to revise the MVEBs one-year after EPA released the MOBILE6 model and the outyear budgets. These pre-2001 SIP revisions' attainment plans were submitted to demonstrate that the Washington area would attain the 1-hour ozone NAAQS by no later than November 15, 2005. On January 3, 2001, EPA approved the pre-2001 SIP revisions and extended the attainment date for the Washington area (then a

[3] In this document a SIP revision which demonstrates the state's SIP contains any necessary transportation control measures to offset any growth in emissions from growth in VMT needed to demonstrate ROP and attainment of the 1-hour NAAQS for ozone is termed a ''VMT offset SIP.''

[4] Maryland's identifiers for the February 14, 2000 and March 31, 2002 submittals are SIP revisions numbers 00–01 and No. 00–02.

[5] Only a commitment to revise the motor vehicle emissions budgets (MVEBs) found in the March 2000 SIP revisions listed in Table 3 of this document were subject to the January 3, 2001 and April 17, 2003 final rules. The portion of these SIP revisions related to MVEBs for years after 2005 (''outyear budgets'') was not subject to these actions.

serious nonattainment area) until November 15, 2005.

2. January 3, 2001 Final Rule Vacated

A petition for review challenging the January 3, 2001 final approval was filed by the Sierra Club. The petition alleged, among other things, that EPA could not lawfully extend the attainment date of a serious ozone nonattainment area past November 15, 1999 without reclassifying the area as severe nonattainment, could not approve a SIP for an area with a 2005 attainment date unless the plan provides for ROP reductions after 1999 and could not approve a SIP that does not include contingency measures. On July 2, 2002, the U.S. Court of Appeals for the District of Columbia Circuit (the Court of Appeals) issued an opinion to vacate our rule extending the attainment date and approving the attainment plans and 1996–1999 ROP plans. Among other things, the Court of Appeals found that EPA had no authority to extend the attainment date of a serious ozone nonattainment area without reclassifying the area as severe nonattainment, and could not approve a SIP for an area with a 2005 attainment date unless the plan provides for ROP reductions until the attainment date. *See Sierra Club* v. *Whitman*, 294 F.3d 155, 160–163 (D.C. Cir. 2002). The Court of Appeals also found that EPA could not approve the pre-2001 SIP revisions because a contingency measures plan, which is required under section 172(c)(9) of the Act, is one of the elements listed under section 172(c) as a requirement for a revised SIP for an area in nonattainment. *See* Id. at 164.

3. Nonattainment Area Plan Requirements

Under section 172(c) of the Act, a revised SIP for an area in nonattainment must also include elements such as an attainment demonstration and all reasonably available control measures (RACM), reasonable further progress toward attainment, an emissions inventory, and new source permitting programs. Under section 182(d), a revised SIP for an area in *severe* ozone nonattainment must include reasonably available control technology (RACT) on, and new source review (NSR) permitting of, major stationary sources of nitrogen oxides (NO_X) emissions and volatile organic compound (VOC) emissions with a potential to emit of 25 tons per year (TPY) or greater; new source permitting offset ratios of 1.3 to 1 or greater; a VMT Offset SIP; a ROP plan to achieve a 15 percent reduction in VOC emissions by 1996; plans for achieving an average of a 3 percent per year ROP reductions after 1996 through the attainment date; and a SIP revision to impose the penalty fees specified in section 185 of the Act.

EPA believes *Sierra Club* v. *Whitman*, 294 F.3d 155, can be read to require that before we can approve the overall revised SIP for the nonattainment area we must approve all of the elements applicable to the area under sections 172(c) and 182 of the Act. In this document, the overall SIP for the nonattainment area will be termed the ''attainment plan.''

Under section 182 of the Act, a demonstration that the SIPs for a nonattainment area, as revised, will provide for attainment of the 1-hour ozone NAAQS by November 15, 2005 is a separate component of the overall attainment plan. *See* 42 U.S.C. 7511a(c)(2)(A). Such a demonstration for a severe ozone nonattainment area must be based upon photochemical grid modeling (or similarly effective method) and must show that the submitted demonstration relies upon or contains adopted control measures that fully satisfy the emission reduction requirements relevant to demonstrating attainment of the 1-hour ozone NAAQS by November 15, 2005. *Id.*

4. Washington Area Reclassified to Severe Nonattainment

On January 24, 2003 (68 FR 3410), EPA reclassified the Washington area to severe nonattainment because the area failed to attain 1-hour ozone NAAQS by the November 15, 1999 statutory attainment date for serious areas. This action made the area subject to the additional requirements applicable to severe areas under section 182(d) of the Act. On April 17, 2003 (68 FR at 19107), EPA conditionally approved the pre-2001 SIP revisions (the history of litigation on the April 17, 2003 conditional approval will be discussed in a later paragraph of this document titled ''April 17, 2003 Final Rule Vacated and Withdrawn'').

5. Recent SIP Revision Actions

In the months that followed the January 24, 2003 reclassification of the Washington area to severe nonattainment and the April 17, 2003 conditional approval, the States submitted the SIP revisions necessary to satisfy the requirements of section 182(d) of the Act for severe areas and EPA's conditional approval, with the exception of Maryland which failed to submit a SIP revision for the section 185 penalty fee program. These SIP revisions included February 2004 SIP revisions. The February 2004 SIP revisions contained the attainment plan which consists of: (1) A photochemical modeling demonstration and adjunct WOE analyses to demonstrate attainment of the ozone NAAQS by no later than November 15, 2005; (2) projected emissions inventories showing that the States, including Maryland, collectively had adopted sufficient measures to support the demonstration of attainment; (3) attainment year MVEBs; and (4) a commitment to conduct and submit a mid-course review to EPA by a date certain.[6] In their February 2004 SIP revisions, each of the States resubmitted to EPA the attainment plan contained in the State's pre-2001 SIP revisions' attainment plan along with additional elements required for a severe area attainment plan, such as a 1999–2005 ROP plan, and a contingency measures plan to augment the previously submitted 1996–1999 ROP plan and contingency measures plan, respectively, as well as other SIP elements not included in the pre-2001 SIP revisions' attainment plan.

6. April 17, 2003 Final Rule Vacated and Withdrawn

A petition for review challenging the April 17, 2003 final conditional approval was filed by the Sierra Club. The petition alleged, among other things, that EPA could not lawfully conditionally approve the SIPs due to a lack of specificity in the States' commitment letters, that EPA should require the 1996–1999 ROP to be revised to use the latest mobile sources emission factor model and that the photochemical grid modeling supporting the attainment plan did not meet the requirements of the Act. On February 3, 2004, the Court of Appeals issued an opinion to vacate our rule conditionally approving the attainment plans and 1996–1999 ROP plans insofar as that Court found that our grant of conditional approval was defective. The Court of Appeals denied the petition for review in all other respects. *See Sierra Club* v. *EPA*, 356 F.3d 296, 301–07 (D.C. Cir. 2004). On April 23, 2004, the Court of Appeals issued its mandate thereby relinquishing jurisdiction over the 1996–1999 ROP plans and the attainment plan SIP revisions, and remanding them back to EPA.[7]

[6] The February 2004 SIP revisions did not need to contain a commitment to revise the MVEBs one-year after EPA released the MOBILE6 model because the MVEBs in these plans were developed using MOBILE6.

[7] On April 16, 2004, the Court of Appeals issued an order revising the February 3, 2004, opinion to address a petition for rehearing filed by the Sierra Club, but otherwise leaving its decision to vacate and remand the conditional approval to EPA intact.

Effective as of the April 23, 2004 date the Court of Appeals issued its mandate for its February 3, 2004 ruling, all three States withdrew their pre-2001 SIP revisions' attainment plan which had been submitted during 1998 and 2000, specifically the SIP revisions listed in Table 2 of the April 17, 2003, final rule (68 FR 19107). By the time the three States withdrew the pre-2001 SIP revisions' attainment plan, they had already submitted revised attainment plan SIP revisions with an analysis that the SIPs contained all RACM, post-1999 ROP plans demonstrating ROP for 2002 and 2005, VMT offset plans and contingency measures plans that superceded the earlier submissions. The States, in their February 2004 SIP submissions, submitted not only this new material, but resubmitted all of the previously withdrawn pre-2001 SIP revisions' attainment plan.[8] The newly submitted materials along with the resubmitted pre-2001 SIP revisions' attainment plan, form a single comprehensive package. EPA is taking final action today on both the newly submitted and resubmitted materials, which we collectively refer to as the February 2004 SIP revisions.

7. District Court Action

The Sierra Club filed a complaint in the United States District Court for the District of Columbia (District Court) claiming that because the Court of Appeals vacated and remanded the conditional approval of the pre-2001 SIP revisions' attainment demonstration and the 1996–1999 ROP plans, EPA had an unfulfilled nondiscretionary duty to complete final action on those SIP revisions. On April 7, 2005, the District Court issued an order enjoining EPA to ''complete final approval and disapproval action, in accordance with 42 U.S.C. 7410(k)(2), (3), on the state implementation plan submittals for the Washington area identified at 66 FR 586, 586 (January 3, 2001).'' *Sierra Club* v. *Johnson*, C.A. No. 04–2163 (JR) (April 7, 2005). The District Court's decision took note ''that the states formally withdrew their pre-2001 submissions (except for the [ROP plans]) after the D.C. Circuit's Sierra Club III remand,'' *Id.,* slip op. at 7, but disputed that ''these withdrawals removed EPA's duty to act,'' stating that '' 'withdrawal' of pre-2001 SIPs could [not] push back the deadlines established by Congress.''

EPA does not dispute that withdrawal of a SIP cannot push back a statutory deadline established by Congress. However, EPA disagrees that it can act on a SIP submittal formally withdrawn by a state. We note, however, that such a withdrawal is not without consequence, as withdrawal of required SIP revision puts a state in jeopardy of sanctions predicated upon a failure to submit the required SIP. However in this case, as described in this document, the States resubmitted the materials comprising their withdrawn pre-2001 SIP revisions' attainment plan as part of the February 2004 SIP submissions. EPA therefore will take action on what the District Court termed the ''pre-2001 submissions,'' [9] as follows:

(1) In this final rule which

(a) approves all of the control measures and other constituents needed to approve Maryland's severe area attainment plan (except for a Section 185 fee program), including all control measures need to fully satisfy the emissions reductions relevant to attainment of the 1-hour ozone NAAQS;

(b) approves all of the control measures and other constituents needed to approve the District's and Virginia's severe area attainment plan;

(c) approves the 1996–1999 ROP plan for the District, Maryland and Virginia;

(d) approves Maryland's modeled demonstration of attainment and adjunct weight of evidence analyses; and

(e) approves the District's and Virginia's modeled demonstrations of attainment and adjunct weight of evidence analyses and the District's and Virginia's attainment plans, which include their pre-2001 SIP revisions' attainment plan, as resubmitted and subsumed by their February 2004 SIP revisions;

(2) Another final rule, which is published elsewhere in today's **Federal Register**, which disapproves Maryland's pre-2001 SIP revisions' attainment plan as resubmitted and subsumed by Maryland's February 2004 SIP revisions' attainment plan based upon Maryland's failure to submit the required 185 fee program, and issues a protective finding on the SIP, based upon our determination that the SIP contains all of the control measures necessary to demonstrate attainment. That protective finding will allow Maryland to use the MVEBs contained in the disapproved SIP for transportation conformity purposes pursuant to 40 CFR 93.120.

II. The Relationship of Past SIP Revisions, February 2004 SIP Revisions and the April 17, 2003 Conditional Approval

A. The Twelve Conditions for Approval

On April 17, 2003, EPA had conditionally approved the pre-2001 SIP revisions subject to the following 12 conditions:

(1) Revise the 1996–1999 portion of the ROP plans to include a contingency plan containing adopted measures;

(2) Revise the contingency plan containing those adopted measures implemented for the failure of the Washington area to attain the one-hour ozone standard for serious areas by November 15, 1999;

(3) Revise the ROP plans to include a contingency plan containing adopted measures for the post-1999 ROP plans;

(4) Revise the attainment demonstration to include a contingency plan containing adopted measures to be implemented if the Washington area does not attain the one-hour ozone standard by November 15, 2005;

(5) Revise the ROP plans to demonstrate emission reductions of ozone precursors of an average of 3 percent per year from November 15, 1999 to the November 15, 2005;

(6) Revise the attainment demonstration to include a revised RACM analysis;

(7) Revise the major stationary source threshold to 25 tons per year;

(8) Revise RACT rules to include the lower major source applicability threshold;

(9) Revise new source review offset requirements to require an offset ratio of at least 1.3 to 1.

(10) Submit a SIP revision that identifies and adopts specific enforceable transportation control strategies and transportation control measures to offset any growth in emissions from growth in vehicle miles traveled or number of vehicle trips if required under section 182(d)(1) of the Act;

(11) Submit the section 185 penalty fee SIP consisting of the penalty fee requirement of Act sections 182(d)(3) and 185 for major sources of VOC and NO_X should the area fail to attain by November 15, 2005;

(12) Update the Washington area severe attainment demonstration to reflect revised MOBILE6-based motor vehicle emissions budgets, including revisions to the attainment modeling/weight of evidence demonstration and adopted control measures, as necessary, to show that the SIP continues to demonstrate attainment by November 15, 2005.

Sierra Club v. *EPA*, No. 03–1084, 2004 WL 877850 (DC Cir. Apr. 16, 2004).

[8] With one exception: the ''outyear budgets,'' which were contained in the March 31, 2002 SIP revision on which EPA had never proposed to take action, were not resubmitted.

[9] The District Court used the term ''pre-2001 submissions'' and ''pre-2001 SIPs'' which consists of what in this document we call ''the pre-2001 SIP revisions' attainment demonstration'' and ''the 1996–1999 ROP plan.''

In the February 3, 2003 (68 FR 5246) proposed rule for the April 17, 2003 final conditional approval, we proposed conditional approval of the pre-2001 SIP revisions if the State committed to correct condition numbers (1) through (3), (6) and (12). EPA revised the conditional approval to include condition numbers (4), (5), and (7) through (11) in response to comment which stated that EPA could not fully approve the pre-2001 SIP revisions because the pre-2001 SIP revisions did not cover all of the required severe area SIP components. EPA agreed with the comment to the extent that condition numbers (4), (5), and (7) through (11) were applicable severe area requirements that precluded full approval. *See* 68 FR at 19121, April 17, 2003.

Conditions (1) and (2) were elements needed to correct deficiencies in the SIP required for a serious nonattainment area.

Conditions (4) through (11) are SIP elements required as a consequence of the reclassification of the Washington area to severe nonattainment.

Conditions (3) through (6) were required to correct deficiencies in the pre-2001 SIP revisions because the pre-2001 SIP revisions included a demonstration that the Washington area would attain the 1-hour ozone standard by November 15, 2005.

We conditioned approval on item (12) under EPA's policy related to the transition from our prior mobile source emissions factor model, MOBILE5, to the newer model, MOBILE6.

B. How the States Have Addressed the Twelve Conditions

In this section we will discuss how the States have addressed the twelve conditions. EPA had already approved many of the States' SIP revisions for the control measures needed to support the attainment plan, the ROP plans and the contingency measure plan by the time we published the NPRs on January 12, 2005 (70 FR 2085) and February 9, 2005 NPR (70 FR 6796) for the States' 1996–1999 ROP plans and the February 2004 SIP revisions including the resubmitted pre-2001 SIP revisions' attainment plan. In this document we will not reiterate the specifics of such approvals but will provide details on the approval of control measures which were not approved at the time of the January 12, 2005 and February 9, 2005 NPRs.

1. Conditions 1 to 4—Contingency Measures

At the time of the January 12, 2005 NPR for the contingency measures plan, EPA had approved all the contingency measures except each of the States' architectural and industrial maintenance coatings rules (AIM coatings rules), and the District's motor vehicle refinishing, consumer products, solvent cleaning and portable fuels container rules.

On May 2, 2005, the Regional Administrator signed final rules approving the District's, Maryland's and Virginia's AIM coatings rules. Those final actions have been published in a recent **Federal Register** or shortly will be published in the **Federal Register**.

On December 23, 2004 (69 FR 76855), December 28, 2004 (69 FR 77642), December 29, 2004 (69 FR 77906) and December 29, 2004 (69 FR 77903), EPA approved, respectively, the District's motor vehicle refinishing, consumer products, solvent cleaning and portable fuels container rules.

In this final rule, EPA is approving the States's contingency measures plans for the Washington area. These contingency measure plans provide sufficient contingency measures to meet our 3 percent (relative to baseline emissions for the Washington area) reduction for all of the relevant years for which the States need contingency measures. Our basis for determining that the States' contingency measures plans get the required reductions is discussed in detail in section V. ''Contingency Measures Plans'' of the January 12, 2005 NPR (70 FR at 2087–2095) and in our response to comments under sections III. D. ''Comment on the Contingency Measures Plans'' of this document.

EPA finds that the actions cited in the preceding four paragraphs fulfilled conditions (1) through (4).

2. Condition 5—Post-1999 ROP

At the time of the January 12, 2005 NPR for the ROP plans and the February 9, 2005 NPR on the attainment demonstration, EPA had approved all the control measures except each of the States' AIM coatings rules, the District's portable fuels container rule, the TCMs submitted with the 1996–1999 and post-1999 ROP plans and Maryland's and Virginia's nonregulatory measures SIP revisions.

As noted previously, EPA has approved the States' AIM coatings rules and the District's portable fuel containers rule. In this action, EPA is approving the TCMs submitted with the 1996–1999 and post-1999 ROP plans.

On May 2, 2005, the Regional Administrator signed a final rule approving Maryland's and Virginia's nonregulatory measures SIP revision. That final action has been published in a recent **Federal Register** or shortly will be published in the **Federal Register**.

In this final rule EPA is approving the States' 1996–1999 and post-1999 ROP plans. Our basis for determining that the States' ROP plans get the required post-1996 ROP reductions of 3 percent per year (averaged over consecutive 3-year periods) is discussed in detail in section IV. ''Post 1996–1999 and Post 1999–2005 ROP Plans'' of the January 12, 2005 NPR (70 FR at 2087–2095) and in our response to comments under sections III. A. ''Comment on the ROP Plans and NO_X Substitution'' and B. ''Comment on the Transportation Demand Model (TDM) Used in the Plans'' of this document.

EPA finds that the actions cited in the preceding four paragraphs fulfilled condition (5).

3. Condition 6—RACM

For the reasons cited in our February 9, 2005 NPR, EPA believes that the States' attainment demonstration in the February 2004 SIP revisions demonstrated that no remaining RACM remain to be adopted for the Washington area. We received no adverse comment on this aspect of the proposal and find that the States have fulfilled condition 5 by adoption of all the measures necessary to demonstrate attainment as expeditiously as practicable.

4. Conditions 7 to 9—New Source Review and RACT Thresholds

EPA has approved a SIP revision to implement the severe area NSR requirements in the Washington area for both VOC and NO_X including an offset ratio of 1.3:1 and a major source applicability definition of 25 tons/year. *See* 69 FR 77647, December 28, 2004; 69 FR 56170, September 20, 2004; and 69 FR 48150, August 9, 2004, for the District, Maryland, and Virginia, respectively. For each of the three States, EPA has fully approved a SIP revision to implement RACT for major sources of VOC and NO_X with major source size definition of 25 tons/year. *See* 69 FR 77647, December 28, 2004; 69 FR 56170, September 20, 2004; and 69 FR 48150, August 9, 2004, for the District, Maryland, and Virginia, respectively. EPA finds that the States have fulfilled conditions (7) through (9).

5. Condition 10—VMT Offset SIP

In this final rule EPA is approving the States' VMT Offset SIP revisions which fulfills condition (10). Our basis for determining that the States' VMT Offset SIP meets the Act's requirements is discussed in detail in section VI. ''Vehicle Miles Traveled (VMT) Offset SIP and Transportation Control Measures (TCMs)'' of the January 12,

2005 NPR (70 FR at 2098) and in our response to comments under section III. C. ''Comment on the VMT Offset SIP'' of this document.

6. Condition 11—the Section 185 Penalty Fee SIP

On December 28, 2004 (69 FR 77639) and on December 29, 2004 (69 FR 77909), EPA approved the District's and Virginia's section 185 penalty fee SIP revisions, respectively, and thus, believes that the District and Virginia have fulfilled condition (11). To date, Maryland has not submitted a section 185 penalty fee SIP revision. For the lack of a section 185 penalty fee SIP revision, EPA is disapproving Maryland's attainment plan with a protective finding which will allow the MVEBs contained in Maryland's 2004 SIP revisions to be used for transportation conformity purposes pursuant to 40 CFR 93.120. That disapproval is published elsewhere in today's **Federal Register**.

7. Condition 12—MOBILE6-Based Attainment Plan Budgets

In their February 2004 SIP revisions, the States adopted MOBILE6-based 2005 attainment year MVEBs. The final version of the 2005 attainment year MVEBs was contained in the February 2004 SIP revisions identified in Table 2 of this document. These MVEBs are area-wide MVEBs which cover the entire Washington area.

In this final rule EPA is approving the District's and Virginia's attainment plan for the Washington area, namely the attainment plans contained in the February 2004 SIP revisions which subsumes the resubmitted pre-2001 SIP revisions' attainment plan. We are also approving the final revision of the 2005 attainment year MVEBs for the District and Virginia found in the February 2004 SIP revisions identified in Table 2 of this document. EPA would have been able to approve Maryland's attainment plan for the Washington area had Maryland submitted a section 185 penalty fee program. We could not approve the District's and Virginia's attainment plan without determining that the three States collectively have adopted enough measures in their SIPs to demonstrate that the area as a whole will attain the 1-hour ozone NAAQS by no later than November 15, 2005. Such a finding is necessary because this is an interstate area and any potential emissions shortfall would have to be addressed collectively before any State's attainment plan could be approved.

For the reasons stated in our February 9, 2005 NPR, the recently approved control measures discussed previously in this final action and given in our responses in this final action to comments received on that proposed rule, EPA believes that the States collectively have adopted enough measures in their SIPs to demonstrate that the area will attain the 1-hour ozone NAAQS by no later than November 15, 2005 with the MVEBs found in the February 2004 SIP revisions identified in Table 2 of this document. EPA believes that Maryland, in combination with the District and Virginia, adopted sufficient measures and have fully satisfied the emissions reduction requirements necessary to ensure that attainment of the 1-hour ozone NAAQS will be attained by no later than November 15, 2005. EPA believes that the States, including Maryland, have satisfied condition (12) since they have demonstrated that the attainment plans have been revised to reflect MOBILE6-based MVEBS and have included the necessary revisions to the modeled demonstration of attainment and adjunct WOE analyses and have adopted control measures showing that the SIP continues to demonstrate attainment by November 15, 2005.

Therefore, in this final rule, EPA is approving the District's, Maryland's, and Virginia's modeled demonstrations of attainment and adjunct WOE analyses and the District's and Virginia's attainment plans. EPA is also determining that the attainment plan for Maryland contains adopted control measures that fully satisfy the emission reduction requirement relevant to attainment of the 1-hour ozone NAAQS. EPA is therefore approving the modeled demonstration of attainment and adjunct WOE analyses contained in Maryland's February 2004 SIP revisions which includes the analysis based upon photochemical grid modeling demonstrating timely attainment of the 1-hour ozone standard. In addition, EPA is therefore issuing Maryland's 2004 SIP revisions' attainment plan—a protective finding which will allow the MVEBs contained in Maryland's 2004 SIP revisions to be used for transportation conformity purposes pursuant to 40 CFR 93.120.

EPA concludes that once we issue our approval of the District's and Virginia's February 2004 SIP revisions the District and Virginia will have cured the deficiencies we identified in their pre-2001 SIP revisions through the various SIP revisions that they have submitted since April 17, 2003. In the case of Maryland, EPA concludes that all of the deficiencies except the section 185 penalty fee SIP revision will have been cured for Maryland's pre-2001 SIP revisions by the various SIP revisions submitted since April 17, 2003 once we issue our approval of:

(1) Maryland's 1996–1999 and 1999–2005 ROP plans,

(2) the changes to the 1990 base year inventory, the contingency measures plan, TCMs,

(3) the modeled demonstration of attainment which includes the analysis based upon photochemical grid modeling and adjunct WOE analyses that Maryland's submitted SIP for the Washington area contains adopted control measures that fully satisfy the emission reduction requirements to provide for attainment of the 1-hour ozone NAAQS in the Washington area by November 15, 2005.

III. Comment Received on the ROP plans, VMT Offset SIP and Contingency Measures Plan and EPA's Response

We received comments adverse to the proposed approval of the ROP, VMT offset, contingency measures, and attainment plans. A summary of these adverse comments, and our responses, follows.

A. Comment on the ROP plans and NO_X Substitution

Comment: We received a comment asserting that the ROP plans do not meet the requirement of demonstrating a nine percent reduction in VOC emissions from 1999 to 2002 and a further nine percent from 2002 to 2005 because the NO_X substitution in the ROP plans is impermissible. The comment asserts that the ROP plans do not meet section 182(c)(2)(c) of the Act because they do not show that a nine percent reduction in NO_X emissions will result in the same reduction in ozone concentration as a nine percent reduction in VOC emissions. The comment claims that EPA's own guidance requires photochemical grid modeling to show equivalent changes in ozone concentrations.

The comment also asserts that EPA's reliance on our December 1993 NO_X Substitution Guidance is flawed because the plain language of the Act requires proof of equivalent benefits of NO_X substitution. The comment also asserts that because the 1999–2005 ROP plan relies solely upon NO_X reductions the plans do not meet the requirement of section 182(c)(2)(C) because the plan does not provide for some percentage of VOC reduction during each period. The comment claims that the Act requires some non-zero percentage reduction in VOC emissions for any ROP period.

The comment asserts that the Act requires the ROP plans to have VOC reductions by November 15, 2002 to

prevent a net increase in VOC emissions by the 2002 milestone date, which would offset the progress achieved by the nine percent NO_X reductions. The comment asserts that while the ROP plans do provide for such reductions, EPA cannot approve the 1999–2005 ROP plans because they do not provide for all of these reductions by the 2002 milestone date.

Response: NO_X Substitution in General. The EPA believes States have the opportunity to substitute NO_X reductions for required VOC reductions under certain circumstances. The opportunity for NO_X substitution originates in section 182(c)(2)(C) of the Act which specifically allows NO_X emissions reductions to be substituted for VOC reductions required under section 182(c)(2)(B) for reasonable further progress (RFP), sometimes called ROP.

EPA issued guidance to the States on how to implement the NO_X substitution provisions for the post-1996 ROP plans in December 1993 (the December 1993 NO_X Substitution Guidance). The guidance allows States to substitute NO_X emission reductions for VOC emission reductions if that substitution is consistent with the demonstration of attainment in the SIP. The modeled demonstration of attainment in the SIP establishes the overall reductions of VOC and/or NO_X reductions required for attainment in the attainment year. The ROP plan is a tool to phase in emission reductions between the time the plan is prepared and the attainment date. When substituting NO_X for VOC in post-1996 ROP plans, we are mindful that if too many NO_X reductions are substituted for VOC reductions, the modeled demonstration of attainment may no longer be valid. Our December 1993 NO_X Substitution Guidance allows substitution on a percentage basis (*i.e.*, one percent of NO_X emissions reductions can be substituted for one percent of VOC emissions reductions).

Results of the Application of EPA's December 1993 NO_X Substitution Guidance in the Washington Area. EPA believes that NO_X substitution as applied to the Washington area based on our December 1993 NO_X Substitution Guidance yields ROP plans that result in reductions in ozone concentrations that are better than those which would have resulted from ROP plans relying upon an equal percent of VOC reductions.

Applying our December 1993 NO_X Substitution Guidance to the Washington area we substitute one percent of VOC ROP reductions with one percent of NO_X reductions. One percent of NO_X represents a larger quantity of emissions reduction than does one percent of VOC. This is the case because ROP reductions are computed from baseline emissions, which are defined in section 182(b)(2)(B) of the Clean Air Act to be ''the total amount of actual VOC or NO_X emissions from all anthropogenic sources in the area during the calendar year 1990,'' excluding the emissions that would be eliminated by the programs specified in sections 182(b)(1)(C) and (D) of the Act. The reduction of baseline emissions by the programs specified in sections 182(b)(1)(C) and (D) yields the adjusted 1990 base year inventory for each milestone year (which is discussed further in the January 5, 2005 technical support document (TSD) [10]). The adjusted 1990 base year inventory is the baseline from which the necessary ROP reductions are computed. Section 182(c)(2) of the Act requires that a set percentage of reductions in baseline emissions be achieved every three years after 1996 until the area's attainment date. To determine the reductions in tons required for any given ROP milestone year, the percentage is multiplied by the adjusted 1990 base year inventory for that milestone year. For example, in the case of the Washington area, the ''Adjusted 1990 Base Year Inventory for 2005'' for VOC is 412.1 tons per day (TPD), and, thus, a one percent ROP reduction equates to 4.1 TPD. For NO_X emissions the ''Adjusted 1990 Base Year Inventory for 2005'' is 735.6 TPD, and, thus, a one percent ROP reduction equates to 7.4 TPD.

The States only modeled changes in anthropogenic (man-made) emissions to see how sensitive the Washington area was to changes in VOC and to NO_X emission reductions. They did not model changes in biogenic emissions which are VOC emissions from plants. The air quality model responds to changes in emission between the 1990 base year inventory and the emissions resulting from the control strategy to be modeled.[11]

The States used the results of this sensitivity modeling to determine that a one ton reduction in NO_X emissions within the Washington area would result in a peak ozone concentration reduction of 0.114 parts per billion (ppb) (0.114 ppb/ton of NO_X); a similar analysis for VOC emissions indicated that a one ton reduction in VOC emissions would result in a peak ozone concentration reduction of 0.029 ppb (0.029 ppb/ton of VOC reduced). The States concluded that emissions reductions of 34.0 tons/day of VOC or 8.8 tons/day NO_X would have to be required within the Washington area would reduce ozone concentrations by 1 ppb. That is, NO_X reductions in the Washington area have greater ozone reducing potential than an equivalent amount of VOC reductions. Therefore, substituting a percentage of VOC reductions with an equal percentage of NO_X reductions should result in greater ozone concentration reduction than if the substitution were not done.

The 1990 base year VOC inventory for the Washington area is comprised of 578.7 TPD of anthropogenic emissions and of 376.5 TPD biogenic emissions for a total of 955.2 TPD of VOC. The 1990 base year NO_X inventory (all of which is anthropogenic) for the Washington area is 869.3 TPD of NO_X. Given that 39 percent (376.5/955.2) of the VOC emissions inventory is biogenic emissions, it is not surprising that reductions in anthropogenic VOC emissions would show less ozone response than an equal percentage reduction in anthropogenic NO_X emissions. The NO_X emissions are all anthropogenic, and, a one percent reduction in NO_X emissions equates to more tons of emission reduction than does one percent reduction of the anthropogenic VOC emissions.

This is not to say VOC reductions are not beneficial towards attainment, but rather that reductions in anthropogenic VOC emissions are not as effective on a TPD or ROP percentage basis as NO_X reductions. However, the States are free to fashion their attainment demonstrations and ROP plans to include whatever mix of VOC and NO_X reductions they choose, so long as the plans demonstrate timely attainment and timely ROP in accordance with the requirements of the Clean Air Act.

The following table compares a 9 percent reduction in baseline VOC emissions by each post-1996 milestone year to the chosen levels of NO_X substitution in the ROP plans in terms

[10] Technical Support Document for Approval and Promulgation of Air Quality Implementation Plans; District of Columbia, Maryland, and Virginia; Post-1996 Rate-of-Progress Plan, Contingency Measures, Transportation Control Measures, 1990 Base Year Inventory Changes, and VMT Offset SIP for the Metropolitan Washington, DC Nonattainment Area, January 5, 2005

[11] For a summary of the photochemical grid modeling for the Washington area refer to the February 9, 2005 (70 FR 6796) NPR, and, for a discussion in depth, see Technical Support Document for Approval and Promulgation of Air Quality Implementation Plans; District of Columbia, Maryland, and Virginia; Attainment Demonstration for the Metropolitan Washington, DC Nonattainment Area, dated January 31, 2005.

of TPD reductions and of ozone concentration decreases resulting from these reductions.

TABLE 4.—RESULTS OF NO_X SUBSTITUTION IN THE WASHINGTON AREA

Milestone year	1999	2002	2005
9 percent reduction in VOC baseline emissions (TPD)	39	37.8	37.1
Ozone Concentration Change to 9 percent VOC (at 0.029 ppb/ton rounded to nearest tenth)	1.1	1.1	1.1
Percent NO_X reduction Substituted (percent of baseline NO_X emissions)	8	9	9
Substituted NO_X Reductions (TPD)	62.8	68.1	66.2
Ozone Concentration Change to Substituted NO_X Reductions (0.114 ppb/ton rounded to nearest tenth)	7.2	7.8	7.5

Technical and Practical Reasons for our December 1993 NO_X Substitution Guidance. The modeling performed for demonstration of attainment basically establishes the relationship between emission reductions—either of VOC, NO_X, or both—and ozone reductions. This relationship is established for the attainment year. As noted previously, the modeled attainment demonstration establishes the overall VOC and/or NO_X emission targets that are consistent with attainment of the standard in the attainment year. When EPA determines that a demonstration of attainment is approvable, *i.e.*, it demonstrates that the relevant area will timely attain the NAAQS, we are making an implicit corollary conclusion that the mix of VOC and/or NO_X control measures included in the area's demonstration of attainment is sufficient for timely attainment.

The post-1996 ROP plan requirement is used to phase-in emission reductions between the time of plan adoption and the attainment date. EPA does not require modeling of interim years for the purpose of trying to update the NO_X/VOC/ozone relationship for a number of reasons, including the following that are provided in our December 1993 NO_X Substitution Guidance:

a. The strong likelihood that optimum ''exchange'' rates vary from year to year and across a geographic area as an area's emissions distribution and atmospheric chemistry change over time;

b. Uncertainty in modeling analyses, particularly when attempting to ascertain responses from small percentage perturbations in emissions; and

c. Resource limitations associated with modeling specific control measures during interim years before attainment dates.

EPA continues to believe in the validity of this guidance and in the reasoning set forth therein as it relates to NO_X substitution under the post-1996 ROP plan requirements.

Legal Rationale for EPA's December 1993 NO_X Substitution Guidance. The comment focuses exclusively upon the phrase ''result in a reduction in ozone concentrations at least equivalent to that which would result from the amount of VOC emission reductions required* * *'' to the exclusion of remaining language of section 182(c)(2)(C). The comment would completely ''write-out'' of the statutory text provisions such as ''in lieu of the demonstration required under subparagraph (B), a demonstration *to the satisfaction of the Administrator* * * *'' and ''*in accord with such guidance* [the substitution guidance required by section 182(c)(2)(C)] a lesser percentage of VOCs may be accepted as an adequate demonstration * * *'' (emphases added). In the plain text of the statute Congress explicitly and affirmatively granted EPA broad discretion as to what sort of demonstration is acceptable on this technical and science-driven issue. *See, e.g., Sierra Club* v. *EPA*, 294 F.3d at 162–163.

In addition, EPA still stands behind its legal rationale underlying the interpretation of ''equivalency'' that appears in our December 1993 NO_X Substitution Guidance in section 4. In that guidance, the basis for equivalency is the ability of a given control strategy (*i.e.*, any particular mix of NO_X and VOC emission reductions) to effect attainment of the ozone NAAQS by the designated attainment year (December 1993 NO_X Substitution Guidance, p. 2). Further, as we previously set out, the NO_X emission reductions credited toward ROP may be limited to the amount of NO_X reductions required in the demonstration of attainment.

In allowing a combination of NO_X and VOC controls or the substitution of NO_X emissions reductions for VOC emissions reductions, section 182(c)(2)(C) of the statute states that the resulting reductions ''in ozone concentrations'' must be ''at least equivalent'' to that which would result from the 3 percent VOC reductions required as a demonstration of ROP under section 182(c)(2)(B).[12] The second sentence of section 182(c)(2)(C) requires EPA to issue guidance ''concerning the conditions under which NO_X control may be substituted for [or combined with] VOC control.'' In particular, the Agency has been authorized by Congress to address in the guidance the appropriate amounts of VOC control and NO_X control needed, in combination, ''in order to maximize the reduction in ozone air pollution.'' Further, the Act explicitly provides that the guidance may permit ROP demonstrations that allow a lower percentage of VOC emission reductions as long as compensating NO_X reductions are achieved. In light of the language in the Act evidencing Congressional intent under this subsection to maximize the opportunity for ozone reductions, EPA believes that section 182(c)(2)(C) confers on the Agency the discretion to select, for purposes of determining ''at least equivalent'' reductions, a percentage of NO_X emission reductions that is reasonably calculated to achieve the statutorily required ozone reduction and attainment progress goals intended by Congress. *See Chevron U.S.A., Inc.* v. *NRDC,* 467 U.S. 837, 842–44 (1984), *Sierra Club* v. *EPA,* 294 F.3d at 162–163.

As we have previously stated, when we determine that a demonstration of attainment is approvable, we are making an implicit corollary conclusion that the mix of VOC and/or NO_X control measures included in the area's demonstration of attainment is sufficient for timely attainment.

As additional evidence that Congress was concerned with getting more than minimal reductions in ozone concentrations through substitution, EPA notes that the ROP demonstration described in section 182(c)(2)(B) focuses on reductions of a specified quantity of VOC emissions per year (similarly, the 15 percent ROP reductions required for

[12] Equivalent means: ''equal in value, force, amount, effect or significance,'' or ''*corresponding in effect or function*; nearly equal; virtually identical.'' *Black's Law Dictionary*, Eighth Edition, 2004. (emphasis added).

moderate ozone nonattainment areas focuses on reductions of that specific quantity of VOC emissions per year). By contrast, the alternative ROP demonstration in section 182(c)(2)(C) allows flexible VOC/NO_X emission reduction strategies, but only so long as the overall quantitative reduction in ozone concentrations is equivalent to the amount which, for serious ozone nonattainment areas, Congress initially determined must be met (*i.e.*, the ozone concentrations achieved by VOC reductions of 3 percent per year) in order to ensure expeditious progress towards attainment. In this regard the House Committee Report states: ''NO_X reductions may not be substituted for VOC reductions in a manner that delays attainment of the ozone standard or that results in lesser annual reductions in ozone concentration than provided for in the demonstration of attainment.'' H.R. Rep. No. 490, 101st Cong., 2d Sess. 239 (1990).

Additional support for EPA's view that our December 1993 NO_X Substitution Guidance's focus on the NO_X and VOC reductions necessary for attainment is consistent with Congressional intent is found in section 182(g), which waives the requirement for a milestone demonstration for a milestone that coincides with an area's attainment date for an area that attains the standard by that date.

EPA disagrees with the comment that EPA's ''Guidance on the Post-1996 Rate-of-Progress Plan and Attainment Demonstration'' (corrected version as of 2/18/94) specifies a different test, that is, a modeled showing of equivalency, than does EPA's December 15, 1993 NO_X Substitution Guidance. In section 4.1 of the ''Guidance on the Post-1996 Rate-of-Progress Plan and Attainment Demonstration,'' EPA restated the equivalency test set forth in sections 2 and 3 of our December 1993 NO_X Substitution Guidance.

With regard to the photochemical grid modeling. section 4.1 of the ''Guidance on the Post-1996 Rate-of-Progress Plan and Attainment Demonstration'' reads:

> Section 182(c)(2)(C) states that actual NO_X emission reductions which occur after 1990 can be used to meet post-1996 emission reduction requirements, provided that such reductions meet the criteria outlined in EPA's December 15, 1993 NO_X Substitution Guidance. The condition for meeting the rate-of-progress requirement is that the sum of all creditable VOC and NO_X emission reductions must equal 3 percent per year averaged over each applicable milestone period. The percent VOC reduction is determined from the VOC rate-of-progress inventory and the percent NO_X reduction is determined from the NO_X rate-of-progress inventory. In addition, the overall VOC and NO_X reductions must be consistent with the area's modeled attainment demonstration. In other words, the NO_X emission reductions creditable toward the rate-of-progress plan cannot be greater than the cumulative reductions dictated by the modeled attainment demonstration.

This portion of the 1994 guidance merely summarizes, and does not alter, the guidance provided in our December 1993 NO_X Substitution Guidance. With regard to the photochemical grid modeling, section 2 of our December 1993 NO_X Substitution Guidance specifies that the provision for NO_X substitution recognizes that a VOC-only control pathway may not be the most effective approach for effecting attainment in all areas. Consequently, NO_X reductions are placed on a near equal footing with VOC through substitution. The December 1993 NO_X Substitution Guidance establishes two conditions pursuant to both the substitution and RFP provisions in the Act. The first condition requires that control strategies incorporating NO_X emission reduction measures must demonstrate that the ozone NAAQS will be attained within time periods mandated by the Act. This condition reflects the Title I provision for photochemical grid modeling demonstrations (section 182(c)). The second condition, addressed in section 3 of the guidance, maintains the requirement for periodic emission reductions in order to realize progress toward attainment. Flexibility is introduced by allowing VOC and NO_X reductions rather than VOC reductions alone. A third condition exists in which the periodic emission reductions must be consistent with the modeled demonstration of attainment.

In both cases, the guidance refers to the photochemical grid modeling that is necessary for the modeled demonstration of attainment and that establishes the NO_X/VOC/ozone relationship at the attainment date. Neither our December 1993 NO_X Substitution Guidance nor the ''Guidance on the Post-1996 Rate-of-Progress Plan and Attainment Demonstration'' require a modeled demonstration of equivalence for an interim period for the reasons discussed previously.

The 1999–2005 ROP Plans Provide for Any Required NO_X and VOC Reductions by 2002 in a Timely Manner. Section 182(c)(2)(C) of the Act states that ''[t]he revision may contain, in lieu of the demonstration required under subparagraph (B), a demonstration to the satisfaction of the Administrator that the applicable implementation plan, as revised, provides for reductions of VOCs and [NO_X] (calculated according to the creditability provisions of subsection (b)(1)(C) and (D) of this section) * * * that would result in reduction in ozone concentrations equivalent to that which would result from the amount of VOC reductions required under subparagraph (B).'' The salient provisions of the demonstration of ''subparagraph B'', that is, section 182(c)(2)(B) of the Act, are: (1) The requirement to reduce baseline emissions by an average of 3 percent per year averaged over each three-year period after 1996, and (2) the reductions creditable towards ROP must meet the same creditability requirements as for the 15 percent reduction by 1996 requirement of section 182(b)(1)(A).

Our post-1996 guidance implements section 182(c)(2)(B) by requiring that the area demonstrate that milestone year emissions with the ROP control strategies will be less than the target level of emissions.[13] Because the target level is determined by reducing 1990 baseline emissions and because the future year projected inventory with all the ROP control strategies must reflect estimated growth in emissions activities, this demonstration accounts for growth between 1990 and the milestone year. Section 182(c)(2)(B) does not contain the phrase ''accounting for growth after 1990'' which is found in section 182(b)(1)(A). Nevertheless, EPA has inferred that the 3 percent reduction requirement of section 182(c)(2)(B) must be net of growth. EPA's interpretation is sound when considering relevant provisions of the statute as a whole because: (1) Section 182(b)(1)(A) contains a statement, ''accounting for growth after 1990,'' of Congressional intent regarding ROP and growth under section 182; and (2) the last sentence of section 182(c)(2)(B) allows creditable VOC reductions between 1990 and 1996 that are in excess of those needed to meet the 15 percent reduction by 1996 requirement to count towards post-1996 ROP. Reductions under section 182(b)(1)(A) are excess only to the extent they are net of growth.

EPA believes that in section 182(c)(2)(C) Congress granted EPA even greater discretion as to the composition of the demonstration required by section 182(c)(2)(C). As noted previously in other portions of this response, section 182(c)(2)(C) allows a post-1996 ROP demonstration ''in lieu of'' that required under section 182(c)(2)(B). This demonstration must be ''to the

[13] ''Guidance on the Post '96 Rate-of-Progress Plan (RPP) and Attainment Demonstration'' (Corrected version of February 18, 1994).

satisfaction of EPA,'' and allows that a ''lesser percentage of VOCs may be accepted'' in accordance with the guidance that the EPA was required to issue.

Thus, EPA was granted discretion regarding the content of the ROP demonstration allowable under section 182(c)(2)(C). For instance, section 182(c)(2)(C) does not use the phrase ''accounting for growth after 1990.'' However, EPA's December 1993 NO_X Substitution Guidance is based upon the use of the future inventories used in the photochemical grid modeling to account for growth in emissions related activities, and thus reflect emissions reductions that are net of growth. Furthermore, section 182(c)(2)(C) does not require that the plan providing for reductions of VOC and NO_X provide for reductions in ''baseline emissions.'' EPA's guidance for demonstrations of ROP under section 182(c)(2)(C) reflects many of the same features in our guidance implementing section 182(c)(2)(B): A ROP plan calculates target levels by reducing 1990 baseline emissions by a set percentage for each ROP period; and, EPA chose to require that NO_X substitution be net of growth.[14] EPA believes that these features are reasonable in order to address a scenario where the demonstration of post-1996 ROP for an area for one ROP milestone year, say 1999, relies a mixture of VOC and NO_X control and then relies upon all VOC reductions for the subsequent 2002 milestone. EPA believes that the claim that the Act requires some non-zero percentage of reductions in VOC baseline emissions in ROP demonstrations pursuant to section 182(c)(2)(C) or provides, that such a percentage reduction net of growth requirements required by section 182(c)(2)(B) is not supported by the plain text of the statute. The Act allows NO_X substitution with lesser VOC reductions and doesn't prohibit 9 percent NO_X substitution and zero percent VOC. Therefore, we believe that we can approve a ROP plan which provides for 9 percent NO_X reductions and no specific level of VOC reductions. EPA's interpretation is reasonable given the broad discretion afforded by section 182(c)(2)(C) on these matters.

EPA's December 1993 NO_X Substitution Guidance focuses on progress towards reducing the levels of NO_X and VOC needed for attainment. In that guidance, EPA caps the NO_X emission reductions to be consistent with those in the modeled demonstration of attainment.

For the reasons discussed previously in this response, EPA believes that the Act allows approval of a ROP Plan even when a ROP milestone is met with out any reduction in VOC baseline emissions for the milestone year. The Act allows EPA to accept a ''lesser percentage of VOC.'' EPA believes that ''lesser percentage'' can mean, consistent with the plain language of the Act, any percentage less than the average 3 percent per year prescribed by section 182(c)(2)(B), including zero percent. EPA previously has approved ROP plans under section 182(c)(2) that relied solely upon NO_X reductions without regard to VOC reductions. *See* 69 FR 42880, July 19, 2004 (proposed at 69 FR 25348, May 6, 2004) and 64 FR 13348, March 18, 1999 (proposed by 63 FR 45172, August 25, 1998).

As to the growth in VOC emissions ''offsetting'' the 9 percent NO_X reductions, the comment fails to realize that a ROP plan meeting the 9 percent reduction requirement for some milestone year, say 1999, prior to the attainment date, say 2005, using only VOC reductions, would not be required to offset any growth in NO_X emissions. EPA believes that such a ROP plan would meet the requirements of section 182(c)(2)(B), even if the area needed significant NO_X reductions for attainment, as long as all the reductions were creditable and the ROP plan otherwise met the Act and EPA's guidance. Nothing in section 182(c)(2)(C) requires the converse—that the ROP plan must ensure that a 9 percent NO_X reduction is not ''offset'' by changes in VOC emissions.

It is worthwhile to note that the 1999–2005 ROP plans in the February 2004 SIP revisions *do* in fact provide for a reduction in VOC emissions. The 1999–2005 ROP plans in the February 2004 SIP revisions project that controlled VOC emissions by November 15, 2002 will be 372.3TPD. This is significantly less than both the 1990 VOC ROP Inventory of 578.7 TPD and the 1990 baseline emissions, reduced by reductions from noncreditable measures (the ''Adjusted 1990 Base Year Inventory for 2002''), of 420.5 TPD. The 1999–2005 ROP plans in the February 2004 SIP revisions project that controlled VOC emissions by November 15, 2005 will be 331.6 TPD. This is significantly less than the 1990 baseline emissions, reduced by reductions from noncreditable measures (the ''Adjusted 1990 Base Year Inventory for 2005''), of 412.1 TPD.[15] Therefore, the 1999–2005 ROP plans do provide for VOC reductions by the 2002 and 2005 milestone years, and, provide for a net reduction in VOC emissions by these dates. However, EPA has concluded that the States' 1999–2005 ROP plans meet section 182(c)(2) of the Act because the States' 1999–2005 ROP plans demonstrate a 9 percent reduction in baseline NO_X emissions by 2002 and a further 9 percent reduction in baseline NO_X emissions by 2005 and can be approved based upon these reductions in baseline NO_X emissions.

EPA has concluded that the States' NO_X measures are sufficient to achieve a 9 percent reduction in NO_X baseline emissions by November 15, 2002. Because ROP is demonstrated through the use of a 9 percent reduction in NO_X emissions by 2002, EPA believes that there is no requirement for the plan to have a target level of VOC emissions for the 2002 milestone year for the reasons discussed previously in this response. Therefore, EPA believes that the plan *cannot* be deficient for not achieving any set reduction in VOC baseline emissions (net of growth) by November 15, 2002—no such requirement exists.

B. Comment on the Transportation Demand Model (TDM) Used in the Plans

Comment: We received a comment asserting that the TDM used to project the mobile source emissions does not properly predict traffic volumes in the Washington area on roadways. The comment alleges that the inaccuracies are significant enough that the results cannot form a basis for predicting future motor vehicle emissions or the emission cuts needed to meet ROP targets, or to show that the SIP contains sufficient transportation control measures to offset any growth in emissions from growth in vehicle miles traveled or numbers of vehicle trips in the nonattainment area.

Response: EPA disagrees with this comment. EPA's conformity regulation requires that for serious, severe, and extreme ozone nonattainment areas (if their metropolitan planning area contains an urbanized area population over 200,000), the estimates of regional transportation-related emissions, which support conformity determinations, must be made at a minimum using network-based TDMs according to

[14] Section 1.1 of ''Guidance on the Post '96 Rate-of-Progress Plan (RPP) and Attainment Demonstration'' (Corrected version of February 18, 1994).

[15] Table IX. A–1 ''Demonstration of ROP'' and 2002 and Table V. D–3 ''2005 ROP Target Levels'' of ''Technical Support Document for Approval and Promulgation of Air Quality Implementation Plans; District of Columbia, Maryland, and Virginia; Post-1996 Rate-of-Progress Plan, Contingency Measures, Transportation Control Measures, 1990 Base Year Inventory Changes, and VMT Offset SIP for the Metropolitan Washington, DC Nonattainment Area,'' dated January 5, 2005.

procedures and methods that are available and in practice, and which are supported by current and available documentation. 40 CFR 93.122(b). These network-based travel models must at a minimum satisfy the certain requirements, including a requirement that network-based travel models must be validated against observed counts (peak- and off-peak, if possible) for a base year that is not more than 10 years prior to the date of the conformity determination. Model forecasts must be analyzed for reasonableness and compared to historical trends and other factors, and the results must be documented. 40 CFR 93.122(b)(1)(i); 62 FR 43793, August 15, 1997.

Even though this regulation applies to network-based travel models used for conformity determinations, it represents EPA's determination as to acceptable practices and was issued through notice and comment rulemaking. The conformity regulation's adequacy provisions (40 CFR 93.118(e)) require that MVEBs in control strategy SIP revisions be the product of interagency consultation between air quality planning agencies and transportation planning agencies. Therefore, EPA believes that it is reasonable to assume that the transportation planning agencies will want the MVEBs to be developed using the same network models currently in use at the time the MVEBs are developed. This is indeed the case for the February 2004 SIP revisions. The TDM model used for development of the February 2004 SIP revisions was based upon the execution of the COG/TPB's Version 2.1/TP+ travel forecasting process.[16] *See* page B–10 of Appendix B to the February 2004 SIP revisions.[17]

EPA believes that only one of the six modeling criteria of section 93.122 of the conformity rule is implicated by the comment. This criterion is that validation must be against observed counts for base year not more than 10 years prior to conformity determination. The comment does not allege that the validation of the model was made against data that was more than 10 years old. Rather, the commenter alleges the model results are not ''reasonable.''

EPA disagrees with this comment, and, we specifically disagree with certain factual allegations made therein. For instance, on page 15 of the supporting documentation to the comment, the commenter claimed that ''the [Transportation Research Board (TRB) review] committee found that 8 of 33 facility type traffic volume classes had percent Root Mean Square Error (RMSE) values that were unacceptable.'' The TRB review committee actually stated that ''for 8 of 33 facility type traffic volume classes, RMSE values were marginally acceptable * * *''[18] EPA concludes that the claim that the review committee found the model results unacceptable is not borne out by the factual record.

The supporting documentation for this comment asserted that the TDMs on average underestimated traffic on the 20 highest volume freeway links by 26 percent, and on the 10 highest volume arterials by 41 percent as demonstrated by ''the comparison of simulated to observed traffic data for over 11,000 links grouped by traffic volume class and facility type.'' The same claim was made to the TPB during the development of the FY 2005–2010 Transportation Improvement Program for the Washington Metropolitan Region. The TPB responded by concluding that the analysis in the comment did not support the conclusion. Specifically the TPB stated: (1) That the commenter did not understand the TPB's data upon which the conclusion was made; (2) that there are many factors which lead to differences between observed data and model outputs; (3) that the RMSE for the model declines with volume, i.e, there is less error associated with higher volumes; (4) that the ''20 highest freeway links'actually represent only five roadway segments in the region because freeway links are directionally coded and these links are split between interchanges resulting in four links per these five highway segment; (5) that the comment focuses only on a few values at the high-end of the volumes ranges, but draws the mistaken conclusion that the model underestimates volumes for the regional highway network links with the highest ''observed'' volumes; (6) that the ''observed date'' for the 11,000 link segments of the regional highway network, do not represent actual traffic counts but rather represent factored *estimates* of average daily traffic volumes based on continuous traffic counts taken at a very limited number of permanent counting stations, and; (7) that ''observed'' volumes on the ''20 highest freeway links'' are either factored *estimates* of average daily or are ''uncounted manual'' *estimates*.[19]

EPA notes that the supporting documentation cited by the comment is for the COG/TPB Travel Forecasting Model, Version 2.1D Draft #50. The TDM model actually used for development of the February 2004 SIP revisions actually was the COG/TPB's Version 2.1/TP+ travel forecasting process. *See* Appendix B to the February 2004 SIP revisions, p. B–10. Version 2.1/TP+ model was validated using year 2000 data. *See* ''COG/TPB Travel Forecasting Model Version 2.1/TP+, Release C Calibration Report,'' Metropolitan Washington Council of Governments, December 23, 2002, p. 9–1. The conclusion in the validation report was that VMT is shown to be overestimated by about 8 percent, screenlines estimates are high by 17 percent overall, and the RMSE is about 51 percent, but the model performs well in other capacities (transit estimation, restrained speeds, trip distribution pattern. COG/TPB's Version 2.1 travel forecasting process represented the continuation of a multi-year models development plan that was formulated in FY–93 in response to the Federal Clean Air Act Amendments of 1990 and the Intermodal Surface Transportation Efficiency Act (ISTEA) of 1991. *Id.,* p. 1–1. For instance, the validation report states that the ratio of estimated to observed transit trips was 0.95 which means that overall the TDM predictions were only 5 percent less than the observed values. For transit trips, the ratio was 0.93 or 7 percent less. The overall ratio of estimated to observed VMT for the entire model domain was 1.08 which is equivalent to the TDM over-predicting VMT by 8 percent. For the Washington area, the TDM over predicted VMT by 9 percent overall. Overall, the Version 2.1/TP+ TDM model used for the February 2004 SIP revisions over predicted VMT by facility type by 13 percent. *See* ''COG/TPB Travel Forecasting Model Version 2.1/TP+, Release C Calibration Report,'' Metropolitan Washington Council of Governments, December 23, 2002, Ex. 9–1 through 9–12.

While the Version 2.1/TP+ TDM model under-predicts VMT on some highway segments it over predicts on most others. EPA believes that the claim made in the comment that the TDM

[16] COG is the Metropolitan Washington Council of Governments. The TPB is the National Capital Region Transportation Planning Board.

[17] The ''Version 2.1/TP+'' model is also called Version 2.1/TP+, Release C in ''COG/TPB Travel Forecasting Model Version 2.1/TP+, Release C Calibration Report,'' Metropolitan Washington Council of Governments, December 23, 2002.

[18] Letter from David J. Forkenbrock, Chair, Transportation Research Board's Committee for Review of Travel Demand Modeling by the Metropolitan Washington Council of Governments to Peter Shapiro, Chairman, National Capital region Transportation Planning Board, dated, September 3, 2003.

[19] ''FY 2005–2010 Transportation Improvement Program for the Washington Metropolitan Region National Capital Region,'' Transportation Planning Board and the Metropolitan Washington Council of Governments, dated November 17, 2004, pp. 260 to 262.

systematically *underestimates traffic* and therefore that the SIP revisions ''necessarily understate emission reductions needed'' to achieve required rates of progress, attainment or the VMT offset requirements is not supported by the facts. In actuality, the model generally *overestimated* VMT, as we have noted.

In a letter to the TPB, the TRB noted that in the four decades of experience with the use of travel demand models in transportation planning there are few universally accepted guidelines or standards of practice for these models and their application, and any assessment of these models, their performance, and the current state of transportation demand modeling practices relies primarily upon professional experience and judgement.[20] Given that TDMs are constantly undergoing refinement, and that models can always be improved, EPA believes we need not hold up the approval process until a hypothetical ''best model'' is eventually, if ever, developed. For these reasons, EPA disagrees with the comment. We conclude that the TDM model used in the SIP revisions is acceptable and that the SIP revisions can be approved.

C. Comment on the VMT Offset SIP

Comment: We received a comment asserting that the SIP revisions are deficient because they do not contain sufficient TCMs to offset growth in emissions from growth in VMT or in trip numbers. The comment alleges that the Act requires the SIP to offset any growth in emissions due to growth in VMT or in trip numbers be offset rather than a showing that overall motor vehicle emissions are expected to decline. The comment implies that the VMT offset provisions apply to both VOC and NO_X emissions.

Response: The VMT Offset Provision Applies Only to VOC Increases. As an initial matter EPA believes that the VMT offset provision applies only to increases of VOC emissions. As explicitly stated in the proposed rulemaking for the General Preamble for the Implementation of Title I of the Clean Air Act Amendments of 1990, 57 FR 13498 at 13521, Apr. 16, 1992, EPA has consistently interpreted the VMT offset requirements of the Act, set forth in section 182, to apply only to VOC emissions. *See*, *e.g.*, 60 FR 38718 at 38721, July 28, 1995; 60 FR 48896 at 48898–48899, September 21, 1995. As we explain, EPA disagrees with the commenter's assertion that the VMT offset SIP revisions are deficient because these revisions do not address growth in NO_X emissions.

Section 182(d)(1)(A) of the Act provides that ''any growth in emissions'' from growth in VMT must be offset. EPA believes that in the plain language of the Act Congress intended that this offset requirement be limited to VOC emissions. First, section 182(d)(1)(A)'s requirement that a State's adopted TCMs comply with the ''periodic emissions reduction requirements'' of subsections 182(b) and (c) the Act, indicates that the VMT offset SIP requirement is VOC-specific, and NO_X emissions are not required to be offset.

Section 182(c)(2)(B), which requires reasonable further progress demonstrations for serious ozone nonattainment areas, provides that such demonstrations will result in VOC emissions reductions; thus, the only ''periodic emissions reduction requirement'' of section 182(c)(2)(B) is VOC-specific. In fact, it is only in section 182(c)(2)(C)—a provision not referenced in section 182(d)(1)(A)—that Congress provided States the authority to submit demonstrations providing for reductions of VOC and NO_X emissions in lieu of the SIP otherwise required by section 182(c)(2)(B).

Moreover, the 15 percent periodic reduction requirement of section 182(b)(1)(A)(i) applies only to VOC emissions, while only the separate ''annual'' reduction requirement applies to both VOC and NO_X emissions. We believe that Congress did not intend the terms ''periodic emissions reductions'' and ''annual emissions reductions'' to be synonymous, and that the former does not include the latter. In section 176(c)(3)(A)(iii) of the Act, Congress required that conformity SIPs ''contribute to annual emissions reductions'' consistent with section 182(b)(1) (and thus achieve NO_X emissions reductions), but did not cross reference the 15 percent periodic reduction requirement. Conversely, section 182(d)(1)(A) refers to the periodic emissions reduction requirements of the Act, but does not refer to annual emissions reduction requirements that require NO_X reductions. Consequently, we interpret the requirement that VMT Offset SIPs comply with periodic emissions reduction requirements of the Act to mean that only VOC emissions are subject to section 182(d)(1)(A) in severe ozone nonattainment areas.

Finally, we note that where Congress intended section 182 ozone SIP requirements to apply to NO_X as well as VOC emissions, it specifically extended applicability to NO_X. Thus, references to ozone or emissions in general in section 182 do not on their own implicate NO_X. For example, in section 182(a)(2)(C), the Act requires States to issue preconstruction permits for new or modified stationary sources ''with respect to ozone.'' Congress clearly did not believe this reference to ozone alone was sufficient to subject NO_X emissions to the permitting requirement, since it was necessary to enact section 182(f)(1) of the Act, which specifically extends the permitting requirement to major stationary sources of NO_X. Since section 182(d)(1)(A) does not specifically identify NO_X emissions requirements in addition to the VOC emissions requirements identified in the provision, EPA does not believe States are required to offset NO_X emissions from VMT growth in their section 182(d)(1)(A) SIPs.

The VMT Offset Provision in Section 182 Does Not Apply as Claimed in Comments. EPA has consistently explained that the purpose of the VMT offset requirement is to maintain motor vehicle VOC emissions beneath a ''ceiling level'' established through modeling of mandated transportation-related controls, so that VOC emission reductions resulting from such measures are not cancelled out by growth in motor vehicle emissions. *See*, *e.g.*, 57 FR 13498 at 13521–13523, April 16, 1992; 61 FR 51214, October 1, 1996; 61 FR 53624, October 15, 1996; and 66 FR 57247 at 57247–57248, November 14, 2001.

The VMT offset provision of section 182(d)(1) of the Act requires that states submit by November 15, 1992 specific enforceable TCMs and transportation control strategies to offset any growth in emissions from growth in VMT or number of vehicle trips and to attain reductions in motor vehicle emissions sufficient, in combination with other measures, to allow total emissions in the sever nonattainment area to comply with the ROP and attainment requirements of the Act.

As discussed in the General Preamble, EPA believes that section 182(d)(1)(A) of the Act requires the State to ''offset any growth in emissions'' from growth in VMT, but not, as the comment suggests, all emissions resulting from VMT growth. *See* 57 FR at 13522–13523. As we explained in response to similar comments objecting to our application of the General Preamble's approach when approving other SIPs, the purpose is to prevent a growth in motor vehicle emissions from canceling out the emission reduction benefits of the federally mandated programs in the Act.

[20] Letter from David J. Forkenbrock, to Christopher Zimmerman, Chairman, National Capital Region Transportation Planning Board, dated, May 10, 2004.

See 60 FR at 48898; 60 FR at 38720–38721. The baseline for emissions is the 1990 level of vehicle emissions and the subsequent reductions in emission levels required to reach attainment with the NAAQS for ozone. Thus, the anticipated benefits from the mandated measures such as the Federal motor vehicle pollution control program, lower Reid vapor pressure, enhanced inspection and maintenance and all other motor vehicle emission control programs are included in the ceiling line calculations used by the States in the VMT Offset SIP. Chapter 10 of the February 2004 SIP revisions, shows how emissions will decline substantially and will not begin to rise over the ceiling established by the mandated controls. Emission reductions are expected every year through the year 2005.

Our approach is consistent with the purposes Congress had in enacting section 182(d)(1)(A). The ceiling line level decreases from year to year as the state implements various control measures, and the decreasing ceiling line prevents an upturn in mobile source emissions. Dramatic increases in VMT that could wipe out the benefits of motor vehicle emission reduction measures will not be allowed and will trigger the required implementation of TCMs. This prevents mere preservation of the status quo, and ensures emissions reductions despite an increase in VMT or number of vehicle trips. To prevent future growth changes from adversely impacting emissions from motor vehicles, states are required under section 182(c)(5) of the Act to track actual VMT and to periodically demonstrate that the actual VMT is equal to or less than the projected VMT, with TCMs required to offset VMT that is above the projected levels. Under the commenter's approach to section 182(d)(1)(A), the States would have to offset VMT growth even while vehicle emissions are declining. Although the statutory language could arguably be read to require offsetting any VMT growth, EPA believes that the language can also be reasonably and appropriately read so that only actual emissions increases resulting from VMT growth need to be offset. The statute by its own terms requires offsetting of ''any growth in emissions from growth in [VMT].'' 42 U.S.C. 7511a(d)(1). EPA has reasonably and consistently interpreted the VMT offset provision of the Act to require that states adopt, and submit to EPA for approval into their SIPs, TCMs or transportation control strategies sufficient to at least offset ''growth in [VMT] or numbers of vehicle trips,'' but only if the VMT growth would result in actual emissions increases from mobile sources. Our consistent historic interpretation of the language of section 182(d)(1)(A) is entitled to deference. *Chevron U.S.A., Inc.* v. *NRDC*, 467 U.S. 837, 842–44 (1984). *See also U.S.* v. *Mead*, 533 U.S. 218, 227–35 (2001).

Given the susceptibility of the statutory language to these two alternative interpretations, EPA believes it is the Agency's role in administering the statute to take the interpretation most reasonable in light of the practical implications of such interpretation, and the purposes and intent of the statutory scheme as a whole. In the context of the intricate planning requirements Congress established in title I to bring areas towards attainment of the ozone standard, and in light of the absence of any discussion of this aspect of the VMT Offset provision by the Congress as a whole (either in floor debate or in the Conference Report), EPA has consistently concluded that the appropriate interpretation of section 182(d)(1)(A) requires offsetting VMT growth only when such growth would result in actual emissions increases.[21]

When growth in VMT and vehicle trips would otherwise cause an upturn in emissions from motor vehicles, this upturn must be prevented. The emissions level at the point of upturn becomes a ceiling on motor vehicle emissions. This requirement applies to projected emissions in the years between the submission of the SIP revision and the attainment demonstrations. The ceiling level is defined, therefore, up to the point of upturn, as motor vehicle emissions that would occur in the ozone season of that year, with VMT growth, if all measures for that area in that year were implemented by the Act. When this curve begins to turn up due to growth in VMT or vehicle trips, the ceiling becomes a fixed value. The ceiling line would include the effects of federal measures such as new motor vehicle standards, phase II Reid vapor pressure (RVP) controls, and reformulated gasoline, as well as the statutorily-mandated SIP requirements. For the reasons outlined in the February 9, 2005 NPR (70 FR 2085), EPA believes that the February 2004 SIP revisions fulfill the first element.

[21] As noted previously, EPA has applied this interpretation since the enactment of the 1990 amendments to the Clean Air Act adding section 182(d)(1)(A), and in response to adverse comments submitted on other rulemaking actions. *See, e.g.*, 60 FR 48898 (final approval of Illinois' SIP) and 60 FR 39720–39721 (final approval of Indiana's SIP); 66 FR 57247 at 57247–57248, November 14, 2001 (final approval of Texas SIP).

Under EPA's approach, the second element, which requires the VMT offset SIP to comply with the 15 percent ROP requirement of the Act, was due on November 15, 1993 for areas initially classified as severe nonattainment. November 15, 1993 is the same date on which the 15 percent ROP SIP itself was due under section 182(b)(1) of the Act. For areas initially classified as severe nonattainment, EPA believes it was reasonable to extend the deadline for this VMT offset element from November 15, 1992 to the date on which the entire 15 percent SIP was due, as this allows states to develop the comprehensive strategy to address the 15 percent requirement and assure that the TCMs elements required under section 182(d)(1)(A) are consistent with the remainder of the 15 percent demonstration. Indeed, EPA believes that only upon submittal of the broader 15 percent plan can a state have had the necessary opportunity to coordinate its VMT strategy with its 15 percent plan. In the case of the Washington area, the second element has been fulfilled because the 15 percent ROP plans were approved long before the area was reclassified to severe nonattainment. *See* 64 FR 42629, August 5, 1999; 65 FR 44686, July 19, 2000; and, 65 FR 59727, October 6, 2000.

The third element, which requires the VMT offset SIP to comply with the post-1996 ROP and attainment requirements of the Act, was due on November 15, 1994, the statutory deadline for those broader submissions. For areas initially classified as severe nonattainment, EPA believes it is reasonable to similarly extend the deadline for this VMT element to the date on which the post-1996 ROP and attainment SIPs are due for the same reason it is reasonable to extend the deadline for the second element.[22] First, it is arguably impossible for a state to make the showing required by section 182(d)(1)(A) for the third element until the broader demonstrations have been developed by the State. Moreover, allowing states to develop the comprehensive strategy to address post-1996 ROP plans and attainment by providing a fuller opportunity to assure that the TCMs elements comply with the broader ROP plans and attainment demonstrations, will result in a better program for reducing emissions in the long term. In the case of the Washington area, EPA believes the third element has

[22] In the case of the Washington area, the post-1999 portions of the post-1996 ROP plan required under section 182(c)(2) were in fact due on the same as the VMT offset SIP. *See* 68 FR 3410, January 24, 2003.

been fulfilled for the reasons outlined in the February 9, 2005 NPR (70 FR 2085) and this document because EPA is approving the 1996–1999 and 1999–2005 ROP plans and the modeled demonstration of attainment. EPA thus finds that the SIPs contain all measures necessary to provide for timely attainment and ROP, and therefore that no additional TCMs will be necessary to meet those requirements.

D. Comment on the Contingency Measures Plans

Comment 1: We received a comment asserting that EPA cannot approve the contingency measures which were identified in the SIP revisions to address the Washington area's the failure to attain by November 15, 1999. The comment claims that, because these measures in the plan required further action by the States, these contingency measures do not meet the CAA's requirement that the measures take effect without further action by the State or EPA after the failure to attain. The comment also claims the contingency measures do not meet EPA's own guidance which requires contingency measures to achieve reductions no later than the year after the one in which the failure is identified because these contingency measures identified by the SIP revision were not implemented until 5 to 6 years after the failure to attain.

Response 1: EPA disagrees with the comment that the contingency plan for the failure of the Washington serious ozone nonattainment area to attain by November 15, 1999 cannot be approved. The comment does not address the factual situation for the Washington area where the SIP did not contain a contingency measures plan consisting of fully adopted measures until the submission of the February 2004 SIP revisions and submission of the various adopted rules identified as the contingency measures that is the contingency measures implemented in response to the failure of the Washington area to attain the 1-hour ozone NAAQS by November 15, 1999.

Prior to our January 12, 2004 NPR (70 FR 2085), EPA had recognized that the SIP of each of the Washington area States did not contain contingency measures to address the failure to attain (FTA) the ozone NAAQS by November 15, 1999 (the ''contingency measures for 1999 FTA''). In the January 12, 2004 NPR (70 FR at 2087), we provided a brief history of the severe area SIP revisions by noting that EPA had previously conditionally approved the post-1996 ROP plans and those versions of the attainment plans submitted during 1998 and 2000, contingent upon the States fulfilling commitments they made to submit the additional elements required of SIPs for a severe area within one year. One of the conditions for approval in the April 17, 2003 final conditional approval (68 FR 19106) was that the States had to revise the Washington area severe attainment plan to include a contingency plan containing those adopted measures that qualify as contingency measures to be implemented for the failure of the Washington area to attain the one-hour ozone standard for serious areas by November 15, 1999; that is, the States had to submit SIP revisions to add the contingency measures for 1999 FTA. 68 FR at 19106. In the NPR for the April 17, 2003 final conditional approval, EPA noted that the States in the Washington area had committed to submit to the EPA those measures that qualify as contingency measures due to the failure of the Washington area to attain the ozone standard for serious areas by November 15, 1999. 68 FR at 5248, February 3, 2003. In the February 3, 2003 NPR, EPA also recounted that our January 3, 2001 approval (66 FR 586) of the post-1996 ROP plans and those versions of the attainment plans submitted during 1998 and 2000 had been vacated by the Court of Appeals. The Court of Appeals determined that EPA lacked the authority to approve attainment plan and ROP SIPs without contingency measures. *Sierra Club* v. *Whitman,* 294 F.3d at 164. EPA had noted that the post-1996 ROP plans and those versions of the attainment plans submitted during 1998 and 2000 covered by the January 3, 2001 final rule ''[did] not specify any specific measures as contingency measures.'' 66 FR at 615–616, January 3, 2001. EPA also agreed with comment that the lawn/garden measure identified in the contingency plan as a contingency measure was insufficient. Therefore, EPA believes that prior to submittal of the February 2004 SIP revisions and the SIP revisions containing the adopted rules for the contingency measures the Washington area States had not submitted the necessary SIP revisions for the contingency measures for 1999 FTA.

EPA has interpreted the requirement that contingency measures must ''take effect without further action by the State or the Administrator'' to mean that no further rulemaking activities, such as public hearings or legislative review, by the State or the EPA should be needed to implement the contingency measures. *See* 57 FR at 13512, April 16, 1992; section 9.0 of ''Guidance for Growth Factors, Projections, and Control Strategies for the 15 Percent Rate-of-Progress Plans,'' (EPA–452/R–93–002, March 1993). EPA has required that contingency measures must be fully adopted rules or measures but do not have to be implemented unless and until they are triggered by a failure to either meet a milestone or attain the NAAQS. *See* section 5.6 of ''Guidance on the Post '96 Rate-of-Progress Plan (RPP) and Attainment Demonstration'' (Corrected version of February 18, 1994).

The States did not have adopted contingency measures to implement without further action by the States on the effective date of EPA's determination that the Washington area failed to attain by 1999. If EPA were to now disapprove the contingency measures plan because the States needed to take further action after the 1999 FTA in order to implement the contingency measures to address the 1999 FTA, the States would have to adopt and submit SIP revisions consisting of a revised contingency measures plan and adopted control measures, and, EPA would have to approve those SIP revisions in order to prevent or lift sanctions required by section 179 of the Act. This would be an impossibility since the relevant 1999 date has long since passed. In short, the States and EPA would have to undertake rulemaking actions on those remedial SIP revisions, and those rulemakings would suffer the same fate that the commenter's claim make the measures we approve today supposedly defective—we would have to disapprove them because they were not implementable prior to the States' failure to attain in 1999. The commenter would have EPA produce an endlessly looping, absurd result, namely, the States would be left in a position where no SIP revision would be able to lift sanctions because the States cannot go back in time to adopt measures that were not adopted by a deadline in the past. The fact that the States failed to adopt and submit these measures in a timely fashion should not preclude EPA from approving them now that they have been adopted, implemented, and submitted.

EPA further disagrees with the comment that the contingency measures needed to address the contingency measures for 1999 FTA are inadequate because these measures do not meet EPA's guidance which requires contingency measures to achieve reductions no later than the year after the one in which the failure is identified. Once again, the commenter would have EPA produce an absurd

result. Because the States cannot go back in time to implement measures that were not implemented by a deadline in the past, if EPA were to disapprove the contingency measures for 1999 FTA for the reason advanced in the comment, the States again would be left in the situation where no SIP revisions or measures could be approved to halt or lift sanctions. Any further SIP revisions to address the contingency measures for 1999 FTA would suffer the same defect of timeliness. Given this impossibility EPA believes that it is appropriate and beneficial to the environment to belatedly get the reductions contemplated by the 1999 FTA contingency measures.

EPA agrees that our guidance and policy requires contingency measures, once triggered, to achieve reductions no later than the year after the one in which the failure is identified. However, this guidance applies to contingency measures that meet the requirement that the measures can be ''implemented without further action'' by the state or EPA. EPA expects that certain actions, such as notification of sources, modification of permits, etc., would probably be needed before a measure could be implemented effectively needed to affect full implementation of the contingency measures and expect such actions to occur within 60 days after EPA notifies the State of its failure. *See* 57 FR at 13512, April 16, 1992. EPA considers that in the case of a failure to attain, the State is notified of a failure to attain only once EPA has published the notice in the **Federal Register** pursuant to section 181(b)(2)(B) that EPA has determined that the area has failed to attain by the statutory attainment date, and that such notification is effective on the effective date of the **Federal Register** publication. Under section 181, such a notification can be published no later than May 15th of the year following the attainment date and still be timely under the Act. For a November 15, 1999 attainment date, the one-year period for implementation of the contingency measures for 1999 FTA could well have started May 15, 2000.

For the Washington area, EPA's determination that the area had failed to attain by the serious attainment date of November 15, 1999 was in fact effective March 24, 2003. 68 FR 3410, January 24, 2003. In the case of the Washington area, the States adopted *and* implemented by January 1, 2005 all the measures identified in the plan as addressing the contingency measures for 1999 FTA. *See* Table X. B–1 Summary of Benefits from Measures 7.4.11, 7.4.12 and 7.4.14 of the January 5, 2005 TSD.[23] Arguably, the one-year period after the States were notified of the failure to attain ended March 24, 2004, but as discussed previously, the States needed to first adopt the measures that would be used as the contingency measures for 1999 FTA before the measures could be implemented. The comment offers no suggestion on how the States might retroactively obtain emission reductions in 2004 (or for that matter 2000) for measures that the States did not adopt and implement until after that time.

As pointed out by the Court of Appeals in *Sierra Club* v. *EPA,* 356 F.3d 296, with respect to the reclassification of the area to severe nonattainment status due to the its failure to attain the 1-hour ozone NAAQS by November 15, 1999, this commenter ''challenged EPA's decision to extend the States' final deadline for submitting revised SIPs complying with the Act's requirements for severe areas, including post-1999 ROP plans, to March 1, 2004.'' 356 F.3d at 308–09.

The Court of Appeals acknowledged that ''the deadline for filing severe area SIP components including post-1999 ROP plans had already passed long before reclassification took place. Indeed, the statutory deadline for such submittals was November 15, 1994.'' *Id.* at 309. Citing to a prior decision, *Sierra Club* v. *Whitman,* 285 F.3d 63 (D.C. Cir. 2002), the Court reiterated that '' 'The relevant provisions of the Clean Air Act * * * contain no language suggesting that Congress intended to give EPA the unusual ability to implement rules retroactively,' '' in upholding EPA's reliance on the discretion conferred by section 182(i) of the CAA to adjust applicable statutory deadlines, other than attainment dates, when it reclassifies an attainment area.

Similarly, EPA believes that it would be arbitrary and capricious to impose a retroactive obligation on the States that can never be fulfilled, resulting in sanctions that could never be lifted. It would be especially egregious for EPA to put the States in that position since the States' failure to submit contingency measures or to even realize that the November 15, 1999 attainment date pertained to the Washington area was due to their reliance on published EPA guidance.[24] The failure to begin implementation of contingency measures in 2000, upon a March 24, 2003 EPA finding that the area failed to attain in November 1999, cannot be cured by a state rulemaking that occurred before March 24, 2003; there was no such rulemaking then, it does not exist now, and it never can be. After March 24, 2003, the States could complete their respective state rulemaking processes to develop the missing contingency measures. They have done so, and all those measures have been implemented.

In this action EPA is acting on SIP revisions that, with respect to the contingency measures for 1999 FTA, identify additional measures that the States have implemented subsequent to November 15, 1999 attainment date for serious areas. EPA concludes that in the circumstances of this case it is appropriate and consistent with the statute to approve these contingency measures that have now been implemented.

Comment 2: We received a comment asserting that the contingency plan for 2005 cannot rely on measures already adopted and in place or to be in place before the 2005 attainment and ROP deadline. The comment claims that the Act requires that contingency measures must be additional measures that will be triggered by the attainment or milestone failure, that is, the Act provision is prospective, not retrospective. In support of their argument, the comment cites language, ''to be undertaken in the event the area fails,'' from the legislative history for the 1990 amendments to the Act.

Response 2: EPA believes that its interpretation of the contingency measure provisions of the Act applicable to severe nonattainment areas is a reasonable interpretation of the Act because reductions from these contingency measures are continuing in nature. Sections 172(c)(9) and 182(c)(9) of the Act direct that a state's revised SIP shall include ''specific measures *to be undertaken*'' if an ROP or attainment milestone is missed, and that the contingency measures are ''*to take effect* in any such case without further action by the State or the Administrator.'' 42 U.S.C. 7502(c)(9), 7511a(c)(9) (emphasis added).

EPA has consistently stated that any rule or measure that meets the creditability requirements of section 182(b)(1)(C) and (D), that would achieve real, permanent, enforceable reductions, and that is not already required as a part of the relevant ROP or attainment

[23] ''Technical Support Document for Approval and Promulgation of Air Quality Implementation Plans; District of Columbia, Maryland, and Virginia; Post-196 Rate-of-Progress Plan, Contingency Measures, Transportation Control Measures, 1990 Base Year Inventory Changes, and VMT Offset SIP for the Metropolitan Washington, DC Nonattainment Area,'' dated January 5, 2005.

[24] *See,* Memorandum dated July 16, 1998, from Richard Wilson, Acting Assistant Administrator for Air and Radiation, ''Extension of Attainment Dates for Downwind Areas.''

demonstration SIP, can be adopted as a contingency measure. *See* ''Guidance on the Post-1996 Rate-of-Progress Plan and Attainment Demonstration'' (corrected version as of 2/18/94), section 5.6.

Congress, in the Act, did not define the terms ''to take effect'' and ''to be undertaken.'' The terms ''to take effect'' and ''to be undertaken'' could imply a purely prospective action that excludes the possibility of contingency measure implementation prior to an area's failure to meet an ROP milestone or attainment date. If we were to read the CAA this way, the only acceptable contingency measure would be those that are adopted but not implemented. Under that reading, the states could adopt the contingency measures but hold their implementation in reserve to meet the contingency measure requirement. If we read the Act to allow adopted and implemented measures that continue to result in emissions reductions in years subsequent to their implementation to serve as contingency measures, provided that those measures' emission reductions are not needed to demonstrate expeditious attainment and/or ROP, the states could implement the contingency measures early and would achieve the environmental benefits prior to the triggering of the contingency requirement. Nothing in the language of sections 172(c)(1), 172(c)(9) or 182(c)(9) prohibits this interpretation. Implemented contingency measures achieve *continuing* emissions reductions. We reasonably interpret the term ''to take effect'' and ''to be undertaken,'' as used in sections 172(c)(9) and 182(c)(9) of the Act, to allow as contingency measures, measures implemented prior to the failure to achieve an ROP or attainment milestone, that will continue to achieve emissions reductions after the plan fails, so long as those measures are not needed to demonstrate expeditious attainment and/or ROP. As noted previously, this interpretation is a longstanding exercise of EPA's authority to construe a statutory scheme it is entrusted to administer, by filling the gap left by Congress's failure to define the terms ''to take effect'' and ''to be undertaken.'' *See generally, U.S.* v. *Mead Corp.,* 553 U.S. at 227–35; *Chevron U.S.A, Inc.* v. *NRDC,* 467 U.S. 837, 842–45 (1984).[25]

EPA believes that allowing early reductions to be used as contingency measures comports with a primary purpose of the Act—the aim of ensuring that nonattainment areas reach NAAQS compliance in an efficient manner and achieving additional emissions reductions that will improve air quality. The contingency plan allows the Washington area to include sufficient contingency measures to ensure that ''upon implementation of such measures, additional emissions reductions of up to 3 percent of the emissions in the adjusted base year inventory (or such lesser percentage that will cure the identified failure) would be achieved in the year following the year in which the failure has been identified.'' *See* 57 FR at 13511, April 16, 1992.

The emissions reductions from the measures in the Washington area contingency plan are not available for any other use so long as the measures remain in the SIP as contingency measures. A failure to attain or failure to demonstrate ROP will result in these emissions reductions being applied toward attainment or ROP (depending on which milestone is not being met). Even though these measures are already implemented, the continuing reduction credits are, in effect, set aside to be applied in the event that attainment or ROP is not achieved. These credits are immediately available, without further action by the States. We note that measures that have already been implemented clearly meet CAA section 172(c)(9) requirement that contingency measures take effect without further action by the State or Administrator. EPA believes that it would be illogical and counterproductive to penalize nonattainment areas that are taking extra step of implementing contingency measures prior to a failure to achieve a ROP or attainment milestone, to further insure that the area will comply with the CAA's mandate that states attain the NAAQS as ''expeditiously as practicable.'' 42 U.S.C. 7502(c)(1). As we have noted previously, ''There are a number of benefits to allowing and even encouraging the early implementation of contingency measures. The chief benefit is that their emission reductions and thus their public health benefit are realized early. Another is that it allows states to build uncredited cushions into their attainment and RFP demonstrations, a cushion which makes actual failures to make progress or attain less likely.'' 67 FR 48718, 48731, July 25, 2002.

The standard advocated by the comment would allow EPA to approve the contingency measure plan only if the measures were scheduled for implementation in the event of a future failure to make a ROP target or attain the NAAQS. EPA believes that the States could correct a disapproval issued pursuant the standard advocated by the comment by amending the contingency measure rules themselves to replace the current requirement for compliance by a date certain with a requirement to comply by some date(s) in future to be determined only upon a ROP or attainment failure. Such a revision would not interfere with ROP or attainment because EPA believes that the reductions from the measures in the contingency plan to address a ROP failure or a failure to attain by November 15, 2005 must go beyond the emissions reductions needed to demonstrate ROP and timely attainment (*i.e.*, they are ''surplus''). Although this result might arguably comply with the statute as the commenter suggests, it would actually be detrimental for air quality as the measures would not be producing emissions reductions currently as under the submitted SIP.

The comment alleges that if an area fails to meet a progress or attainment deadline, the measures already in effect are insufficient, thus warranting the implementation of additional controls which the comment claims should be the contingency measures. Yet, the comment fails to recognize that if the area fails to attain on time, such failure would have been worse in the absence of the contingency measures. Likewise, if an area has an ROP shortfall, such shortfall would have been larger in the absence of the contingency measures.

EPA has approved many contingency measure plans relying upon early implementation of contingency measures. *See, e.g.*, 67 FR 60590, September 26, 2002. EPA's interpretation that early implemented contingency measures meet the requirements of the Act was upheld in *Louisiana Environmental Action Network* v. *EPA,* 382 F.3d 575 (5th Cir. 2004), though the court found that the particular measure at issue did not qualify as a contingency measure for other reasons.

Comment 3: We received a comment that the Act requires a set of contingency measures to address any failure to meet ROP requirements for the 2002–2005 period, that is separate from those required for failure to attain. The comment claims that the requirement for contingency measures to address post-1996 milestone failures is explicitly set out in the Act as an additional mandate in addition to the requirement for contingency measures to address attainment failures. The comment further claims that the 2005 ROP deadline here could precede the attainment date if, in the case of an area which qualifies for one or both of the 1-

[25] The commenter's appeal to the legislative history does not add to its argument, since the quoted language reiterates, but does not elaborate, explain or expound upon, the statutory text.

year attainment date extensions allowed by the Act.

Response 3: EPA disagrees that section 182(c)(9) of the Act necessarily adds anything substantive to the requirement of section 172(c)(9) other than a requirement that the contingency plan be able to address a milestone failure pursuant to section 182(g). EPA first notes that neither section 182(c)(9) nor 172(c)(9) of the Act specify how many contingency measures are needed or the magnitude of emissions reductions that must be provided by these measures. The Act is totally silent on this issue. EPA rejected the interpretation that the Act requires states to adopt sufficient contingency measures to make up for a shortfall resulting from the failure where none of the state measures produce any expected reductions. We thus rejected an interpretation where the state would have to adopt ''double'' the measures needed to satisfy the applicable emissions reduction requirements because EPA believes that this would be an unreasonable requirement given the difficulty many States will already have in identifying and adopting sufficient measures to meet ROP and other requirements, let alone contingency measures. *See* 57 FR at 13510–13512, April 16, 1992.

Instead, EPA believes that the contingency measures should, at a minimum, ensure that an appropriate level of emissions reduction progress continues to be made if attainment or ROP is not achieved and additional planning by the state is needed. Therefore, EPA has interpreted the Act to require states with moderate and above ozone nonattainment areas to include sufficient contingency measures so that, upon implementation of such measures, additional emissions reductions of up to 3 percent of the emissions in the adjusted base year inventory [26] (or such lesser percentage that will cure the identified failure) would be achieved in the year following the year in which the failure has been identified. This ''additional'' reduction would ensure that progress toward attainment occurs at a rate similar to that specified under the ROP requirements for moderate areas (*i.e.,* 3 percent per year), and that the state would achieve these reductions while conducting additional control measure development and implementation as necessary to correct the shortfall in emissions reductions and/or to adopt newly required measures resulting from reclassification to a higher classification, in the case of a moderate or serious area, or to meet the 3 percent per year requirements specified by section 181(b)(4)(A) of the Act for severe areas that fail to attain. Under this approach, the State would have 1 year to modify its SIP and take other corrective action needed to ensure that milestones are achieved and that ROP toward attainment continues. *See* 57 FR at 13510–13512, April 16, 1992.

Section 182(c)(9) provides that ''[i]n addition to the contingency provisions required under section [172(c)(9)] * * * the plan revision [for serious and above nonattainment areas] shall provide for the implementation of specific measures to be undertaken if the area fails to meet any applicable milestone.'' Section 172(c)(9) requires contingency measures for failure of an area to ''make reasonable further progress, or to attain'' the NAAQS. As clarified by section 182(g)(1) of the Act, the ''applicable milestones'' for serious, and above, nonattainment areas, such as the Washington area, which is a severe nonattainment area, are those tied to the ROP plan percent emission reductions. The commenter urges EPA to interpret sections 172(c)(9) and 182(c)(9) to require not only that there be contingency measures in the SIP tied to the ROP milestones for the Washington area, but that these contingency measures must be different from the measures required under 172(c)(9).

We believe, however, that 182(c)(9) merely adds milestones for serious and above areas that must be included as triggers for contingency measures, and does not impose any requirement for a state to adopt contingency measures in addition to those being used in the contingency plan required by section 172(c)(9), provided that such measures will generate reductions in all the relevant years.[27] Thus a state may specify the same contingency measure to be used for failure to attain the NAAQS as for failure to meet an ROP milestone, in a year for which the measure produces emission reductions. Of course, if a measure is triggered for failure to meet a milestone in an early year the area would have to submit an additional measure to be available in the event of a later failure to meet a subsequent milestone or demonstrate attainment. Since the plain language of the statute supports this interpretation, and nothing in the statute prohibits this interpretation, EPA's interpretation of how these two contingency measure provisions relate to each other is entitled to deference. *See U.S.* v. *Mead Corp.*, 553 U.S. 218 (2001); *Chevron U.S.A, Inc.* v. *NRDC*, 467 U.S. 837 (1984).

Comment 4: We received a comment asserting that the contingency plan does not meet EPA's guidance because the plan does not contain a commitment for timely adoption of additional measures if the 3 percent contingency plan is not adequate to correct a failure to attain or achieve an ROP milestone.

Response 4: While EPA's guidance does specify that the States to backfill a contingency measures plan after the need for the measures is triggered neither the statute nor the guidance contains the sort of commitment claimed by the comment.

''Any implemented measures (that are not needed for the rate-of-progress requirements or for the attainment demonstration) would need to be backfilled only to the extent they are used to meet a milestone * * *. The State would be required to adopt new contingency measures as part of the process of developing their new SIP for their new classification.'' *See* section 5.6 of ''Guidance on the Post '96 Rate-of-Progress Plan (RPP) and Attainment Demonstration'' (Corrected version of February 18, 1994). ''Within 1 year of the triggering of a contingency requiring the early implementation of control measures, the State must submit a revision to the SIP containing whatever additional measures will be needed to backfill the SIP with replacement measures to cure any eventual shortfall that would occur as the result of the early use of the contingency measure.'' *See* 57 FR at 13511, April 16, 1992.

The commitment discussed in the General Preamble (57 FR 13498 at 13511–31512, April 16, 1992) was to an annual tracking program—not a commitment to backfill the plan with new measures. As interpreted in the general preamble, EPA does not believe that contingency measures are required to completely fill any shortfall caused by a failure. This will be filled by the revised plan required to cure the failure.

Comment 5: We received a comment asserting that the contingency plan must contain some NO_X reductions since the ROP and attainment plans rely upon NO_X reductions as well as VOC reductions.

Response 5: With regard to the need for NO_X contingency measures, EPA disagrees with the comment that the contingency plan must contain NO_X

[26] The adjusted base year inventory is that inventory specified by the provisions under section 182(b)(1)(B).

[27] We note that if a serious or above nonattainment area fails to meet an applicable milestone, the contingency measures will not even necessarily be triggered. A state may opt to be reclassified to the next higher classification or to adopt an economic incentive program in lieu of implementing the measures in its contingency plan. 42 U.S.C. 7511a(g)(3).

contingency measures simply because the ROP and attainment plans rely upon NO_X reductions. As to contingency measures to address a failure to in the ROP plans, the Act creates a clear command that VOC reductions presumptively meet the ROP requirements applicable to moderate, serious and worse areas. Section 182(b)(1)(A) requires a ROP plan for a 15 percent reduction in baseline VOC emissions. EPA has never interpreted the Act to allow NO_X substitution in the 15 percent plan for an area which is subject to subpart 2 of part D to Title I of the Act and which is not already covered by a 15 percent ROP plan. *See*, section 1.1 of ''Guidance on the Post-1996 Rate-of-Progress Plan and Attainment Demonstration'' (corrected version as of 2/18/94); *see*, 68 FR at 32826, June 2, 2003 (waiving the VOC reduction requirement would require ''absurd results;'' ''We believe that absurd results will happen only rarely in those cases where application of the requirement in that area would thwart the intent of Congress in enacting the relevant provisions of the [Act].'' Absurd results would require a showing that ''future VOC reductions required under subpart 2 for a particular area would actually cause ozone to increase more than a *de minimis* amount,'' and, ''it would not be sufficient for the area to show that VOC reductions would be less beneficial than NO_X reductions.'') *See* 68 FR at 32833, June 2, 2003. Section 182(c)(2)(B) requires ROP reductions averaging 3 percent per year reduction in baseline VOC emissions. Section 182(c)(2)(C) authorizes EPA to accept ROP plans containing a lesser percentage of VOC reductions plan if the that substitutes NO_X reductions in accordance with EPA's guidance.

The comment claims EPA's policy and guidance requires SIPs to provide for contingency reductions in NO_X where the SIP for the area relies on NO_X substitution in lieu of or in addition to VOC reductions. In support of this position, the commenter quotes a footnote in the General Preamble, 57 FR 13498, April 16, 1992. However, EPA believes our interpretation of the Act set forth in later guidance allows just the opposite, namely, that the contingency measures for both ROP and attainment failures can provide for at least some VOC reductions where the attainment plan relies on VOC and NO_X reductions even if the ROP plan relies on all NO_X reductions. *See* ''Guidance on Issues Related to 15 Percent Rate-of-Progress Plans,'' Memorandum from Michael H. Shapiro, Acting Assistant Administrator for Air and Radiation to the Regional Division Directors, August 23, 1993.[28] This later guidance provides that NO_X contingency reductions *can be substituted* for VOC contingency reductions, but plainly does not preclude all of the contingency reductions from being achieved through VOC control.

Where a ROP plan relies upon 9 percent NO_X reduction to demonstrate ROP pursuant to section 182(c)(2)(C) of the Act for one or more milestone years after 1996, EPA believes that a milestone failure caused by a shortage of NO_X reductions can be filled by VOC reductions. Under EPA's guidance for NO_X substitution, the VOC contingency reductions would in essence change the plan from one relying upon 9 percent NO_X reductions to a plan relying upon a mixture of NO_X and VOC percentage reductions. For instance, a 1 percent failure would change in such a ROP plan from 9 percent NO_X to 8 percent NO_X and at least 1 percent VOC.

EPA believes that the Washington area attainment plans demonstrate attainment through a strategy of VOC and NO_X control. Therefore, inclusion of VOC measures in the contingency measures plan is proper to address a failure to attain.

Comment 6: We received a comment alleging that all of the emission reductions from the continency measures are not ''surplus'' because neither EPA nor the States have quantified the total VOC and NO_X reductions needed to attain by November 15, 2005. The comment further claims that the use of a WOE approach in the modeled demonstration of attainment is incapable of identifying the precise level of emission reductions needed for attainment and thus does not support the claim that there are ''surplus'' reductions in the SIP that can be used for ''contingency'' purposes.

Response 6: The photochemical grid modeling runs used in the SIP revisions which were the subject of the April 17, 2003 final rule (68 FR 19106) are the same as those photochemical grid modeling runs used in the February 2004 SIP revisions which are the subject of this final rule. The WOE analytical methods and/or analyses that support the modeled demonstration of attainment in the February 2004 SIP revisions, which are the subject of this final rule, include the same WOE analytical methods and/or analyses that supported the modeled demonstration of attainment which were the subject of the April 17, 2003 final rule (68 FR 19106). This issue has been litigated by the commenter and conclusively decided in EPA's favor. *See Sierra Club* v. *EPA*, 356 F.3d at 304–307. In addition, as noted in section IV. A. 2. of the January 31, 2005 TSD prepared for the February 9, 2005 NPR (70 FR 6796) the States provided additional WOE in the form of the results of EPA's photochemical grid modeling performed for the Tier 2 final rule. See, sections VI. A. 1. and 2. of ''Technical Support Document for Approval and Promulgation of Air Quality Implementation Plans; District of Columbia, Maryland, and Virginia; Attainment Demonstration for the Metropolitan Washington, DC Nonattainment Area,'' dated January 31, 2005.

As discussed elsewhere in response to comment, EPA believes that the States' use of photochemical grid modeling with an adjunct WOE analysis demonstrates timely attainment and meets the statutory requirements of the Act and constitutes a modeled demonstration of attainment. Specifically, EPA incorporates by reference the responses to comment in section IV. A. ''Comment on the Attainment Demonstration Modeling'' of the preamble to this final rule. In the TSD prepared for the NPR for this final rule, EPA concluded that *without* the reductions from the contingency measures the SIP contained sufficient creditable measures to achieve emissions levels in the Washington area of 331 TPD of VOC emissions and 491 TPD of NO_X emissions.[29]

These overall emissions levels of 331 TPD of VOC and 491 TPD of NO_X are still less than the levels used in the photochemical grid modeling which assumed levels of 360 TPD of VOC emissions and of over 500 TPD of NO_X emissions, and are sufficient to support the WOE demonstration.[30] The WOE demonstration builds upon the photochemical grid modeling by considering other photochemical grid modeling results, and the overall change in emissions from the 1990 base year to the 2005 attainment year. EPA concludes that attainment is

[28] Reissued in Appendix D to ''Guidance on the Post-1996 Rate-of-Progress Plan and Attainment Demonstration'' (corrected version as of 2/18/94).

[29] Table IV.F–1 Relative Reductions on page A–27 of ''Technical Support Document for Approval and Promulgation of Air Quality Implementation Plans; District of Columbia, Maryland, and Virginia; Attainment Demonstration for the Metropolitan Washington, DC Nonattainment Area,'' dated January 31, 2005.

[30] Table IV.F–1 Relative Reductions on page A–27 of ''Technical Support Document for Approval and Promulgation of Air Quality Implementation Plans; District of Columbia, Maryland, and Virginia; Attainment Demonstration for the Metropolitan Washington, DC Nonattainment Area,'' dated January 31, 2005.

demonstrated without reliance upon the reductions from the contingency measures and therefore the reductions from the contingency measures are surplus for the purposes of attainment.

Comment 7: We received a comment asserting that the SIP cannot rely on the reformulated gasoline (RFG) program as a ''contingency'' measure to address the area's failure to attain by 1999, because the RFG program became mandated by the Act once the Washington area missed the 1999 attainment deadline. The comment claims that contingency measures are measures that must be in addition to those mandated by the Act. The comment also claims that RFG was never intended as a contingency measure and, thus, contrary to EPA's assertion, it is hardly a ''penalty'' to the nonattainment area to disallow contingency credit for a measure that was never intended as a contingency measure, and that was implemented at a time when the area was already years behind schedule in adopting adequate ROP and attainment plans. The comment further asserts that if the RFG program is a permissible contingency measure the agency's guidance would obligate the states to ''backfill'' the measure with one year assuring equivalent reductions and that the states have not done so.

Response 7: EPA agrees with the comment to the extent that it raises questions about whether RFG can be used as a contingency measure after an area is reclassified to severe nonattainment. The RFG requirement is required under Title II of the Act once an area is reclassified to severe nonattainment. However, EPA believes that whether or not RFG is a contingency measure is not a deciding factor whether EPA approve the contingency measures plan in this case because the plan contains other sufficient measures to fulfill the requirement. EPA concludes that the contingency measures plan is approvable even without considering RFG to be a contingency measure and thus EPA is not responding to the allegations that RFG can not be considered a contingency measure in this case.

E. Comment Received Regarding the TSD and EPA's Response

We received the following comments on our evaluation of the credits from the States' AIM coatings rules which was in our January 12, 2005 TSD prepared for the January 12, 2005 NPR. A summary of these comments that we received on our evaluation of the credits from the States' AIM coatings rules for the Washington area and our responses follows.

Comment: We received one set of comments that were critical of the baseline per capita emission factor EPA used to evaluate the States' emission reductions claims for the States' AIM coatings rules. Specifically, these comments took issue with the pre-control baseline value of 4.5 pounds per person per year (lbs/p/yr) that EPA used. These comments also took issue with the 6.7 lbs/p/yr emission factor which was used by the States and which is found in ''Procedures for the Preparation of Emission Inventories for Carbon Monoxide and Precursors of Ozone'' (EPA–450/4–91–016), May 1991. These comments noted that EPA has issued another document under EPA's ongoing Emission Inventory Improvement Program with yet another per capita emission factor of 5.7 lbs/p/yr. In summary, the comments questioned if any of the baseline per capita emission factors (6.7, 5.7, or 4.5 lbs/p/yr) published by EPA is based upon the best currently available data. These comments supported EPA's use of the most recent California Air Resources Board (CARB) survey data for deriving the best estimate of the post-control per capita emission factor to be realized from the promulgation of the District's, Maryland's and Virginia's rules modeled upon the Ozone Transport Commission's Model AIM coatings rule. These comments advocate the position that the CARB surveys provide the best available data under federal data quality criteria and asserts that the California pre-control total emissions should be similar on a per person basis to the rest of the country. The commenter examined the pre-control baseline used by CARB and assert that the baseline per capita emissions factor for VOC emissions from AIM coatings in California before controls should be 6.3 lbs/p/yr. The commenter states that this 6.3 lbs/p/yr factor is based upon CARB's data for VOC emissions from AIM coatings for the years 1975 through 2004. The comments note that the first significant AIM controls were not adopted in California until 1984, and, conclude that 1980 is an acceptable year to use as a baseline year. The comments state: California reports that in 1980, according to its surveys, there were 148,579,090 pounds of VOC emitted from AIM coatings; the population of California in 1980 according to the U.S. Census Bureau was 23,668,000 people, and thus this yields a pre-control baseline of 6.3 lbs/p/yr. The commenter therefore urges EPA to evaluate the benefits from the States' AIM coatings rules using a pre-control baseline of 6.3 lbs/p/yr.

We received a second set of comments supporting the States' analysis of the reduction credits from the States' AIM coatings rules but critical of EPA's reliance upon CARB data to determine a per capita emission factor after application of the States's AIM coatings rules. These comments assert that because California has had more restrictive VOC limits for architectural coatings for over a decade, VOC emissions for architectural and industrial maintenance coatings in California were already significantly lower than the States' pre-rule emissions.

Response: The States' Contingency Measures, ROP and Attainment Plans Are Still Approvable. EPA has considered both set of comments and analyzed the sufficiency of the contingency measures, ROP and attainment plans by considering the baseline emission factors and reduction calculation methodologies advocated by each set of comments, as well as the baseline emission factors and reduction calculation methodology contained in our January 5, 2005 TSD that was prepared for the January 12, 2005 (70 FR 2085) NPR.[31] EPA concludes that the contingency measures, ROP and attainment plans are approvable regardless of whether we use the baseline emission factor and reduction calculation methodology advocated by each set of comments, or whether we use the baseline emission factors and reduction calculation methodology contained in our January 5, 2005 TSD.

EPA has evaluated the effect that changing the 1990 per capita emission factor for the AIM coatings source category might have on the contingency measures implemented to address the failure of the Washington area to attain in 1999, the 1999–2005 ROP plans, and the attainment demonstration plans. EPA has determined that regardless of which of the 1990 per capita emission factors and reduction calculation methodologies—be it that advocated by the first set of comments, or that advocated by the second set of comments, or that found in our technical support for the January 12, 2005 (70 FR 2085) NPR—the States secure sufficient VOC reductions to meet the needs of the contingency

[31] ''Technical Support Document for Approval and Promulgation of Air Quality Implementation Plans; District of Columbia, Maryland, and Virginia; Post-1996 Rate-of-Progress Plan, Contingency Measures, Transportation Control Measures, 1990 Base Year Inventory Changes, and VMT Offset SIP for the Metropolitan Washington, DC Nonattainment Area,'' dated January 5, 2005.

measures plan for failure to attain in 1999, the 1999–2005 ROP plans or attainment plans. As noted in the January 12, 2005 NPR, the States computed that the reductions needed to address the 1999 failure to attain contingency requirement was at least 13.0 TPD.[32] Of these 13.0 TPD, 11.4 would be filled by the solvent cleaning and portable fuels containers rules. The States' AIM coatings rules would thus have to provide at least 1.6 TPD of reductions to ensure that the contingency plan is approvable. EPA has evaluated the effects that changing the 1990 per capita emission factor and reduction methodologies for the AIM coatings source category might have on the contingency plan for failure to attain by 1999. The States ascribed 12.3 tons per day reduction from the States' AIM coatings rules. EPA arrived at a value of over 16 tons per day using the 4.5 pounds per capita emission factor.[33] EPA concludes that the States' contingency plans are still approvable.

There is no effect on the approvability of the 1999–2005 ROP plans because any change in the 1990 per capita emission factor for the AIM coatings source category or the method to determine reduction from the States' AIM coatings rules will only affect VOC emission reductions. EPA proposed approval of the 1999–2005 ROP plans based solely upon a showing that the plans provided for a minimum 9 percent reduction in baseline NO_X emissions by the 2002 milestone and a further 9 percent by 2005. As discussed elsewhere in this document in response to comment, EPA is approving the 1999–2005 ROP plans based upon these NO_X reductions alone.

With respect to the demonstration of attainment, EPA evaluated the overall change in VOC emissions relative to 1990 base year emissions which would result from using the 4.5 or the 6.3 pounds per capita emission factor. The results were an overall relative reduction in VOC emissions of 45 percent in 1990 VOC emissions by 2005 from all sources (point plus area plus nonroad plus on-road). The States' credit claims corresponded to a projected overall 42.8 percent reduction in 1990 VOC emissions by 2005 from all sources (point plus area plus nonroad plus on-road). 70 FR at 6803, February 9, 2005. EPA concludes that the States' estimate of the overall relative reduction in VOC emissions is conservative relative to the use of either the 4.5 or the 6.3 emission factors. EPA concludes that using either baseline the States get at least the reductions they claimed and needed to demonstrate timely attainment, to meet the ROP requirements, and to provide for sufficient reduction for the contingency plan. EPA concludes that the issues raised in the comments do not change the approvability of the attainment plans.

After considering the comments received during the public comment period, EPA's analysis indicates that the reduction claims in the February 2004 SIP revisions are supported using the alternative per capita base line emission factors in the record in that the States' reduction claims are less than the other methods. EPA is neither approving nor disapproving the States' method nor promoting an alternative method. EPA's analysis in support of this rulemaking is to determine if any information received during the comment period would give cause for us to reconsider our proposed approval. Regardless of which of the baseline emission factors or methods that have been proffered by the commenters or by EPA is used to calculate VOC emission reductions for the States' AIM coatings rules, we have determined that the States' ROP, attainment and contingency measures plans for the Washington area demonstrate ROP, provide sufficient VOC reductions to satisfy the need for implemented contingency measures set by EPA's guidance and demonstrate attainment. Therefore, EPA is approving the States' SIP revisions.[34] Further details of EPA's analysis can be found in the supplemental TSD prepared for this final rule.[35]

A determination of the best baseline from which to estimate the reductions from the States' AIM rules is not essential for this final rule because, as stated earlier, regardless of whether those reductions are calculated as proposed by EPA or as advocated by either of the commenters, the States' ROP, attainment and contingency measures plans demonstrate ROP, provide sufficient VOC reductions to satisfy the need for implemented contingency measures, and demonstrate attainment.

However, EPA recognizes the need to resolve conclusively how to determine the amount of VOC emission reductions achieved from the implementation of AIM coatings rules in a given ozone nonattainment area. This remains an issue of concern to the states, the regulated sector, and other interested parties. Therefore, EPA intends to conduct a separate process to solicit further comment, information and recommendations from all interested parties as to how to determine the amount of VOC emission reductions achieved from the implementation of AIM coatings rules in a given ozone nonattainment area.

EPA's Policy on Changes in Inventory Methods. EPA is clarifying its proposal in the NPR (70 FR 2085) that EPA was not proposing that the District, Maryland and Virginia change the ROP plans to reflect a new 1990 per capita emission factor for the AIM source category prepared for this action, but rather intended to verify that the ROP plans were adequate without using the reduction methodology upon which the States relied.

EPA acknowledges that emissions factors, as well as inventory calculation methodologies, are continually being improved. In general, EPA has not required changes to submitted SIPs that result from changes in factors and methodologies that occur after the SIP is submitted. With respect to the 15 percent plan due in November 1993, in section 2.4 of ''Guidance on the Adjusted Base Year Emissions Inventory and the 1996 Target for 15 Percent Rate-of-Progress Plans'' (EPA–452/R–92–005) EPA stated: ''If other significant changes occur in emissions factors or methodologies before which time it is impossible for states to make adjustments to their 15 percent calculations and associated control strategies, then EPA may require states to make corrections to the base year emissions inventory, as well as to the adjusted base year inventory and the 1996 target level of emissions.'' This guidance discussed the then pending transition from the MOBILE4.1 model to the MOBILE5 model but only prospectively, by requiring that emissions values calculated using MOBILE4.1 would have to be recalculated using MOBILE5 before

[32] See Table 12. Contingency Measures in the NPR for this action (70 FR 2085 at 2096, January 12, 2005).

[33] The comments advocating the 6.3 pounds per capita emission factor did not advocate by what percentage this value would be reduced by the 1998 Federal AIM coatings rule, EPA assumed for the purposes of this analysis that the Federal AIM coatings rule would result in the same post-rule per capita emission factor.

[34] As noted elsewhere in this doucment, EPA is not approving Maryland's attainment plan for the Washington area but is making a finding that Maryland's attainment plan, in conjunction with those of the District and Virginia, contains control measures that ''fully satisfy the emission reduction requirements relevant to * * * attainment.''

[35] ''Supplement to the Technical Support Document for Approval and Promulgation of Air Quality Implementation Plans; District of Columbia, Maryland, Virginia; 1-Hour Ozone Attainment Plans, Rate-of-Progress Plans, Contingnecy Measures, Transportation Control Measures, VMT Offset, and 1990 Base Year Inventory,'' dated May 3, 2005.

submittal of the final ROP plans in November 1993.

Likewise with respect to the post-1996 ROP plans, EPA has advised the states when changes in emissions factors or in methodologies for developing emissions inventories would force revisions to the inventories or plans. Changes would be necessary if they occurred before the plan was submitted. ''However, if such changes occur after November 15, 1991, but prior to November 15, 1994, a serious or above area may be required to make corrections to the base year inventory and attainment year projection inventory for purposes of developing the 3 percent rate-of-progress demonstration. If such changes occur after November 15, 1994, EPA will advise on when it would be appropriate for the states to make corrections in future supplements to this General Preamble.'' 57 FR at 13517 (April 16, 1992). In the context of the guidance, ''November 15, 1994'' would mean the date by which the post-1996 plan was due. In the case of the Washington area, the 1996–1999 ROP plans were due on November 15, 1994 because the area was serious nonattainment area, and the 1999–2005 ROP plans were due by March 1, 2004, which was the date established in our final rule reclassifying the Washington area to severe nonattainment. *See* 68 FR 3410 at 3422, January 24, 2003.

From the States' perspective, the baseline per capita emission factor of 4.5 pounds per person per year (lbs/p/yr) for the AIM coatings source category could be seen as a change in factors and methodologies which occurred after the SIP is submitted. As for the 1996–1999 ROP plans, EPA notes that the plan was projected to have a surplus of 14 tons per day in VOC emission reductions. Nor did EPA propose that the States do so in the NPR (70 FR 2085) prepared for this action. Indeed, to require the States to revise completed plans every time a new emission factor or changed methodology is announced would lead to significant costs and potentially endless delays in the approval processes. In the case of the 1996–1999 ROP plans, any possible claim that EPA required a ''changed methodology'' would have to accept that the ''changed methodology'' came to light years after the 1996–1999 ROP plans were submitted. For the policy reasons stated previously, EPA has not required the States revise their 1996–1999 ROP plans for the Washington area.

Additional Response to the Second Set of Comments. EPA further believes that the second set of comments misstates the role CARB data played in the EPA's estimate of the OTC rule reduction. EPA used data from CARB to ascertain an end point for the OTC rule (post-OTC rule per capita emission factor) not a 1990 baseline factor. EPA did so in order to evaluate the States' reduction claims using methods other than those used by the States for the reasons stated in the January 12, 2005 (70 FR 2085) NPR.

IV. Comment Received on the Attainment Demonstration and EPA's Response

We received the following additional comments adverse to the proposed approval of the attainment plans. In addition to comments that are unique to the attainment plan (set forth in sections IV. A. and IV. B of this document), we also received a number of comments identical to those submitted in relation to the ROP plans, VMT Offset SIPs, and contingency measure plans, to which we responded in section III of this document. We have set forth in this section of this document each comment we received relevant to the attainment demonstrations and plans and respond separately to it even if that comment is identical to a comment to which we responded in section III. A summary of these additional adverse comments that we received on our proposed action to approve the attainment plans for the Washington area and our responses follows.

A. Comment on the Attainment Demonstration Modeling

Comment: We received a comment asserting that the SIP does not demonstrate attainment as required by the Act. The comment alleges that attainment is not demonstrated using photochemical grid modeling, or other analytical tool which EPA has determined to be at least as effective, that the WOE approach does not satisfy the CAA's requirement to assure attainment as expeditiously as practicable or the CAA's requirement for a modeled demonstration of attainment, that EPA provides no evidence that the core assumption underlying its WOE approach—*i.e.,* that ozone will be reduced in the same proportion as emissions—is valid. The comment alleges that such an assumption conflicts with EPA's own repeated findings that the relationship between ozone formation and precursor emissions is nonlinear, and cannot be accurately predicted by means other than photochemical grid models. The comment also asserts that the photochemical grid model used in the modeled demonstration of attainment and WOE analysis is not based upon a photochemical grid model that represents sound science and that meets current regulations and guidance. Therefore, the comment claims EPA cannot approve the WOE determination.

Response: Attainment Is Demonstrated Using Photochemical Grid Modeling, the Woe Approach Satisfies the Act Requirements. The photochemical grid modeling runs used in the pre-2001 SIP revisions' attainment plan are the same as those photochemical grid modeling runs used in the February 2004 SIP revisions which are the subject of this final rule. The WOE analytical methods and/or analyses that support the modeled demonstration of attainment in the February 2004 SIP revisions, which are the subject of this final rule, include the same WOE analytical methods and/or analyses that supported the modeled demonstration of attainment which were the subject of the April 17, 2003 final rule (68 FR 19106). In addition, as noted in section IV. A. 2. of the January 31, 2005 TSD prepared for the February 9, 2005 NPR (70 FR 6796) the States provided additional WOE in the form of the results of EPA's photochemical grid modeling performed for the Tier 2 final rule. *See,* sections VI. A. of ''Technical Support Document for Approval and Promulgation of Air Quality Implementation Plans; District of Columbia, Maryland, and Virginia; Attainment Demonstration for the Metropolitan Washington, DC Nonattainment Area,'' dated January 31, 2005.

EPA had received a comment from the same commenter alleging the same deficiencies of WOE for the same photochemical grid modeling runs and some of the same adjunct WOE analyses when EPA conditionally approved the pre-2001 SIP revisions' attainment plan. Specifically the commenter had alleged that photochemical grid modeling shows that the Washington area will not attain the ozone standard by the November 2005 attainment date and because the WOE analysis used by EPA to conclude that the Washington area has demonstrated attainment by November 2005 is not authorized by the Act or by EPA rules. The commenter had claimed that the modeling demonstration and WOE used in the attainment demonstration for the Washington area do not meet requirements of section 182(c) of the [Act] and EPA's own regulations for photochemical grid modeling and other analytical methods, that the WOE is an alternative method to photochemical grid modeling which has not been shown to be equally effective to the Urban Airshed Model (UAM), and that

WOE is a proscribed rollback method. *See* 68 FR 19106 at 19111/3, April 17, 2003.

The claim in the comment from the same commenter received during the public comment period for this rulemaking ''that ozone will be reduced in the same proportion as emissions'' merely restates the claim that the WOE approach relies upon '''proportional''' rollback. Likewise, the comment on this rulemaking assert that the modeled demonstration of attainment does not meet the CAA's requirement for a modeled demonstration of attainment or that attainment is not demonstrated using a photochemical grid model and that WOE does not demonstrate timely attainment simply restate, with less specificity, comment made by the same commenter on our April 17, 2003 final rule, 68 FR 19106. *See* 68 FR 5246, February 3, 2003.

EPA provided responses to these comments in our April 17, 2003 final rule (68 FR 19106) and incorporates our responses in the April 17, 2004 final rule by reference, particularly those in response to ''comment 1'' on pages 19111 to 19112 of the April 17, 2003 final rule. *See* 68 FR 19112–19115, April 17, 2003.

Furthermore, this commenter's assertions that EPA's use of photochemical grid modeling with an adjunct WOE analysis does not demonstrate timely attainment, violates statutory requirements of the Act and does not constitute a ''modeled demonstration of attainment,'' encompasses all those issues related to WOE that the commenter has restated in this rulemaking, and were briefed and litigated to conclusion in a suit brought by the commenter against EPA. *See Sierra Club* v. *EPA,* 356 F.3d at 304–07; *see also Initial Opening Brief of Petitioner Sierra Club,* Docket No. 03–1084 (June 23, 2003), pp. 25–37; *Final Reply Brief of Petitioner Sierra Club,* Docket No. 03–1084 (September 22, 2003), pp. 8–19. The Court of Appeals' decision upholding the very same photochemical grid modeling and WOE that is at issue herein (as resubmitted by the States and supplemented with an analysis of the effects of the Tier 2 rule that strengthened the conclusion of the WOE analysis), is binding on both EPA and the commenter. After extensively analyzing the record, the Court of Appeals resolved the commenter's claims in EPA's favor with respect to the Urban Airshed Model–IV (UAM–IV) and the WOE analysis, stating:

> ''[P]hotochemical modeling [using the UAM–IV] is the primary basis for the attainment demonstration,'' while the [WOE] ''is merely an adjunct for assessing the photochemical grid modeling. * * *'' [T]hat analysis was employed to ensure that the model achieved its statutory purpose: determining whether the SIPs actually ''provide for attainment of the ozone national ambient air quality standard by the applicable attainment date.'' 42 U.S.C. 7511a(c)(2)(A). And the adjustments appear well-suited to that end, as they do no more than correct for the model's over-prediction of ozone levels as compared to actual observations, and for its reliance on a base day that appears to be a statistical outlier. *See, Sierra Club* v. *EPA,* 356 F.3d at 306.

Res judicata bars re-litigation not only of matters determined in a previous litigation but also ones that a party could have raised. * * * Collateral estoppel further bars parties from re-litigating issues of law or fact resolved in prior cases between those parties. * * * (When a court determines an issue of fact or law that is actually litigated and necessary to its judgment, that conclusion binds the same parties in a subsequent action.).'' *Appalachian Power Co.* v. *EPA,* 251 F.3d 1026, 1033–34 (D.C. Cir. 2001) (internal citations and quotations omitted). While EPA believes that the commenter is precluded from re-litigating the binding holding of the court in *Sierra Club* v. *EPA* with respect to the validity of WOE analyses, EPA reiterates that, as articulated and explained in the April 17, 2004 final conditional approval rule at 68 FR 19112–19115, April 17, 2003, WOE in general as a supplement to photochemical grid modeling, and Washington Area WOE analysis in particular (as upheld by the Court of Appeals), is a valid tool for demonstrating attainment with the NAAQS. The Washington Area WOE analysis demonstrates that the Washington Area will timely attain the 1-hour ozone NAAQS for all the reasons previously explained in the April 17, 2004 final conditional approval.

EPA continues to believe that the commenter is wrong on the law, as EPA's use of WOE as an analytical adjunct to photochemical grid modeling has been successfully litigated to conclusion several times. Each time the Court of Appeals has upheld both EPA's interpretation of the Act to allow supplemental analysis to photochemical grid modeling to demonstrate attainment, and EPA's determination that each of the WOE analyses at issue, including the core of the WOE analysis at issue in the conditional approval and in this current rulemaking, was valid. *See* 356 F.3d at 304–07; *Environmental Defense* v. *EPA,* 369 F.3d 193, 203–07 (2d Cir. 2004); *BCCA Appeal Group* v. *EPA,* 348 F.3d 817, 203–09 (5th Cir. 2003). *Accord, 1000 Friends of Maryland* v. *Browner,* 265 F.3d 216, 234 (4th Cir. 2001).

The Amendments to Appendix W Do Not Preclude Use of UAM–IV. EPA disagrees that the use of the UAM–IV for photochemical grid modeling represents a reason to disapprove the attainment plan even though UAM–IV is no longer on the list of refined models that are preferred or recommended for use in regulatory applications. EPA notes that no other photochemical grid models for modeling urban areas are on the preferred list found in Appendix A to Appendix W to 40 CFR part 51, even though the Act reflects a clear preference, or, in the case of serious and worse areas, essentially mandates that a modeled demonstration of attainment be based on photochemical grid modeling. 42 U.S.C. 7511a(c)(2)(A); (j)(1)(B). All photochemical grid models for modeling ozone in urban areas are on EPA's list of alternative models which is now posted on the internet as opposed to being issued as Appendix B to Appendix W to 40 CFR part 51.

Nothing in the Appendices to 40 CFR part 51 indicate that EPA may no longer rely on UAM–IV modeling, or that other photochemical grid models are mandated for use in lieu of UAM–IV. The ''[s]imulation of ozone formation and transport is a highly *complex and resource intensive exercise.* Control agencies with jurisdiction over areas with ozone problems are *encouraged* to use photochemical grid models, such as the Models-3/Community Multi-scale Air Quality (CMAQ) modeling system * * * to evaluate the relationship between precursor species and ozone.'' *See* section 6.2.1.a. ''Choice of Models for Multi-source Applications'' in Appendix W to 40 CFR part 51 (emphases added); *see also* 68 FR at 18457–18458, April 15, 2003.

Explicitly, the ''[d]etermination of acceptability of a model *is a Regional Office responsibility.* Where the Regional Administrator finds that an alternative model is more appropriate than a preferred model, that model may be used subject to the recommendations of this subsection. This finding will *normally* result from a determination that (1) a preferred air quality model is not appropriate for the particular application; or (2) a more appropriate model or analytical procedure is available and applicable. (emphasis added). *See* section 3.2.2 in Appendix W to 40 CFR part 51. *See* 68 FR at 18452, April 15, 2003.

In this case, the States had submitted the pre-2001 SIP revisions' attainment plan which demonstrated that the States had sufficient measures in the SIP to demonstrate that the Washington area

would attain the 1-hour ozone NAAQS no later then November 15, 2005. EPA acknowledged that the SIP could not be fully approved at that time because the States had not demonstrated that all RACM had been adopted and the plan lacked certain other elements which we initially identified in our February 3, 2003 proposed conditional approval. *See* 68 FR 5246, February 3, 2003. All that adoption of additional rules as RACM would have done to the attainment plan would be to strengthen the WOE that the area would timely attain or advance the date by which the area would attain. Of the other elements noted as needing revision under the conditional approval, the only one which could possibly have implicated the modeling demonstration was a proposed condition that required the States to commit to revise and submit to the EPA by April 17, 2004, an updated attainment plan SIP that reflects revised MOBILE6-based MVEBs, including revisions to the attainment modeling and/or WOE demonstration, as necessary, to demonstrate that the SIP continues to demonstrate attainment by November 15, 2005. *See* 68 FR at 5253, 5258, 5260–5261, February 3, 2003. We included this condition in our April 17, 2003 (68 FR 19106) final rule conditionally approving the pre-2001 SIP revisions' attainment plan.

The States readily agreed to this condition because, in their pre-2001 SIP revisions' attainment plan, the States had included a commitment to revise the 2005 attainment MVEBs within one-year of the EPA's release of the MOBILE6 model. *See* 66 FR at 631–632 (regulatory text for 40 CFR 52.476(c), 52.1076(g) and 52.2428(d)), January 3, 2001. By the time we issued the April 17, 2003 conditional approval EPA had released the MOBILE6 model and its implementing guidance. That guidance does not mandate redoing the entire modeling demonstration due to a change in the MVEBs.[36] EPA reasonably believes that the Act does not mandate a revision to the photochemical grid modeling due to a change in the MVEBs, and, this interpretation has been upheld on review. *See 1000 Friends of Maryland* v. *Browner,* 265 F.3d 216 (4th Cir. 2001). EPA concludes that where MVEBs are changed the state must analyze the impacts of such change on the modeled attainment demonstration, but that the state need not rerun the entire model.

In this case EPA believes that disapproving the February 2004 SIP revisions based on alleged defects in the modeling demonstration for the reason cited in the comment would be arbitrary and capricious because in the February 3, 2003 notice of proposed rulemaking (68 FR 5246) EPA did not propose to require that the States redo the photochemical grid modeling. Because, as of February 3, 2003, the changes to Appendix W to 40 CFR part 51 had not been issued, only, proposed,[37] EPA believes that it would not have been appropriate to disapprove the SIP revisions in the April 17, 2003 final rule which was the final action issued pursuant to the February 3, 2003 NPR. We believe that it would not be appropriate to disapprove the SIP revisions now because the States have relied on the same photochemical grid modeling analysis for the February 2004 SIP revisions as they previously did.

In addition, the modeled demonstration of attainment does not depend solely upon the UAM–IV modeling results. The WOE contained in the February 2004 SIP revisions relied upon EPA's modeling conducted for the NO_X SIP call and the Tier 2 rulemaking. These modeling rules relied upon photochemical grid modeling that used the UAM–V and/or the CAM_x models. *See,* 63 FR 57356 at 57381, October 27, 1998; ''Technical Support Document for the Tier 2/Gasoline Sulfur Ozone Modeling Analyses,'' EPA420–R–99–031, December 1999. The UAM–V and the CAM_x models are among those listed on the replacement for what was formerly Appendix B of the Guideline on Air Quality Models (Appendix W to 40 CFR Part 51). ''The models listed in this section are: ADAM, ADMS, AFTOX, ASPEN, CAM_x, CMAQ, DEGADIS, HGSYSTEM, HOTMAC, HYROAD, OZIPR, OBODM, Panache, PLUVUEII, REMSAD, SCIPUFF, SDM, SLAB, UAM–V.'' (See *http://www.epa.gov/scram001/tt22.htm#altmod,* last checked April 6, 2005). For these reasons, EPA believes the Regional Administrator appropriately and reasonably exercised the discretion afforded by Appendix W to allow the continued use of the UAM–IV modeling results in this particular case.

Furthermore, the law is well established that res judicata bars re-litigation not only as to all matters actually determined in prior litigation, but also as to all matters *that might have been determined. See, e.g., Appalachian Power, supra*, at 1033–34; *Natural Resources Defense Council, Inc.* v. *Thomas*, 838 F.2d 1224, 1235 (D.C. Cir. 1988). EPA proposed to remove UAM–IV as obsolete on April 21, 2001. 65 FR 21506. EPA proposed the conditional approval based on WOE. *See* 68 FR 5246, February 3, 2003. As noted previously, EPA took final action to remove UAM–IV as obsolete on April 15, 2003, 68 FR 18440, two days before final action on the conditional approval, April 17, 2003. *See* 68 FR at 19121. The commenter did not raise the issue that UAM–IV was no longer a preferred model listed in Appendix A of Appendix W to 40 CFR 51 in its comments on the conditional approval, and in the subsequent litigation over that EPA action, although it could have, although the commenter had raised the general issue that the modeling demonstration and WOE used in the modeled demonstration of attainment for the Washington area did not meet requirements of section 182(c) of the Act and EPA's own regulations for photochemical grid modeling and other analytical methods.[38] *See* 68 FR at 19111, April 17, 2003. Res judicata would bar raising the UAM–IV claim now as it could have been litigated in the suit over EPA's conditional approval. Nevertheless, and without waiving its contention that res judicata and/or collateral estoppel bar litigation of the UAM–IV claim, for the reasons stated previously in this response, EPA believes: (1) The Regional Administrator appropriately and reasonably exercised the discretion afforded by Appendix W to allow the continued use of the UAM–IV modeling results in this particular case, (2) EPA's guidance is reasonable and is not a

[36] *See*, Joint memorandum dated January 18, 2002, From John S. Seitz, Director, Office of Air Quality Planning & Standards, and Margo Tsirigotis Oge, Director of Office of Transportation and Air Quality, ''Policy Guidance for the Use of MOBILE6 in SIP Development and Transportation Conformity.''

[37] The final rule amending Appendix W was signed on April 2, 2003, nearly two months after the proposed conditional approval.

[38] The fact that EPA had not finalized its proposed removal of UAM–IV as an approved model was no bar to raising this issue in the litigation over the Conditional Approval. Section 307(d)(7)(B) of the Act specifically allows, if certain conditions are met, for comment on a rule after the comment period was closed if ''it was impracticable to raise such objection within such time or if the grounds for such objection arose after the period for public comments (but within the time specified for judicial review. * * *'' Although EPA's proposal clearly demonstrated its intention to remove the UAM–IV as a preferred model three years prior to the opening of the comment period on the Conditional Approval, EPA's final action on the UAM–IV occurred just two days prior to the Conditional Approval, thereby arising within the time period specified by Section 307(d)(7)(B). Importantly, the commenter did not invoke this administrative reconsideration provision of the Act at the time of the conditional approval. Had the Court of Appeals not vacated and remanded the conditional approval for reasons entirely unrelated to the WOE analysis issue, the commenter would not have been afforded opportunity to attempt add to the record on WOE.

proportional rollback, (3) WOE and the photochemical grid modeling used to demonstrate attainment is consistent with the Act and EPA regulations.

B. Comment On the MVEBs

Comment: We received a comment that EPA cannot approve the MVEBs in the attainment plan SIP because the NO_X budgets are 70 tons per day higher than those in the previous attainment SIP budget for the same year. The comment claims that the MVEBs in the previous attainment plan were inadequate because that SIP did not demonstrate attainment with photochemical grid modeling as required by the Act and did not include all reasonably available transportation control measures. The comment asserts that because the MVEBs in the previous attainment plan were inadequate EPA cannot approve the NO_X MVEBs that are 70 tons per day higher and that EPA does not demonstrate, with photochemical grid modeling as required by the Act, how it can assure attainment in 2005 with such a major increase in allowable motor vehicle emissions.

Response: EPA disagrees with the comment that the MVEBs in the SIP revisions are inadequate. EPA had proposed to conditionally approve the previous attainment plan and in the alternative to disapprove the attainment plan with a protective finding that would allow the MVEBs to be used for transportation conformity purposes. Our proposed protective finding was based upon our conclusion that the pre-2001 SIP revisions' attainment plan, which were the subject to the February 3, 2003 notice of proposed rulemaking, had demonstrated that the Washington area will attain the 1-hour ozone NAAQS no later than November 15, 2005, by providing enough reductions with *adopted* measures to demonstrate attainment. *See* 68 FR at 5259, February 3, 2003. Our final conditional approval was granted on the basis that the pre-2001 SIP revisions' attainment plan did demonstrate attainment with photochemical grid modeling as required by the Act. We granted a conditional, rather than a full approval solely on the basis that the pre-2001 SIP revisions' attainment plan lacked some adopted measures required by an attainment plan for a severe ozone nonattainment area. *See* 68 FR 19106 (April 17, 2003). While the conditional approval itself was vacated, our determination that the modeled demonstration of attainment in the pre-2001 SIP revisions' attainment plan demonstrated attainment with photochemical grid modeling as required by the Act was specifically upheld. *Sierra Club* v. *EPA*, 356 F.3d at 304–307.

The conditional approval was predicated in part upon the States revising and submitting to the EPA by April 17, 2004, SIP revisions constituting an update to the attainment plan incorporating MOBILE6-based MVEBs. Further, the States would need to include in the submittal revisions to the attainment modeling and/or WOE demonstration, as necessary, to show that the SIP would continue to demonstrate attainment by November 15, 2005. *See* 68 FR at 5258, February 3, 2003.

EPA acknowledged at the time of the conditional approval the possibility that the MVEBs in the pre-2001 SIP revisions' attainment plan might not have included all RACM or all adopted transportation control strategies and TCMs to offset increases in emissions resulting from growth in VMT or numbers of vehicle trips and to obtain reductions in motor vehicle emissions as necessary (in combination with other emission reduction requirements) to comply with the CAA's ROP milestones and attainment demonstration requirements. We had conditioned approval of the pre-2001 SIP revisions' attainment plan upon the States adopting any remaining RACM and any required TCMs. *See* 68 FR at 19106–19107, 19129–19130 (April 17, 2004).

For the reasons outlined in our notices of proposed rulemakings, and in conjunction with response to comments elsewhere in this document, EPA has concluded that the SIP revisions now before us demonstrate that all RACM has been adopted and that the SIP contains all necessary transportation control strategies and TCMs to offset increases in emissions resulting from growth in VMT or numbers of vehicle trips and to obtain reductions in motor vehicle emissions as necessary (in combination with other emission reduction requirements) to demonstrate attainment and ROP.

EPA disagrees that the ''70'' ton per day increase from the mobile sector is the only relevant criterion for analyzing the impact of the MVEBs. MVEBs exist in the context of the attainment plan and do not in and of themselves determine whether an area will attain the NAAQS. MVEBs merely are the amount of motor vehicle emissions allowed by a control strategy SIP which consists of, among other things the estimated further reductions from adopted rules affecting all source categories including stationary and area sources in the States' SIPs or promulgated by EPA. A change in the MVEBs higher or lower cannot, in a vacuum, lead to a conclusion as to whether an area is still on track to attain the NAAQS. Rather, the MVEBs must be considered in context, as follows:

EPA first addressed the sufficiency of the attainment plan in our first round of rulemaking on the pre-2001 SIP revisions' attainment plan. *See* 68 FR at 5249 (February 3, 2003) (citing 64 FR 70460 (December 16, 1999); 66 FR 586 (January 3, 2001).

In the December 16, 1999 NPR we noted that the ''1998 SIP revisions'' did not contain adequate MVEBs.[39] In the December 16, 1999 (64 FR 70460), NPR, we also stated that:

> [A] motor vehicle emissions budget is the estimate of motor vehicle emissions in the attainment year that when considered with emissions from all other sources is consistent with attainment. The attainment demonstrations for the Washington area contain levels of modeled emissions that EPA concludes demonstrate attainment once transport from upwind areas is addressed. The basis for this conclusion will not be altered if the Washington area States can demonstrate that the level of nonattainment area emissions in 2005 is equal to or less than the 1999 control strategy levels contained in the attainment demonstrations considering growth. 64 FR at 70473.

In other words, we required the States to revise the MVEBs and to demonstrate that the SIP contained enough measures that when considered with the revised 2005 MVEBs, the overall emissions levels in 2005, taking into account growth through 2005, were less than or equal to the levels of emissions assumed in the photochemical grid modeling. In the TSD for the December 16, 1999 NPR we noted that the photochemical grid modeling performed for the area had assumed local emissions levels of 360 TPD of VOC emissions and over 500 TPD of NO_X emissions.[40] These were the local emissions levels the 1998 SIP revisions projected the Washington area would have by 1999. The pre-2001 SIP revisions' attainment plans were submitted to fulfill these and other prerequisites for approval proposed in

[39] The ''1998 SIP revisions'' are those submittals listed in Table 3 of this document which were submitted during calendar year 1998.

[40] ''Technical Support Document for the One-Hour Ozone Attainment Demonstrations submitted by the State of Maryland, Commonwealth of Virginia and the District of Columbia for the Metropolitan Washington, DC Ozone Nonattainment Area (DC039–2019, VA090–5036, MD073–3045),'' dated November 30, 1999. *See also*, ''Technical Support Document for Approval and Promulgation of Air Quality Implementation Plans; District of Columbia, Maryland, and Virginia; Post-1996 Rate-of-Progress Plan, Contingency Measures, Transportation Control Measures, 1990 Base Year Inventory Changes, and VMT Offset SIP for the Metropolitan Washington, DC Nonattainment Area,'' dated January 5, 2005.

the December 16, 1999 NPR. On January 3, 2001, we approved the pre-2001 SIP revisions' attainment plans.[41] In the TSD for that rulemaking, we concluded that the creditable measures upon which the pre-2001 SIP revisions' attainment plan relied were projected to achieve emissions levels of 356.7 TPD of VOC emissions and 403 TPD of NO_X emissions.[42] The pre-2001 SIP revisions' attainment plan contained MVEBs of 101.8 TPD of VOC emissions and 161.8 TPD of NO_X emissions. See 66 FR at 590, January 3, 2001. The pre-2001 SIP revisions' attainment plans were later conditionally approved on April 17, 2004, 68 FR 19106, one condition of the approval being that the States revise the budgets using the MOBILE6 model and revise, as necessary, the attainment modeling and/or WOE demonstration to show that the SIP continues to demonstrate attainment by November 15, 2005. In the TSD prepared for this final rule, EPA concluded that even with the higher MVEBs the SIP contained sufficient creditable measures applying to all source categories to achieve overall emissions levels in the Washington area of 331 TPD of VOC and 491 TPD of NO_X.[43] Even though the February 2004 SIP revisions contained the higher, 234.7 TPD of NO_X MVEBs (and lower motor vehicle VOC emissions budgets of 97.4 TPD) than the pre-2001 SIP revisions' attainment plan (101.8 TPD for VOC and 161.8 TPD for NO_X), the overall emissions levels from all sources of 331 TPD of VOC and 491 TPD of NO_X are still less than the levels used in the photochemical grid modeling. Because the overall VOC and NO_X emissions are less than both the 360 TPD of VOC and over 500 TPD of NO_X used in the photochemical grid modeling, EPA concludes that the 70 ton increase in the NO_X MVEB will not adversely impact the Washington area's ability to timely attain the one-hour ozone NAAQS.

Comment: We received a comment claiming that EPA cannot approve the MVEBs in the attainment plan because the attainment plan is based on a ''flawed WOE analysis'' and relies on an outdated photochemical model and thus the modeled demonstration of attainment does not accurately identify the mobile source budgets required to ensure timely attainment.

Response: EPA disagrees with the comment. As explained elsewhere in the response to comments portion of this document, EPA believes that the both WOE analysis and the photochemical grid model upon which the States relied meets the requirements of the Act, and EPA's regulations and guidance. Therefore, EPA believes that the MVEBs consistent with the attainment modeling would not be defective based upon any alleged defects in the modeling.

Comment: We received a comment asserting that the photochemical modeling runs for the modeled demonstration of attainment assumed motor vehicle NO_X emissions of 161.8 tons per day instead of the motor vehicle NO_X emissions budgets of 234.7 tons per day in the attainment plan. The comment states that because EPA has found that emissions projections determined using MOBILE6 are more accurate than the MOBILE5 values relied on in the photochemical grid modeling runs the States should have rerun the photochemical grid model with the MOBILE6 values. The comment contends that the demonstration of attainment is flawed because the demonstration assumes that 2005 ozone levels will be no different even though NO_X emissions will be more than 72 tons per day higher than assumed in the photochemical grid modeling runs and that because this conclusion of no increase in 2005 ozone levels is based not on photochemical grid modeling, but on the conclusion that ozone levels in 2005 will be determined not by actual 2005 emission levels but by the relative reduction in emissions between the baseline and 2005. The comment claims that this assumption is invalid because ozone levels do not respond in linear fashion to emission changes and claim that EPA does not demonstrate, with photochemical grid modeling as required by the Act, how it can assure attainment in 2005 with such a major increase in allowable motor vehicle emissions. The comment further alleges that this approach would allow any absolute increase in projected 2005 emissions over the level used in the photochemical grid modeling, as long as the ''relative increase over baseline emissions is the same or less.''

Response: EPA disagrees with the comment because the comment assume that in this case the overall emissions levels in the Washington area in 2005 will be higher than those assumed in the photochemical grid modeling for the attainment year because the MVEB for NO_X will be higher.

We have noted previously that the photochemical grid modeling performed for the area had assumed local emissions levels of 360 TPD of VOC emissions and over 500 TPD of NO_X emissions in the attainment year. In the TSD prepared for the February 9, 2005 NPR (which is the notice of proposed rulemaking published for this final rule), EPA concluded that even with the higher MVEBs the SIP would contain sufficient creditable measures applicable to all source categories to achieve emissions levels in the Washington area of 331 TPD of VOC and 491 TPD of NO_X.[44] Even though the February 2004 SIP revisions contained the higher 234.7 TPD NO_X, MVEB (and a lower VOC MVEB of 97.4 TPD) than the pre-2001 SIP revisions' attainment plan (101.8 TPD for VOC and 161.8 TPD for NO_X), the overall emissions levels of 331 TPD of VOC and 491 TPD of NO_X are still less than the levels assumed in the photochemical grid modeling. Therefore in the attainment year, notwithstanding an increase in mobile source NO_X emissions, there is a decrease in overall emissions in the attainment year, not an increase as implied by the commenter.

The comment that EPA's policy would allow any absolute increase in projected 2005 emissions over the level used in the photochemical grid modeling, as long as the ''relative increase over baseline emissions is the same or less,'' is irrelevant because as discussed in the preceding paragraph the overall emissions levels for the Washington area in 2005 are projected to be less than the overall levels assumed in the photochemical grid modeling used in the demonstration of attainment. That is, the February 2004 SIP revisions achieve emissions levels less than that assumed in the photochemical grid modeling for the attainment year and a greater relative emissions reduction between the 1990 baseline and 2005 attainment year. The

[41] That rule was vacated by the Court of Appeals for reasons unrelated to the adequacy of the modeled demonstration of attainment. *See Sierra Club* v. *Whitman*, 294 F.3d at 163.

[42] Table II—Summary of Creditable Measures in ''Supplement to Technical Support Document for the One-Hour Ozone Attainment Demonstrations, Attainment Date Extension and Post-1996 Rate-of-Progress Plans submitted by the State of Maryland, Commonwealth of Virginia and the District of Columbia for the Metropolitan Washington, DC Ozone Nonattainment Area and Commitment to Revise Motor Vehicle Budgets for the Metropolitan Washington, DC Ozone Nonattainment Area (DC–2025, VA–5052, MD–3064),'' dated December 15, 2000.

[43] Table IV. F–1 Relative Reductions on page A–27 of ''Technical Support Document for Approval and Promulgation of Air Quality Implementation Plans; District of Columbia, Maryland, and Virginia; Attainment Demonstration for the Metropolitan Washington, DC Nonattainment Area,'' dated January 31, 2005.

[44] Table IV. F–1 Relative Reductions on page A–27 of ''Technical Support Document for Approval and Promulgation of Air Quality Implementation Plans; District of Columbia, Maryland, and Virginia; Attainment Demonstration for the Metropolitan Washington, DC Nonattainment Area,'' dated January 31, 2005.

photochemical grid modeling for the Washington area shows that VOC and NO_X reductions, along or in combination, that go beyond those assumed in the attainment year will result in additional reduction in ozone concentrations. While ozone may not respond linearly to reductions, the photochemical grid modeling for this area indicates that ozone concentration does respond directionally to a reduction in ozone precursors (a decrease in the ozone precursors VOC and NO_X will result in a decrease, not an increase in ozone concentration, albeit not necessarily a proportional decrease). Therefore the demonstration that this SIP will result in emissions levels of ozone precursors at levels less than that assumed in the photochemical grid modeling for the attainment year, along with a showing of a greater relative emissions reduction, only adds to the WOE that attainment is demonstrated.

EPA also believes that an upward revision of the MVEBs, which is more than offset by other emissions reductions from other source categories, does not mandate a new photochemical grid modeling demonstration. EPA believes that, if an ozone attainment plan relied on changes in emissions from the base year to an attainment or maintenance year inventory to estimate via photochemical grid modeling the relative changes in monitored ozone levels, that the attainment plan SIP revision with revised MVEBs continues to demonstrate attainment of the ozone NAAQS showing that the relative emission reductions between the base year and the attainment are the same or greater using MOBILE6 than they were using MOBILE5, and that projected emissions levels for the attainment year are lower than those assumed in the modeling demonstration. The Washington area attainment plan relies upon the use of the photochemical modeling results in a relative manner, and, the attainment plan shows a greater relative emission reduction with the MOBILE6-based base year and attainment year MVEBs. *See,* Joint Memorandum dated January 18, 2002, From John S. Seitz, Director, Office of Air Quality Planning & Standards, and Margo Tsirigotis Oge, Director of Office of Transportation and Air Quality, ''Policy Guidance for the Use of MOBILE6 in SIP Development and Transportation Conformity.'' EPA has reasonably interpreted the Act not to require new photochemical grid modeling for every revision of a SIP. While section 182(c)(2)(A) requires demonstrations of attainment for serious and above areas be based upon photochemical grid modeling (or something equivalent), the Act only establishes a time frame for the initial submittal of the attainment demonstration and does not explicitly require new modeling in connection with every SIP revision. The Act simply requires that the demonstration of attainment be based upon photochemical grid modeling and demonstrate attainment of the ozone NAAQS. *See 1000 Friends of Maryland* v. *Browner,* 265 F.3d 216 (4th Cir. 2001) (''Nothing in [section 182(c)(2)(A)] prohibits the use of previously performed modeling if that modeling can show that the plan as revised will allow the area to reach attainment'').

Comment: We received a comment asserting that photochemical grid modeling runs and WOE analysis relied on by EPA in its 2001 approval of the attainment plan assumed that motor vehicle NO_X emissions would be 161.8 tons per day and that neither EPA nor the States ever proclaimed that were any surplus emission reductions under that scenario. The comment contends that the photochemical grid modeling runs showed continued nonattainment even with motor vehicle emissions at that level and therefore EPA cannot find that motor vehicle NO_X emissions more than 72 tons per day higher than those assumed in the photochemical grid modeling runs are consistent with timely attainment.

Response: As discussed elsewhere in this document in section IV. A. ''Comment on the Attainment Demonstration Modeling,'' EPA disagrees that the photochemical grid modeling runs showed continued nonattainment even with motor vehicle NO_X emissions at 161.8 TPD. This issue has previously been litigated by the commenter and conclusively decided in EPA's favor. *See Sierra Club* v. *EPA,* 356 F.3d at 304–307. As noted in our response to previous comments on the MVEBs, EPA has concluded that the MVEBs must be analyzed in the context of the entire SIP, and in that context EPA even with the higher MVEBs the SIP contains sufficient creditable measures applicable to all source categories to achieve overall emissions levels consistent with attainment in a demonstration based on the submitted photochemical grid modeling.

C. Comment on the ROP Plans and NO_X Substitution

Comment: We received a comment asserting the ROP plans do not meet the requirements to demonstrate a nine percent reduction in VOC emissions from 1999 to 2002 and a further nine percent from 2002 to 2005 because the NO_X substitution in the ROP plans is impermissible. The comment asserts that the plan does not meet section 182(c)(2)(c) of the Act because the plan does not show that a nine percent reduction in NO_X emissions will result in the same reduction in ozone concentration as a nine percent reduction in VOC emissions. The comment asserts that EPA's reliance on our December 1993 NO_X Substitution Guidance is flawed because the plain language of the Act requires proof of actual equivalent benefits of NO_X substitution.

The comment also asserts that because the ROP plans for each of the 1999 to 2005 periods rely solely upon NO_X reductions the plans do not meet the requirement of section 182(c)(2)(C) because the plan does not provide for some percentage of VOC reduction during each period. The comment claims that the Act requires some non-zero percentage reduction in VOC emissions for any ROP period. Finally, the comment asserts that the Act requires the ROP plan to have VOC reductions by November 15, 2002 to prevent a net increase in VOC emissions by the 2002 milestone date, which would offset the progress achieved by the nine percent NO_X reductions. The comment notes that the plan provides for such reductions but asserts that EPA cannot approve the ROP plans because the plan does not provide for all of these reductions by the 2002 milestone date.

Response: EPA disagrees with the comment and incorporates by reference the response found in section III. A. ''Comment on the ROP plans and NO_X Substitution'' of this document.

D. Comment on the Transportation Demand Model (TDM) Used in the Plans

Comment: We received a comment asserting that the TDM used to project the mobile source emissions does not properly predict traffic volumes in the Washington area on roadways. The comment alleges that the inaccuracies are significant enough that the results cannot form a basis for predicting future motor vehicle emissions or the emission cuts needed to demonstrate attainment of the 1-hour ozone NAAQS by November 15, 2005.

Response: EPA disagrees with the comment and incorporates by reference the response found in section III. B. ''Comment on the Transportation Demand Model (TDM) Used in the plans'' of the this document.

E. Comment on the VMT Offset SIP

Comment: We received a comment asserting that the SIP revisions are

deficient because they do not contain sufficient transportation control measures (TCMs) to offset growth in emissions from growth in vehicle miles traveled (VMT) or in trip numbers. The comment alleges that the Act requires that the SIP offset any growth in emissions due to growth in VMT or in trip numbers not a showing that overall motor vehicle emissions are expected to decline.

Response: EPA disagrees with the comment and incorporates by reference the response found in section III. C. ''Comment on the VMT Offset SIP'' of this document.

F. Comment on the Contingency Measures Plans

Comment 1: We received a comment asserting that EPA cannot approve the contingency measures which were identified in the SIP revisions to address the Washington area's failure to attain by November 15, 1999. The comment claims that, because these measures in the plan required further action by the States, these contingency measures do not meet the CAA's requirement that the measures take effect without further action by the State or EPA after the failure to attain. The comment also claims the contingency measures do not meet EPA's own guidance which requires contingency measures to achieve reductions no later than the year after the one in which the failure is identified because these contingency measures identified by the SIP revision were not implemented until 5 to 6 years after the failure to attain.

Response 1: EPA disagrees with the comment and incorporates by reference the response to the comment labeled ''comment 1'' found in section III. D. ''Comment on the Contingency Measures Plans'' of this document.

Comment 2: We received a comment asserting that the contingency plan for 2005 cannot rely on measures already adopted and in place or to be in place before the 2005 attainment and ROP deadline. The comment claims that the Act requires that contingency measures must be additional measures that will be triggered by the attainment or milestone failure, that is, the Act provision is prospective, not retrospective.

Response 2: EPA disagrees with the comment and incorporates by reference the response to the comment labeled ''comment 2'' found in section III. D. ''Comment on the Contingency Measures Plans'' of this document.

Comment 3: We received a comment that the Act requires a set of contingency measures to address any failure to meet ROP requirements for the 2002–2005 period, that is separate from those required for failure to attain. The comment claims that the requirement for contingency measures to address post-1996 milestone failures is explicitly set out in the Act as an additional mandate in addition to the requirement for contingency measures to address attainment failures. The comment further claims that the 2005 ROP deadline here could precede the attainment date if, in the case of an area which qualifies for one or both of the 1-year attainment date extensions allowed by the Act.

Response 3: EPA disagrees with the comment and incorporates by reference the response to the comment labeled ''comment 3'' found in section III. D. ''Comment on the Contingency Measures Plans'' of this document.

Comment 4: We received a comment asserting that the contingency plan does not meet EPA's guidance because the plan does not contain a commitment for timely adoption of additional measures if the 3 percent contingency plan is not adequate to correct a failure to attain or achieve an ROP milestone.

Response 4: EPA disagrees with the comment and incorporates by reference the response to the comment labeled ''comment 4'' found in section III. D. ''Comment on the Contingency Measures Plans'' of this document.

Comment 5: We received a comment asserting that the contingency plan must contain some NO_X reductions since the ROP and attainment plans rely upon NO_X reductions as well as VOC reductions.

Response 5: EPA disagrees with the comment and incorporates by reference the response to the comment labeled ''comment 5'' found in section III. D. ''Comment on the Contingency Measures Plans'' of this document.

Comment 6: We received a comment alleging that all of the emission reductions from the continency measures are not ''surplus'' because neither EPA nor the States have quantified the total VOC and NO_X reductions needed to attain by November 15, 2005. The comment further claims that the use of a WOE approach in the modeled demonstration of attainment is incapable of identifying the precise level of emission reductions needed for attainment and thus does not support the a claim that there are ''surplus'' reductions in the SIP that can be used for ''contingency'' purposes.

Response 6: EPA disagrees with the comment and incorporates by reference the response to the comment labeled ''comment 6'' found in section III. D. ''Comment on the Contingency Measures Plans'' of this document.

Comment 7: We received a comment asserting that the SIP cannot rely on the reformulated gasoline program (RFG program) as a ''contingency'' measure to address the area's failure to attain by 1999, because the RFG program became mandated by the Act once the Washington area missed the 1999 attainment deadline. The comment claims that contingency measures are measures in addition to those mandated by the Act. The comment also claims that RFG was never intended as a contingency measure and, thus, contrary to EPA's assertion, it is hardly a ''penalty'' to the nonattainment area to disallow contingency credit for a measure that was never intended as a contingency measure, and that was implemented at a time when the area was already years behind schedule in adopting adequate ROP and attainment plans. The comment further asserts that if the RFG program is a permissible contingency measure the agency's guidance would obligate the states to ''backfill'' the measure with one year assuring equivalent reductions and that the states have not done so.

Response 7: EPA incorporates by reference the response to the comment labeled ''comment 7'' found in section III. D. ''Comment on the Contingency Measures Plans'' of this document.

G. Comment on Protective Finding

We also received comment adverse to issuing a protective finding in concert with a disapproval of the Maryland attainment plan. Because we are not issuing a protective finding in this final rule, we do not address this comment in this document. Our response to these comment adverse to issuing a protective finding are addressed in the final rule disapproving Maryland's attainment plan with a protective finding that is published elsewhere in today's **Federal Register**.

V. Other Matters

In 1995, Virginia adopted legislation that provides, subject to certain conditions, for an environmental assessment (audit) ''privilege'' for voluntary compliance evaluations performed by a regulated entity. The legislation further addresses the relative burden of proof for parties either asserting the privilege or seeking disclosure of documents for which the privilege is claimed. Virginia's legislation also provides, subject to certain conditions, for a penalty waiver for violations of environmental laws when a regulated entity discovers such violations pursuant to a voluntary compliance evaluation and voluntarily discloses such violations to the

Commonwealth and takes prompt and appropriate measures to remedy the violations. Virginia's Voluntary Environmental Assessment Privilege Law, Va. Code Sec. 10.1–1198, provides a privilege that protects from disclosure documents and information about the content of those documents that are the product of a voluntary environmental assessment. The Privilege Law does not extend to documents or information (1) that are generated or developed before the commencement of a voluntary environmental assessment; (2) that are prepared independently of the assessment process; (3) that demonstrate a clear, imminent and substantial danger to the public health or environment; or (4) that are required by law.

On January 12, 1998, the Commonwealth of Virginia Office of the Attorney General provided a legal opinion that states that the Privilege law, Va. Code Sec. 10.1–1198, precludes granting a privilege to documents and information ''required by law,'' including documents and information ''required by Federal law to maintain program delegation, authorization or approval,'' since Virginia must ''enforce Federally authorized environmental programs in a manner that is no less stringent than their Federal counterparts. * * *'' The opinion concludes that ''[r]egarding [section] 10.1–1198, therefore, documents or other information needed for civil or criminal enforcement under one of these programs could not be privileged because such documents and information are essential to pursuing enforcement in a manner required by Federal law to maintain program delegation, authorization or approval.''

Virginia's Immunity law, Va. Code Sec. 10.1–1199, provides that ''[t]o the extent consistent with requirements imposed by Federal law,'' any person making a voluntary disclosure of information to a state agency regarding a violation of an environmental statute, regulation, permit, or administrative order is granted immunity from administrative or civil penalty. The Attorney General's January 12, 1998 opinion states that the quoted language renders this statute inapplicable to enforcement of any Federally authorized programs, since ''no immunity could be afforded from administrative, civil, or criminal penalties because granting such immunity would not be consistent with Federal law, which is one of the criteria for immunity.''

Therefore, EPA has determined that Virginia's Privilege and Immunity statutes will not preclude the Commonwealth from enforcing its program consistent with the Federal requirements. In any event, because EPA has also determined that a state audit privilege and immunity law can affect only state enforcement and cannot have any impact on Federal enforcement authorities, EPA may at any time invoke its authority under the Clean Air Act, including, for example, sections 113, 167, 205, 211 or 213, to enforce the requirements or prohibitions of the state plan, independently of any state enforcement effort. In addition, citizen enforcement under section 304 of the Clean Air Act is likewise unaffected by this, or any, state audit privilege or immunity law.

VI. Final Actions

A. The District of Columbia—1996–1999 ROP Plan

EPA is approving as a revision to the District's SIP the District of Columbia's 1996–1999 ROP plan SIP revision for the Washington area which was submitted on November 3, 1997, as supplemented on May 25, 1999. EPA is approving the 1999 MVEBs of 128.5 tons per day of VOC and 196.4 tons per day of NO_X established and identified in the Post 1996–1999 ROP plan.

B. The District of Columbia—1990 Base Year Inventory Revisions

EPA is approving as a revision to the District's SIP the revision to the 1990 Base Year Emissions Inventory submitted by the District of Columbia on September 5, 2003 as supplemented on February 25, 2004.

C. The District of Columbia—Post 1999–2005 Rate-of-Progress Plan and TCMs

EPA is approving as a revision to the District's SIP the District of Columbia's post 1999–2005 ROP plan SIP revision for the Washington area which was submitted on September 5, 2003 as supplemented on February 25, 2004 and the TCMs in Appendix J of the February 25, 2004 submittal. EPA is approving the 2002 MVEBs of 125.2 tons per day for VOC and 290.3 tons per day of NO_X and the 2005 MVEBs of 97.4 tons per day for VOC and 234.7 tons per day of NO_X established and identified in the Post 1999–2005 ROP Plan.

D. The District of Columbia—VMT Offset SIP

EPA is approving as a revision to the District's SIP the District of Columbia VMT Offset SIP revision for the Washington area which was submitted on September 5, 2003, as supplemented on February 25, 2004.

E. The District of Columbia—Contingency Measure Plan

EPA is approving as a revision to the District's SIP the District of Columbia's contingency measure plan SIP revision for the Washington area which was submitted on September 5, 2003, as supplemented on February 25, 2004.

F. The District of Columbia—Attainment Demonstration and Plan

EPA is approving as a revision to the District's SIP the modeled demonstration of attainment and adjunct WOE analyses that the Washington area will attain the 1-hour ozone NAAQS by November 15, 2005 and the District's 1-hour ozone attainment plan for the Washington area both of which were submitted on September 5, 2003 as supplemented on February 25, 2004. EPA is approving the 2005 MVEBs of 97.4 tons per day for VOC and 234.7 tons per day of NO_X established and identified in the attainment plan.

G. Maryland—Post 1996–1999 Rate-of-Progress Plan and TCMs

EPA is approving as a revision to the State of Maryland's SIP Maryland's post 1996–1999 ROP plan SIP revision for the Washington area which was submitted on December 24, 1997, as supplemented on May 20, 1999, and the TCMs in Appendix H of the May 20, 1999 submittal. EPA is approving the 1999 MVEBs of 128.5 tons per day of VOC and 196.4 tons per day of NO_X established and identified in the Post 1996–1999 ROP plan.

H. Maryland—1990 Base Year Inventory Revisions

EPA is approving as a revision to the State of Maryland's SIP the revision to the 1990 Base Year Emissions Inventory submitted by Maryland on September 2, 2003 as supplemented on February 24, 2004.

I. Maryland—Post 1999–2005 Rate-of-Progress Plan and TCMs

EPA is approving as a revision to the State of Maryland's SIP Maryland's post 1999–2005 ROP plan SIP revision for the Washington area which was submitted on September 2, 2003 as supplemented on February 24, 2004 and the TCMs in Appendix J of the February 24, 2004 submittal. EPA is approving the 2002 MVEBs of 125.2 tons per day for VOC and 290.3 tons per day of NO_X and the 2005 MVEBs of 97.4 tons per day for VOC and 234.7 tons per day of NO_X established and identified in the Post 1999–2005 ROP Plan.

J. Maryland—VMT Offset SIP

EPA is approving as a revision to the State of Maryland's SIP Maryland's VMT Offset SIP revision for the Washington area which was submitted on September 2, 2003 as supplemented on February 24, 2004

K. Maryland—Contingency Measure Plan

EPA is approving as a revision to the State of Maryland's SIP Maryland's contingency measure plan SIP revision for the Washington area which was submitted on September 3, 2003, as supplemented on February 24, 2004.

L. Maryland—Modeled Demonstration of Attainment and Determination That Maryland's Submitted SIP Contains Measures That Fully Satisfy the Emission Reduction Requirements Relevant to Attainment

EPA is approving as a revision to the State of Maryland's SIP the modeled demonstration of attainment and adjunct WOE analyses that the Washington area will attain the 1-hour ozone NAAQS by November 15, 2005, which was submitted on September 2, 2003 as supplemented on February 24, 2004. EPA is issuing a determination that Maryland's submitted SIP for the Washington area contains adopted control measures that fully satisfy the emission reduction requirements relevant to attainment of the 1-hour ozone NAAQS in the Washington area by November 15, 2005.

M. Virginia—Post 1996–1999 Rate-of-Progress Plan and TCMs

EPA is approving as a revision to the Commonwealth of Virginia's SIP Virginia's post 1996–1999 ROP plan SIP revision for the Washington area which was submitted on December 29, 1997, as supplemented on May 25, 1999, and the TCMs in Appendix H of the May 25, 1999 submittal. EPA is approving the 1999 MVEBs of 128.5 tons per day of VOC and 196.4 tons per day of NO_X established and identified in the Post 1996–1999 ROP plan.

N. Virginia—1990 Base Year Inventory Revisions

EPA is approving as a revision to the Commonwealth of Virginia's SIP Virginia's revision to the 1990 Base Year Emissions Inventory which was submitted on August 19, 2003 as supplemented on February 25, 2004.

O. Virginia—Post 1999–2005 Rate-of-Progress Plan and TCMs

EPA is approving as a revision to the Commonwealth of Virginia's SIP Virginia's post 1999–2005 ROP plan SIP revision for the Washington area which was submitted on August 19, 2003 as supplemented on February 25, 2004 and the TCMs in Appendix J of the February 25, 2004 submittal. EPA is approving the 2002 MVEBs of 125.2 tons per day for VOC and 290.3 tons per day of NO_X and the 2005 MVEBs of 97.4 tons per day for VOC and 234.7 tons per day of NO_X established and identified in the Post 1999–2005 ROP Plan.

P. Virginia—VMT Offset SIP

EPA is approving as a revision to the Commonwealth of Virginia's SIP Virginia's VMT Offset SIP revision for the Washington area which was submitted on August 19, 2003, as supplemented on February 25, 2004.

Q. Virginia—Contingency Measure Plan

EPA is approving as a revision to the Commonwealth of Virginia's SIP Virginia's contingency measure plan SIP revision for the Washington area which was submitted on August 19, 2003, as supplemented on February 25, 2004.

R. Virginia—Attainment Demonstration and Plan

EPA is approving as a revision to the Commonwealth of Virginia's SIP the modeled demonstration of attainment and adjunct WOE analyses that the Washington area will attain the 1-hour ozone NAAQS by November 15, 2005 and Virginia's SIP Virginia's 1-hour ozone attainment plan for the Washington area both of which were submitted on August 19, 2003 as supplemented on February 25, 2004. EPA is approving the 2005 MVEBs of 97.4 tons per day for VOC and 234.7 tons per day of NO_X established and identified in the attainment plan.

VII. Statutory and Executive Order Reviews

A. General Requirements

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

B. Submission to Congress and the Comptroller General

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**. This rule is not a ''major rule'' as defined by 5 U.S.C. 804(2).

C. Petitions for Judicial Review

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 July 12, 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 to approve the District's and Virginia's base year inventory revision, ROP, VMT Offset, contingency measure and attainment plans, MVEBs and TCMs, Maryland's base year inventory revision, TCMs, and ROP, VMT Offset and contingency measure plan, and Maryland's modeled demonstration of attainment and demonstration that its submitted SIP for the Washington area contains adopted control measures that fully satisfy the emissions reductions requirements relevant to attainment of the 1-hour ozone NAAQS may not be challenged later in proceedings to enforce its requirements. (See section 307(b)(2).)

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Intergovernmental relations, Nitrogen dioxide, Ozone, Volatile organic compounds.

Dated: May 3, 2005.

Donald S. Welsh,

Regional Administrator, Region III.

■ 40 CFR part 52 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 J—District of Columbia

■ 2. In § 52.470, the table in paragraph (e) is amended by adding at the end of the table, the entries for 1996–1999 Rate-of-Progress Plan, 1990 Base Year Inventory Revisions, Post 1999–2005 Rate-of-Progress Plan and Transportation Control Measures (TCMs) in Appendix J, VMT Offset SIP, Contingency Measure Plan and 1-hour Ozone Modeled Demonstration of Attainment and Attainment Plan to read as follows:

§ 52.470 Identification of plan.

* * * * *

(e) * * *

Name of non-regulatory SIP revision	Applicable geographic or non-attainment area	State submittal date	EPA approval date	Additional explanation
* *	*	*	* *	*
1996–1999 Rate-of-Progress plan SIP.	Washington 1-hour ozone nonattainment.	11/3/1997, 5/25/1999	5/13/05 ..... [Insert page number where the document begins].	1999 motor vehicle emissions budgets of 128.5 tons per day (tpy) of VOC and 196.4 tpy of NO_X.
1990 Base Year inventory Revisions,.	Washington 1-hour ozone nonattainment area.	9/5/2003, 2/25/2004	5/13/05 ..... [Insert page number where the document begins].	
1999–2005 Rate-of-Progress Plan SIP Revision and the Transportation Control Measures (TCMs) in Appendix J.	Washington 1-hour ozone nonattainment area.	9/5/2003, 2/25/2004	5/13/05 ..... [Insert page number where the document begins].	Only the TCMs in Appendix J of the 2/25/2004 revision, 2002 motor vehicle emissions budgets (MVEBs) of 125.2 tons per day (tpy) for VOC and 290.3 tpy of NO_X, and, 2005 MvEBs of 97.4 tpy for VOC and 234.7 tpy of NO_X.
VMT Offset SIP Revision	Washington 1-hour ozone nonattainment area.	9/5/2003, 2/25/2004	5/13/05 ..... [Insert page number where the document begins].	
Contingency Measure Plan	Washington 1-hour ozone nonattainment area.	9/5/2003, 2/25/2004	5/13/05 ..... [Insert page number where the document begins].	
1-hour Ozone Modeled Demonstration of Attainment and Attainment Plan.	Washington 1-hour ozone nonattainment area.	9/5/2003, 2/25/2004	5/13/05 ..... [Insert page number where the document begins].	2005 motor vehicle emissions budgets of 97.4 tons per day (tpy) for VOC and 234.7 tpy of NO_X.

Subpart V—Maryland

■ 3. In § 52.1070, the table in paragraph (e) is amended by adding at the end of the table, the entries for 1996–1999 Rate-of-Progress Plan and Transportation Control Measures (TCMs) in Appendix H, 1990 Base Year Inventory Revisions, Post 1999–2005 Rate-of-Progress Plan and Transportation Control Measures (TCMs) in Appendix J, VMT Offset SIP, Contingency Measure Plan and Modeled Demonstration of Attainment to read as follows:

§ 52.1070 Identification of plan.

* * * * *

(e)* * *

Name of non-regulatory SIP revision	Applicable geographic or non-attainment area	State submittal date	EPA approval date	Additional explanation
* *	*	*	*	* *
1996–1999 Rate-of-Progress Plan SIP and the Transportation Control Measures (TCMs) in Appendix H.	Washington DC 1-hour ozone nonattainment area.	12/20/1997, 5/20/1999	5/13/05 ..... [Insert page number where the document begins].	Only the TCMs in Appendix H of the 5/20/1999 revision, 1999 motor vehicle emissions budgets of 128.5 tons per day (tpy) of VOC and 196.4 tpy of NO_X.
1990 Base Year Inventory Revisions.	Washington DC 1-hour ozone nonattainment area.	9/2/2003, 2/24/2004	5/13/05 ..... [Insert page number where the document begins].	
1999–2005 Rate-of-Progress Plan SIP Revision and the Transportation Control Measures (TCMs) in Appendix J.	Washington DC 1-hour ozone nonattainment area.	9/2/2003, 2/24/2004	5/13/05 ..... [Insert page number where the document begins].	Only the TCMs in Appendix J of the 2/24/2004 revision, 2002 motor vehicle emissions budgets (MVEBs) of 125.2 tons per day (tpy) for VOC and 290.3 tpy of NO_X, and, 2005 MVEBs of 97.4 tpy for VOC and 234.7 tpy of NO_X.
VMT Offset SIP Revision	Washington DC 1-hour ozone nonattainment area.	9/2/2003, 2/24/2004	5/13/05 ..... [Insert page number where the document begins].	
Contingency Measure Plan	Washington, DC Area	9/2/2003, 2/24/2004	5/13/05 ..... [Insert page number where the document begins].	
1-hour Ozone Modeled Demonstration of Attainment.	Washington DC 1-hour ozone nonattainment area.	9/2/2003, 2/24/2004	5/13/05 ..... [Insert page number where the document begins].	

■ 4. Section 52.1073 is revised by adding paragraph (f) to read as follows:

§ 52.1073 Approval status.

* * * * *

(f) EPA is issuing a determination that Maryland's submitted SIP for the Washington area contains adopted control measures that fully satisfy the emission reduction requirements relevant to attainment of the 1-hour ozone NAAQS in the Washington area by November 15, 2005.

Subpart VV—Virginia

■ 5. In § 52.2420, the table in paragraph (e) is amended by adding at the end of the table, the entries for 1996–1999 ROP Plan and Transportation Control Measures (TCMs) in Appendix H, 1990 Base Year Inventory Revisions, Post 1999–2005 Rate-of-Progress Plan and Transportation Control Measures (TCMs) in Appendix J, VMT Offset SIP, Contingency Measure Plan and 1-hour Ozone Modeled Demonstration of Attainment and Attainment Plan to read as follows:

§ 52.2420 Identification of plan.

* * * * *

(e)* * *

Name of non-regulatory SIP revision	Applicable geographic or non-attainment area	State submittal date	EPA approval date	Additional explanation
* * *	*	* * *		
1996–1999 Rate-of-Progress Plan SIP and the Transportation Control Measures (TCMs) in Appendix H.	Washington 1-hour ozone nonattainment area.	12/29/2003, 5/25/1999	5/13/05 ..... [Insert page number where the document begins].	Only the TCMs in Appendix H of the 5/25/1999 revision, 1999 motor vehicle emissions budgets of 128.5 tons per day (tpy) of VOC and 196.4 tpy of NO_X.
1990 Base Year Inventory Revisions.	Washington 1-hour ozone nonattainment area.	8/19/2003, 2/25/2004	5/13/05 ..... [Insert page number where the document begins].	
1999–2005 Rate-of-Progress Plan SIP Revision and the Transportation Control Measures (TCMs) in Appendix J.	Washington 1-hour ozone nonattainment area.	8/19/2003, 2/25/2004	5/13/05 ..... [Insert page number where the document begins].	Only the TCMs in Appendix J of the 2/25/2004 the revision, 2002 motor vehicle emissions budgets (MVEBs) of 125.2 tons per day (tpy) for VOC and 290.3 tpy of NO_X, and, 2005 MVEBs of 97.4 tpy for VOC and 234.7 tpy of NO_X.
VMT Offset SIP Revision	Washington 1-hour ozone nonattainment area.	8/19/2003, 2/25/2004	5/13/05 ..... [Insert page number where the document begins].	

Name of non-regulatory SIP revision	Applicable geographic or non-attainment area	State submittal date	EPA approval date	Additional explanation
Contingency Measure Plan	Washington 1-hour ozone nonattainment area.	8/19/2003, 2/25/2004	5/13/05 ..... [Insert page number where the document begins].	
1-hour Ozone Modeled Demonstration of Attainment and Attainment Plan.	Washington 1-hour ozone nonattainment area.	8/19/2003, 2/25/2004	5/13/05 ..... [Insert page number where the document begins].	2005 motor vehicle emissions budgets of 97.4 tons per day (tpy) for VOC and 234.7 tpy of NO_X.

[FR Doc. 05–9401 Filed 5–12–05; 8:45 am]
BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[RME No. R03–OAR–2004–DC–0010; FRL–7910–4]

Approval and Promulgation of Air Quality Implementation Plans; Maryland; Metropolitan Washington DC 1-Hour Ozone Attainment Demonstration Plans

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: EPA is disapproving a State Implementation Plan (SIP) revision submitted by the State of Maryland, and is issuing a protective finding for that plan pursuant to EPA's transportation conformity rule. The intended effect of this action is to disapprove Maryland's attainment plan for the Metropolitan Washington, DC severe 1-hour ozone nonattainment area (the Washington area) and to issue a protective finding which allows the motor vehicle emissions budgets identified in that plan to be used in future conformity determinations. This action allows transportation planning activities, including conformity analyses and determinations, to continue normally until such time as highway sanctions would be imposed pursuant to the Clean Air Act (the CAA or the Act) and EPA's order of sanctions rule.

DATES: *Effective Date:* This final rule is effective on June 13, 2005.

ADDRESSES: EPA has established a docket for this action under Regional Material in EDocket (RME) ID Number R03–OAR–2004–DC–0010. All documents in the docket are listed in the RME index at *http://www.docket.epa.gov/rmepub/*. Once in the system, select ''quick search,'' then key in the appropriate RME identification number. Although listed in the electronic docket, some information is not publicly available, *i.e.*, confidential business information (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 RME or in hard copy for public inspection during normal business hours at the Air Protection Division, U.S. Environmental Protection Agency, Region III, 1650 Arch Street, Philadelphia, Pennsylvania 19103. Copies of the State submittal are available at the Maryland Department of the Environment, 1800 Washington Boulevard, Suite 705, Baltimore, Maryland 21230.

FOR FURTHER INFORMATION CONTACT: Christopher Cripps, (215) 814–2179, or by e-mail at *cripps.christopher@epa.gov*.

SUPPLEMENTARY INFORMATION: In this document any reference to ''we'' and ''our'' means EPA and EPA's, respectively.

I. Background

A. Summary

On February 9, 2005, (70 FR 6796), EPA published a notice of proposed rulemaking (NPR) for the State of Maryland. In our February 9, 2005, NPR, we proposed approval of an attainment plan SIP revision submitted by the State of Maryland for the Washington area contingent upon the State submitting an approvable SIP revision for certain penalty fees, required by the Act, prior to the time EPA issued a final rule on Maryland's attainment plan. In the alternative, EPA proposed to disapprove the attainment plan SIP revision submitted by the State of Maryland for the Washington area and to issue a protective finding for the attainment plan which would allow the use of the motor vehicle emissions budgets (the MVEBs) identified in the attainment plan SIP to be used for demonstrating conformity.

In the February 9, 2005, NPR, we also proposed to approve attainment plan SIP revisions for the Washington area submitted by the Commonwealth of Virginia and the District of Columbia (the District). EPA has taken final action on the District's and Virginia's attainment plans in a separate final rule which is published elsewhere in today's **Federal Register**. In that same final rule approving the District's and Virginia's attainment plan for the Washington area, we determine that the attainment plan for Maryland contains adopted control measures that fully satisfy the emission reduction requirement relevant to attainment of the 1-hour ozone National Ambient Air Quality Standard (NAAQS).

B. Relationship to Past SIP Revisions and Litigation

1. Prior SIP Revisions

On April 29, 1998, Maryland submitted an attainment plan for the Washington area and supplemented those submittals on August 17, 1998, February 14, 2000 and March 31, 2000. The April 29, 1998, August 17, 1998, February 14, 2000 SIP revisions cumulatively constituted the attainment plan for the Washington area which, at the time, was classified as a serious nonattainment area for the 1-hour ozone NAAQS. In the aggregate, these attainment plans consisted of a photochemical modeling demonstration and adjunct weight of evidence analyses to demonstrate attainment of the ozone NAAQS, projected emissions inventories showing that Maryland had adopted sufficient measures to support the demonstration of attainment, attainment year MVEBs, and a commitment to conduct and submit a mid-course review to EPA by a date certain. The March 31, 2000 SIP revision consisted of a commitment to revise the mobile vehicle emissions budgets one-year after EPA released the MOBILE6 model and MVEBs for years after 2005 (outyear budgets). These attainment plans were submitted to demonstrate that the Washington area would attain the 1-hour ozone NAAQS by no later than November 15, 2005. Hereafter these revisions will be called the ''pre-2001 SIP revisions'' attainment plan.'' These are those SIP revisions listed in Table 2 of a January 3, 2001 final rule (66 FR at 586) and those listed

in Table 2 of an April 17, 2003 final rule (68 FR at 19107).[1]

On January 24, 2003 (68 FR 3410), EPA reclassified the Washington area to severe because the area failed to attain the 1-hour ozone NAAQS by the statutory attainment date for serious areas. This action made the Washington area subject to the additional requirements applicable to severe areas under section 182(d) of the CAA. On April 17, 2003 (68 FR at 19107), EPA conditionally approved these SIP revisions. The history of litigation on the April 17, 2003 conditional approval will be discussed in paragraph 3. of this section entitled, ''April 17, 2003 Final Rule Vacated and Withdrawn'.

2. Recent SIP Revision Actions

In the months that followed the January 24, 2003 reclassification of the Washington area to severe nonattainment and the April 17, 2003 conditional approval, Maryland submitted the SIP revisions necessary to satisfy the requirements section 182(d) of the CAA for severe areas and EPA's conditional approval, with the exception of a SIP revision for the section 185 penalty fee program. These SIP revisions included Maryland's September 2, 2003 and February 19, 2004 submittals (hereafter the February 2004 SIP revisions). The February 2004 SIP revisions contained the attainment plan which consists of:

(1) A photochemical modeling demonstration and adjunct weight of evidence analyses to demonstrate attainment of the ozone NAAQS by no later than November 15, 2005;

(2) Projected emissions inventories showing that Maryland had adopted sufficient measures to support the demonstration of attainment;

(3) Attainment year MVEBs; and

(4) A commitment to conduct and submit a mid-course review to EPA by a date certain.[2] The February 2004 SIP revisions resubmitted to EPA the attainment plan contained in the pre-2001 SIP revisions' serious area attainment plan along with additional elements required for a severe area attainment plan, such as a post-1999 rate-of-progress (ROP) plan, and a contingency measures plan to augment the previously submitted 1996–1999 ROP plan and contingency measures plan, respectively, as well as other SIP elements not included in the pre-2001 SIP revisions' serious area attainment plan.

EPA had already approved many of Maryland's SIP revisions by the time we published NPR's on January 12, 2005 (70 FR 2085) and February 9, 2005 NPR (70 FR 6796) for Maryland's February 2004 SIP revisions.

We proposed approval on Maryland's February 2004 SIP revisions in two separate NPR's published on January 12, 2005 (70 FR 2085) and on February 9, 2005 (70 FR 6796). On May 3, 2005, the Regional Administrator signed a final rule approving Maryland's 1996–1999 ROP plan and all portions of the ''February 2004 SIP revisions'' except the attainment plan. That final action is published elsewhere in today's **Federal Register**.

3. April 17, 2003 Final Rule Vacated and Withdrawn

A petition for review challenging the April 17, 2003 final conditional approval was filed by the Sierra Club. The petition alleged, among other things, that EPA could not lawfully conditionally approve the SIPs due to a lack of specificity in the States' commitment letters, that EPA should require the 1996–1999 ROP to be revised to use the latest mobile sources emission factor model and that the photochemical grid modeling supporting the attainment plan did not meet the requirements of the CAA. On February 3, 2004, the Court of Appeals issued an opinion to vacate our rule conditionally approving the attainment plans and 1996–1999 ROP plans insofar as that the court found that our grant of conditional approval was defective. The Court of Appeals denied the petition for review in all other respects. *See Sierra Club* v. *EPA*, 356 F.3d 296, 301–07 (DC Cir. 2004). On April 23, 2004, the Court of Appeals issued its mandate thereby relinquishing jurisdiction over the 1996–1999 ROP plans and the attainment plan SIP revisions, and remanding them back to EPA.[3]

Effective as of the April 23, 2004 date the Court of Appeals issued its mandate for its February 3, 2004 ruling, all three States withdrew their pre-2001 SIP revisions' attainment plan which had been submitted during 1998 and 2000, specifically the SIP revisions listed in Table 2 of the April 17, 2003, final rule (68 FR 19107). By the time the three States withdrew the pre-2001 SIP revisions' attainment plan, they had already submitted revised attainment plan SIP revisions with an analysis that the SIPs contained all reasonably available control measures, post-1999 ROP plans demonstrating ROP for 2002 and 2005, vehicle miles traveled (VMT) offset plans and contingency measures plans that superceded the earlier submissions. The States, in their February 2004 SIP submissions, submitted not only this new material, but resubmitted all of the previously withdrawn pre-2001 SIP revisions' attainment plan.[4] The newly submitted materials along with the resubmitted pre-2001 SIP revisions' attainment plan, form a single comprehensive package. EPA is taking final action today on both newly submitted materials, which we collectively refer to as the February 2004 SIP revisions, as well as the resubmitted pre-2001 SIP revisions' attainment plan.

4. District Court Action

The Sierra Club filed a complaint in the United States District Court for the District of Columbia (District Court) claiming that because the Court of Appeals vacated and remanded the conditional approval of the pre-2001 SIP revisions' attainment demonstration and the 1996–1999 ROP plan, EPA had an unfulfilled nondiscretionary duty to complete final action on those SIP revisions. On April 7, 2005, the District Court issued an order enjoining EPA to ''complete final approval and disapproval action, in accordance with 42 U.S.C. 7410(k)(2), (3), on the state implementation plan submittals for the Washington area identified at 66 FR 586 (January 3, 2001).'' *Sierra Club* v. *Johnson*, C.A. No. 04–2163 (JR)(April 7, 2005). The District Court's decision took note ''that the states formally withdrew their pre-2001 submissions (except for the ROP plan) after the D.C. Circuit's Sierra Club III remand,'' *Id.*, slip op. at 7, but disputed that ''these withdrawals removed EPA's duty to act,'' stating that '' 'withdrawal' of pre-2001 SIPs could [not] push back the deadlines established by Congress.''

EPA does not dispute that withdrawal of a SIP cannot push back a statutory deadline established by Congress. However, EPA disagrees that it can act on a SIP submittal formally withdrawn by a state. We note, however, that such

[1] Only the commitment to revise the MVEBs found in the March 31, 2000 SIP revisions was subject to these final rules. The portion of the SIP revision related to MVEBs for years after 2005 (outyear budgets) was not subject to these final rules.

[2] The February 2004 SIP revisions did not need to contain a commitment to revise the MVEBs one-year after EPA released the MOBILE6 model because the MVEBs in these plans were developed using MOBILE6.

[3] On April 16, 2004, the Court of Appeals issued an order revising the February 3, 2004, opinion to address a petition for rehearing filed by the Sierra Club, but otherwise leaving its decision to vacate and remand the conditional approval to EPA intact. *Sierra Club* v. *EPA*, No. 03–1084, 2004 WL 877850 (DC Cir. Apr. 16, 2004).

[4] With one exception: the ''outyear budgets'' contained in the March 31, 2002 SIP revision and which EPA had never proposed to take action on, were not resubmitted.

a withdrawal is not without consequence, as withdrawal of required SIP revision puts a state in jeopardy of sanctions predicated upon a failure to submit the required SIP. However in this case, as described in this document, the States resubmitted the materials comprising their withdrawn pre-2001 SIP revisions' attainment plan as part of the February 2004 SIP submissions. EPA therefore will take action on what the District Court termed the ''pre-2001 submissions,'' [5] as follows:

(1) This disapproval action covers Maryland's pre-2001 SIP revisions' attainment plan as resubmitted and subsumed by Maryland's February 2004 SIP revisions' attainment plan based upon Maryland's failure to submit the required 185 fee program and issues a protective finding on the SIP, based upon our determination that the SIP contains all of the control measures necessary to demonstrate attainment. This protective finding will allow Maryland to use the MVEBs contained in the disapproved SIP for transportation conformity purposes pursuant to 40 CFR 93.120; and

(2) Another final rule, which is published elsewhere in today's **Federal Register**, which among other things,

(a) Approves all of the control measures and other constituents needed to approve Maryland's severe area attainment plan (except for a Section 185 fee program), including all control measures need to fully satisfy the emissions reductions relevant to attainment of the 1-hour ozone NAAQS;

(b) Approves all of the control measures and other constituents needed to approve the District's and Virginia's severe area attainment plan;

(c) Approves the 1996–1999 ROP plan for the District, Maryland and Virginia;

(d) Approves Maryland's modeled demonstration of attainment and adjunct weight of evidence analyses; and

(e) Approves the District's and Virginia's modeled demonstrations of attainment and adjunct weight of evidence analyses and the District's and Virginia's attainment plans, which include their pre-2001 SIP revisions' attainment plan, as resubmitted and subsumed by their February 2004 SIP revisions.

III. Comment Received and EPA's Response

EPA received a comment on our February 9, 2005 NPR wherein we proposed to approve the Maryland February 2004 SIP revisions' attainment plan and, in the alternative, proposed to disapprove that plan in concert with the issuance of a protective finding for the MVEBs. Because EPA is not approving the attainment plan we are not responding to the comments opposing the proposed approval. A summary of the adverse comment that we received on our proposed action to disapprove Maryland's attainment plan for the Washington area in concert with the issuance of a protective finding, and our response, follows.

Comment: We received a comment claiming that Maryland's attainment plan does not meet the requirement for a protective finding under EPA's transportation conformity rules because the section 185 penalty fee SIP revision is a control measure. The commenter claims that the section 185 penalty fee provision is an emission reduction requirement because the fees are assessed on emissions in excess of a baseline and will promote emission reductions, and, is an emission reduction requirement relevant to the Act's requirements for severe area SIPs.

Response: EPA disagrees that an approved section 185 penalty fee SIP revision is necessary to grant a protective finding. The section 185 penalty fee program, which is the only ''control measure'' the commenter alleges to be missing from the attainment plan and creating a bar to a protective finding, is not a ''control measure'' as that term is used at 40 CFR 93.120(a)(3).[6] EPA's regulation containing the criteria for granting a protective finding states that the relevant ''control measures'' that must be in place (adopted or subject to a written commitment) in order to receive a protective finding are those ''that fully satisfy the emissions reductions requirements relevant to the statutory provisions for which the implementation plan revision was received, such as reasonable further progress or attainment.''

Because we are granting a protective finding for a disapproved attainment plan, the comments require us to examine whether the section 185 penalty fee provision is a control measure for purposes of achieving emissions reductions relevant to attainment of the 1-hour ozone NAAQS. We conclude it is not. The section 185 penalty fee is a required element of the SIP for a severe or extreme ozone nonattainment area. 42 U.S.C. 7511d(a). Section 185 requires that the SIP contain a provision that major stationary sources within a severe or extreme nonattainment area pay ''a fee to the state as a penalty'' for failure of a severe or extreme nonattainment area to attain the ozone NAAQS by the area's attainment date.[7] This penalty fee, which is based on the tons of volatile organic compounds or nitrogen oxides emitted above a source-specific trigger level based on the source's emissions during the ''attainment year,'' first comes due for emissions during the ''calendar year beginning after the attainment date and must be paid annually until the area attains the NAAQS. 42 U.S.C. 7511d(a)—(c); 7511a(f)(1). Thus, if a severe area, with an attainment date of November 15, 2005, fails to attain by that date, the first penalty assessment will be assessed for emissions in calendar year 2006 that are more than 80% above the source's 2005 baseline. Thus, the penalty cannot first be paid until after the 2006 emissions are known, *i.e.*, some time in 2007.

A penalty fee that is based on emissions could have some incidental effect on emissions if sources decrease their emissions to reduce the amount of the per ton monetary penalty. However, the penalty fee does not ensure that any actual emissions reduction will ever occur, since every source can pay a penalty rather than achieve actual emissions reductions. The section 185 fee has the purpose of extracting a monetary penalty for emissions above a threshold level in relation to a source-specific baseline. It does not mandate that emissions ever be reduced. The section 185 penalty fee is not a control measure as meant by 40 CFR 93.120 because it does not ''satisfy * * * emissions reductions requirements relevant to * * * attainment.'' The provision's plain language evinces an intent to penalize emissions in excess of a threshold by way of a fee; it does not have as a stated purpose the goal of

[5] The District Court used the term ''pre-2001 submissions'' and ''pre-2001SIPs'' which consists of what in this document we call ''the pre-2001 SIP revisions' attainment demonstration'' and ''the 1996–1999 ROP plan.''

[6] The term ''control measures * * * that fully satisfy the emissions reductions requirements relevant to * * * attainment,'' is not defined in 40 CFR Part 93. Nor is this term, or the term ''control measure'' itself, defined by Congress in the Act. The failure of Congress to define the term ''control measure'' has been held to create ambiguity in the Act, *see Greenbaum* v. *EPA,* 370 F.3d 527, 536–37 (6th Cir. 2004), and EPA's interpretation as to the meaning of the ambiguous phrase ''control measure'' in a given context therefore should be afforded deference. EPA believes it is reasonable to interpret ''control measures * * * that fully satisfy the emissions reductions requirements relevant to * * * attainment,'' not to include the penalty fee program of Section 185 of the Act for the reasons given in response to this comment.

[7] The fee program established by section 185 of the Act is restricted to major *stationary* sources and does not reach mobile sources. 42 U.S.C. 7511d(a). Therefore, the effects of section 185 does not affect the mobile source emissions and hence cannot affect the MVEBs.

emissions reductions.[8] Further, even if the section 185 penalty fee achieved incidental emissions reductions, those reductions plainly are not ''relevant to attainment,'' since the first year the reductions could be achieved would come only after the area has failed to reach attainment, in the year after the attainment deadline.[9] We reasonably interpret the language in 40 CFR 93.120(a)(3) referring to ''control measures * * * that fully satisfy the emissions reductions requirements relevant to * * * attainment,'' to mean control measures that are intended to achieve emissions reductions prior to the statutory attainment deadline.[10]

IV. Disapproval With Protective Finding

In this final rule, EPA is disapproving the attainment plan of Maryland's February 2004 SIP revisions (and therefore the pre-2001 SIP revisions' attainment plan subsumed therein) for the reasons cited in the February 9, 2005 NPR. As noted previously, on May 3, 2005, the Regional Administrator signed a final rule which approves Maryland's February 2004 SIP revisions except the overall attainment plan, and which approves the 1996–1999 ROP plan. That other final rule, which the Regional Administrator signed on May 3, 2005, also approves the District of Columbia's and the Commonwealth of Virginia's attainment plans for the Washington area and approves the 2005 area-wide MVEBs in those attainment plans. That other final action determines that the District's, Maryland's and Virginia's SIPs contain enough emission reduction measures to achieve the specific purpose of demonstrating attainment with the 1-hour ozone NAAQS and approves the 2005 area-wide MVEBs into the District's, and Virginia's SIPs. That other final action is published elsewhere in today's **Federal Register**, and, along with this action cumulatively constitutes a final action on what the District Court defined as the pre-2001 submissions, as well as the February 2004 SIP revisions.

Pursuant to 40 CFR 93.120(a)(1) and (2), EPA is issuing a protective finding with respect to the attainment plan contained Maryland's February 2004 SIP revisions submission and the resubmitted pre-2001 SIP revisions' attainment plan subsumed therein, but the applicable budgets are those identified in Maryland's February 19, 2004 SIP revisions.

V. Consequences That May Result From Disapproval of a Required SIP Element

EPA has promulgated a rule (40 CFR 52.31), commonly called the ''order of sanctions rule,'' that provides that the offset sanction shall apply in an area 18 months after the effective date of a disapproval of a mandatory Part D SIP requirement. That same rule provides that if the SIP deficiency has still not been remedied by the state and approved by EPA, the highway sanction shall apply in that area 6 months following application of the offset sanction. Under this rule, sanctions will apply automatically in the sequence prescribed in all instances in which sanctions are required following a disapproval, except when EPA determines through a separate rulemaking to change the sanction sequence for one or more specific circumstances.

When EPA disapproves a SIP submission for a nonattainment area based on its failure to meet one or more plan elements required by the CAA, the sanctions clocks actually start on the date the final **Federal Register** actions are effective. Under EPA's order of sanctions rule, 40 CFR 52.31:

(1) If, within 18 months of the effective date found in the DATES section of this final rule, EPA has not issued a final approval for nor issued an interim final determination pursuant to 40 CFR 52.31 for Maryland's attainment plan for the Washington area, the offset sanction will be imposed pursuant to 40 CFR 52.31(e)(1); and

(2) If, within 24 months of the effective date found in the DATES section of this final rule, EPA has not issued a final approval for nor issued an interim final determination pursuant to 40 CFR 52.31 for Maryland's attainment plan for the Washington area, the highway sanction will be imposed pursuant to 40 CFR 52.31(e)(2);

Pursuant to 40 CFR 120(a)(1) this disapproval will cause the conformity status of the transportation plan and TIP to lapse on the date that highway sanctions are imposed, and, no new transportation plan, TIP, or project may be found to conform until another control strategy implementation plan revision fulfilling the same CAA requirements is submitted and conformity to this submission is determined.

Furthermore, section 110(c)(1) of the CAA requires EPA to promulgate a Federal Implementation Plan (FIP) any time within two years after an EPA disapproval of a SIP revision unless the State corrects the deficiency and EPA approves the plan or SIP revision before EPA promulgates such FIP.

VI. Protective Finding

When disapproving a control strategy SIP revision such as an attainment plan, EPA may make a protective finding pursuant to section 93.120(a) of the transportation conformity rule, 40 CFR part 93, when as here, EPA finds that the submitted SIP contains adopted control measures that fully satisfy the emission reduction requirements relevant to the statutory provision for which the SIP was submitted. *See* 69 FR at 40048, July 1, 2004, citing 69 FR at 38984–38985, June 30, 2003. If EPA disapproves a plan but gives a protective finding, the MVEBs in the disapproved plan can still be used to demonstrate conformity (62 FR at 43796, August, 15, 1997). There will be no adverse conformity consequences unless highway sanctions are imposed, as is the case with respect to all other SIP planning failures. Highway sanctions would be imposed two years following EPA's disapproval if the SIP deficiency had not been remedied. The conformity of the plan and TIP would lapse once highway sanctions were imposed.

[8] We note that ''control measures'' may include ''economic incentives such as fees,'' for some purposes of the Act. *See* 42 U.S.C. 7410(a)(2)(A). However, the particular fee program prescribed by section 185 of the Act is not among the ''control measures that fully satisfy * * * emissions reductions requirements relevant to * * * attainment,'' as we explain, since it is not triggered until after a serious or extreme nonattainment area has failed to timely attain the NAAQS.

[9] The section 185 penalty fee program actually provides a disincentive for sources to foster the achievement of attainment by ratcheting down emissions in the calendar year containing the attainment deadline, since the threshold above which emissions trigger the fee is calculated from a baseline determined from emissions occurring over the course of the statutory attainment year. If a source knew or reasonably suspected that the severe or extreme area in which it is located would not timely attain, it would have an incentive to increase its emissions during the attainment deadline year to the highest level allowed by law in order to raise its baseline and corresponding penalty trigger threshold. This perverse incentive is yet another reason that the section 185 penalty fee program is not an emissions reduction measure relevant to attainment.

[10] In another action published in today's **Federal Register**, among other things, we approve the attainment plans for the Washington area submitted by Virginia and the District of Columbia. Neither took credit for emissions reductions based on a section 185 fee program, yet both demonstrate that the Washington area will timely attain the 1-hour ozone NAAQS. In that same **Federal Register** notice we also determine that the Maryland attainment plan that we are disapproving with a protective finding in this notice contains control measures to fully satisfy the emissions reduction requirements relevant to attainment of the 1-hour ozone NAAQS. Thus, even if the section 185 program actually could achieve emissions reduction prior to the attainment deadline, it would not be as an emissions control measure under 40 CFR 93.120, since the attainment plans submitted by the District, Maryland and Virginia demonstrate timely attainment of the NAAQS without resort to a section 185 penalty fee program.

On May 3, 2005, the Regional Administrator signed a final rule approving the District of Columbia's and the Commonwealth of Virginia's attainment plans for the Washington area and approving the 2005 area-wide MVEBs in these attainment plans. This other final action determines that the District's, Maryland's and Virginia's SIPs contain enough emission reduction measures to achieve the specific purpose of demonstrating attainment with the 1-hour ozone NAAQS and approves the 2005 area-wide MVEBs into the District's and Virginia's SIPs. Maryland's February 19, 2004 SIP revision includes the following MVEBs of 97.4 tons per day of volatile organic compound (VOC) emissions and 234.7 tons per day of nitrogen oxide (NO_X) emissions for the 2005 attainment year. These MVEBs are area-wide MVEBs covering the entire Washington area and are the MVEBs that will apply pursuant to the protective finding.

VII. Final Action

EPA is disapproving the Maryland's attainment plan for the Washington area, and, pursuant to 40 CFR 93.120(a), issuing a protective finding to Maryland's February 2004 SIP revisions' attainment plan. This disapproval applies to Maryland's February 2004 SIP revisions' attainment plan for the Washington area and to the pre-2001 SIP revisions' attainment plan which were resubmitted and subsumed by the February 2004 SIP revisions' attainment plan. In another final rule, which is published elsewhere in today's **Federal Register**, EPA is approving all of the control measures and other constituents needed to approve Maryland's severe area attainment plan (except for a section 185 fee program), including all control measures need to fully satisfy the emissions reductions relevant to attainment of the 1-hour ozone NAAQS. That final rule also approves Maryland's 1996–1999 ROP plan for the Washington area.

VIII. Statutory and Executive Order Reviews

A. Executive Order 12866, Regulatory Planning and Review

The Office of Management and Budget (OMB) has exempted this regulatory action from Executive Order 12866, entitled ''Regulatory Planning and Review.''

B. Paperwork Reduction Act

Under the Paperwork Reduction Act, 44 U.S.C. 3501 et seq., OMB must approve all ''collections of information'' by EPA. The Act defines ''collection of information'' as a requirement for ''answers to * * * identical reporting or recordkeeping requirements imposed on ten or more persons * * *'' 44 U.S.C. 3502(3)(A). Because this final rule does not impose an information collection burden, the Paperwork Reduction Act does not apply.

C. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) generally requires an agency to conduct a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. Small entities include small businesses, small not-for-profit enterprises, and small governmental jurisdictions. This rule will not have a significant impact on a substantial number of small entities because SIP approvals and disapprovals under section 110 and part D of the Clean Air Act do not create any new requirements but simply approve or disapprove requirements that the States are already imposing.

Furthermore, as explained in this action, the submission does not meet the requirements of the Clean Air Act and EPA cannot approve the submission. The final disapproval will not affect any existing State requirements applicable to small entities in the Washington area. Federal disapproval of a State submittal does not affect its State enforceability. Therefore, because the Federal SIP disapproval does not create any new requirements nor impact a substantial number of small entities, I certify that this action will not have a significant economic impact on a substantial number of small entities. Moreover, due to the nature of the Federal-State relationship under the Clean Air Act, preparation of flexibility analysis would constitute Federal inquiry into the economic reasonableness of state action. The Clean Air Act forbids EPA to base its actions concerning SIPs on such grounds. *Union Electric Co.,* v. *U.S. EPA,* 427 U.S. 246, 255–66 (1976); 42 U.S.C. 7410(a)(2).

D. Unfunded Mandates Reform Act

Under sections 202 of the Unfunded Mandates Reform Act of 1995 (Unfunded Mandates Act), signed into law on March 22, 1995, EPA must prepare a budgetary impact statement to accompany any proposed or final rule that includes a Federal mandate that may result in estimated costs to State, local, or tribal governments in the aggregate; or to the private sector, of $100 million or more. Under section 205, EPA must select the most cost-effective and least burdensome alternative that achieves the objectives of the rule and is consistent with statutory requirements. Section 203 requires EPA to establish a plan for informing and advising any small governments that may be significantly or uniquely impacted by the rule. EPA has determined that the disapproval action does not include a Federal mandate that may result in estimated costs of $100 million or more to either State, local, or tribal governments in the aggregate, or to the private sector. This Federal action determines that pre-existing requirements under State or local law should not be approved as part of the federally-approved SIP. It imposes no new requirements. Accordingly, no additional costs to State, local, or tribal governments, or to the private sector, result from this action.

E. Executive Order 13132, Federalism

Federalism (64 FR 43255, August 10, 1999) revokes and replaces Executive Orders 12612 (Federalism) and 12875 (Enhancing the Intergovernmental Partnership). 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.'' Under Executive Order 13132, EPA may not issue a regulation that has federalism implications, that imposes substantial direct compliance costs, and that is not required by statute, unless the Federal government provides the funds necessary to pay the direct compliance costs incurred by State and local governments, or EPA consults with State and local officials early in the process of developing the proposed regulation. EPA also may not issue a regulation that has federalism implications and that preempts State law unless the Agency consults with State and local officials early in the process of developing the proposed regulation. This 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, as specified in

Executive Order 13132, because it merely disapproves a state rule implementing a federal requirement, and does not alter the relationship or the distribution of power and responsibilities established in the Clean Air Act. Thus, the requirements of section 6 of the Executive Order do not apply to this rule.

F. Executive Order 13175, Coordination With Indian Tribal Governments

Executive Order 13175, entitled ''Consultation and Coordination with Indian Tribal Governments'' (65 FR 67249, November 9, 2000), requires EPA to develop an accountable process to ensure ''meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications.'' This final rule does not have tribal implications, as specified in Executive Order 13175. It will not have substantial direct effects on tribal governments, on the relationship between the Federal government and Indian tribes, or on the distribution of power and responsibilities between the Federal government and Indian tribes. This action does not involve or impose any requirements that affect Indian Tribes. Thus, Executive Order 13175 does not apply to this rule.

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

Protection of Children from Environmental Health Risks and Safety Risks (62 FR 19885, April 23, 1997), applies to any rule that: (1) Is determined to be ''economically significant'' as defined under Executive Order 12866, and (2) concerns an environmental health or safety risk that EPA has reason to believe may have a disproportionate effect on children. If the regulatory action meets both criteria, the Agency must evaluate the environmental health or safety effects of the planned rule on children, and explain why the planned regulation is preferable to other potentially effective and reasonably feasible alternatives considered by the Agency. This rule is not subject to Executive Order 13045 because it does not involve decisions intended to mitigate environmental health or safety risks.

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

This rule is not subject to Executive Order 13211, ''Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use'' (66 FR 28355, May 22, 2001) because it is not a significant regulatory action under Executive Order 12866.

I. National Technology Transfer and Advancement Act

Section 12 of the National Technology Transfer and Advancement Act (NTTAA) of 1995 requires Federal agencies to evaluate existing technical standards when developing a new regulation. To comply with NTTAA, EPA must consider and use ''voluntary consensus standards'' (VCS) if available and applicable when developing programs and policies unless doing so would be inconsistent with applicable law or otherwise impractical. EPA believes that VCS are inapplicable to this action. Today's action does not require the public to perform activities conducive to the use of VCS.

J. Congressional Review Act

The Congressional Review Act, 5 U.S.C. 801 *et seq.*, as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. 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).

K. Petitions for Judicial Review

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 July 12, 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 to disapprove Maryland's 1-hour ozone attainment plan for the Washington area and to issue a protective finding may not be challenged later in proceedings to enforce its requirements. (See section 307(b)(2).)

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Intergovernmental relations, Nitrogen dioxide, Ozone, Volatile organic compounds.

Dated: May 3, 2005.

Donald S. Welsh,

Regional Administrator, Region III.

■ 40 CFR part 52 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 V—Maryland

■ 2. Section 52.1073 is revised by adding paragraph (g) to read as follows:

§ 52.1073 Approval status.

* * * * *

(g) EPA is disapproving the Maryland September 2, 2003 and February 19, 2004 SIP revision submittals' 1-hour ozone attainment plan for the Metropolitan Washington DC area. Pursuant to 40 CFR 93.120(a) EPA is issuing a protective finding to the Maryland September 2, 2003 and February 19, 2004 SIP revision submittals' 1-hour ozone attainment plan which identifies the following 2005 attainment year MVEBs: 97.4 tons per day of VOC emissions and 234.7 tons per day of NO_X emissions.

[FR Doc. 05–9402 Filed 5–12–05; 8:45 am]

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Federal Register

Friday,
May 13, 2005

Part VI

Environmental Protection Agency

40 CFR Part 82

Protection of Stratospheric Ozone: Extension of Global Laboratory and Analytical Use Exemption for Essential Class I Ozone Depleting Substances; Proposed Rule

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 82

[FRL–7912–1]

RIN 2060–AM56

Protection of Stratospheric Ozone: Extension of Global Laboratory and Analytical Use Exemption for Essential Class I Ozone Depleting Substances

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: EPA is proposing to extend the global laboratory and analytical use exemption for production and import of class I ozone depleting substances from December 31, 2005, to December 31, 2007, consistent with recent actions by the Parties to the Montreal Protocol on Substances that Deplete the Ozone Layer. The exemption allows persons in the United States to produce and import controlled substances for laboratory and analytical uses that have not been already identified by EPA as nonessential. EPA also is proposing to clarify the applicability of the laboratory and analytical use exemption to production and import of methyl bromide after the January 1, 2005, phaseout date.

DATES: Written comments on this proposed rule must be received by the EPA Docket on or before July 12, 2005.

ADDRESSES: Submit your comments, identified by Docket ID No. OAR–2004–0064, by one of the following methods:

- Federal eRulemaking Portal: *http://www.regulations.gov.* Follow the on-line instructions for submitting comments.
- Agency Web site: *http://www.epa.gov/edocket.* EDOCKET, EPA's electronic public docket and comment system, is EPA's preferred method for receiving comments. Follow the on-line instructions for submitting comments.
- Mail: Air and Radiation Docket, Environmental Protection Agency, Mailcode 6102T, 1200 Pennsylvania Ave., NW., Washington, DC 20460, Attention: Docket ID No. OAR–2004–0064.
- Hand Delivery: EPA Docket Center, (EPA/DC) EPA West, Room B102, 1301 Constitution Ave., NW., Washington, DC, Attention Docket ID No. OAR–2004–0064. Deliveries are only accepted during the Docket's normal hours of operation, and special arrangements should be made for deliveries of boxed information.

Instructions: Direct your comments to Air Docket ID No. OAR–2004–0064. EPA's policy is that all comments received will be included in the public docket without change and may be made available online at *http://www.epa.gov/edocket,* including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through EDOCKET, regulations.gov, or e-mail.

The EPA EDOCKET and the federal regulations.gov Web sites are ''anonymous access'' systems, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through EDOCKET or regulations.gov, your e-mail address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet.

If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD–ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses.

Docket: All documents in the docket are listed in the EDOCKET index at *http://www.epa.gov/edocket.* Although listed in the index, some information is not publicly available, namely 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 Air Docket, EPA/DC, EPA West, Room B102, 1301 Constitution Ave., NW., Washington, DC. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566–1744, and the telephone number for Docket ID No. OAR–2004–0064 is (202) 566–1742.

Materials related to previous EPA actions on the essential use program are contained in EPA Air Docket No. A–93–39. Docket A–93–39 may be reviewed at the Public Reading Room.

FOR FURTHER INFORMATION CONTACT: Scott Monroe, Essential Use Program Manager, by regular mail: U.S. Environmental Protection Agency, Stratospheric Protection Division (6205J), 1200 Pennsylvania Avenue, NW., Washington, DC 20460; by courier service or overnight express: 1301 L Street, NW., Washington, DC 20005, by telephone: 202–343–9712; or by e-mail: *monroe.scott@epa.gov.*

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I. Extension of the Global Laboratory and Analytical Use Exemption

The Montreal Protocol on Substances that Deplete the Ozone Layer (Protocol) is the international agreement to reduce and eventually eliminate the production and consumption [1] of all stratospheric ozone depleting substances (ODSs). The elimination of production and consumption of ODSs is accomplished through adherence to phase-out schedules for specific class I ODSs [2], including: chlorofluorocarbons (CFCs), halons, carbon tetrachloride, and methyl chloroform. The Clean Air Act, as amended in 1990 and 1998, requires EPA to promulgate regulations implementing the Protocol's phaseout schedules in the United States. Those regulations are codified at 40 CFR part 82. As of January 1, 1996, production and import of most class I ODSs were

[1] ''Consumption'' is defined as the amount of a substance produced in the United States, plus the amount imported into the United States, minus the amount exported to Parties to the Montreal Protocol (*see* section 601(6) of the Clean Air Act). Stockpiles of class I ODSs produced or imported prior to the 1996 phase out may be used for purposes not expressly banned at 40 CFR part 82.

[2] Class I ozone depleting substances are listed at 40 CFR part 82, subpart A, appendix A.

phased out in developed countries, including the United States.

However, the Protocol provides exemptions that allow for the continued import and/or production of ODSs for specific uses. Under the Protocol, for most class I ODS, the Parties may collectively grant exemptions to the ban on production and import of ODSs for uses that they determine to be ''essential.'' For example, with respect to CFCs, Article 2A(4) provides that the phaseout will apply ''save to the extent that the Parties decide to permit the level of production or consumption that is necessary to satisfy uses agreed by them to be essential.'' Similar language appears in the control provisions for halons (Art. 2B), carbon tetrachloride (Art. 2D), methyl chloroform (Art. 2E), hydrobromochlorofluorocarbons (Art. 2G), and bromochloromethane (Art. 2I). As defined by Decision IV/25 of the Parties, use of a controlled substance is essential only if (1) it is necessary for the health, safety or is critical for the functioning of society (encompassing cultural and intellectual aspects), and (2) there are no available technically and economically feasible alternatives or substitutes that are acceptable from the standpoint of environment and health.

Decision X/19 under the Protocol (taken in 1998) allowed a general exemption for essential laboratory and analytical uses through December 31, 2005. EPA included this exemption in our regulations at 40 CFR part 82, subpart A. While the Clean Air Act does not specifically provide for this exemption, EPA determined that an exemption for essential laboratory and analytical uses was allowable under the Act as a *de minimis* exemption. EPA addressed the *de minimis* exemption in the final rule of March 13, 2001 (66 FR 14760–14770).

Decision X/19 also asked the Protocol's Technology and Economic Assessment Panel (TEAP), a group of technical experts from member countries, to report annually on procedures that could be performed without the use of controlled substances and stated that at future meetings the Parties would decide whether such procedures should no longer be eligible for exemptions. Based on the TEAP's recommendation, the Parties to the Protocol decided in 1999 (Decision XI/15) that the general exemption no longer applied to the following uses: Testing of oil and grease, and total petroleum hydrocarbons in water; testing of tar in road-paving materials; and forensic finger-printing. EPA incorporated this exclusion at appendix G to subpart A of 40 CFR part 82 on February 11, 2002 (67 FR 6352).

Subsequently, in its May 2003 progress report the TEAP noted, ''No new non-ODS methods have been forthcoming which would enable the TEAP to recommend the elimination of further uses of controlled substances for analytical and laboratory uses'' (p. 106, see Air Docket OAR–2004–0064). Based on this statement, and in consideration of the pending cessation of the laboratory use exemption in 2005, the European Community proposed an extension of the exemption that would allow further time for development of non-ODS methods. At their fifteenth Meeting in November 2003, the Parties adopted the proposal in Decision XV/8, which extended the global exemption for laboratory and analytical uses to December 31, 2007.

EPA's regulations regarding this exemption at 40 CFR 82.8(b) currently state, ''A global exemption for class I controlled substances for essential laboratory and analytical uses shall be in effect through December 31, 2005, subject to the restrictions in appendix G of this subpart, and subject to the record keeping and reporting requirements at § 82.13(u) through (x). There is no amount specified for this exemption.'' Because certain laboratory procedures continue to require the use of class I substances in the United States, and because non-ODS replacements for the class I substances have not been identified for all uses, EPA is proposing to revise 40 CFR 82.8(b) to reflect the extension of the exemption to 2007 consistent with Decision XV/8. For a more detailed discussion of the reasons for the exemption, refer to the March 13, 2001, **Federal Register** notice. As discussed in the March 2001 notice, the controls in place for laboratory and analytical uses provide adequate assurance that very little, if any, environmental damage will result from the handling and disposal of the small amounts of class I ODS used in such applications. In addition, the amount of phased-out class I substances being supplied to laboratories under this exemption decreased each year since 1997 to reach the level of eight metric tons in 2001 (approximately one-quarter the amount supplied in 1997), according to EPA's tracking system for ODSs.

II. Applicability of the Global Laboratory and Analytical Use Exemption to Methyl Bromide

As of January 1, 2005, production and import of methyl bromide no longer will be allowed in the United States, except for limited exemptions (40 CFR 82.4(d)). Methyl bromide is a class I controlled substance used chiefly as a fumigant for soil treatment and pest control. EPA created a system of allowances to permit continued production and import of methyl bromide for critical uses after January 1, 2005 (see 69 FR 76981, December 23, 2004). This exemption does not include allowances for continued production of methyl bromide to supply laboratories. However, the phaseout of methyl bromide production and import does not restrict inventories of methyl bromide produced prior to January 1, 2005, from being used for laboratory applications.

Methyl bromide (also known as bromomethane) does have laboratory uses, for example, as a chemical intermediate and methylating agent. EPA regulations allow for methyl bromide to be produced after the January 1, 2005, phaseout date if production is covered by ''essential use allowances or exemptions.'' (40 CFR 82.4(b)(1)) The regulations list the laboratory and analytical use exemption as a ''global exemption for class I controlled substances,'' subject to the restrictions in appendix G (40 CFR 82.4(n)(1)(iii), 82.8(b)). However, EPA has not specifically addressed the issue of whether the exemption should apply to methyl bromide. In addition, it is not clear what the Parties to the Protocol intended. Previous Decisions by the Parties concerning essential uses have referred generally to ''ozone-depleting substances,'' not to specific, individual ozone-depleting substances (see, for example, Decisions VI/9, VII/11, and X/19, available in Air Docket OAR–2004–0064). As noted above, the Protocol's control measures for most of the class I ODS contain language stating that the phaseout shall not apply ''to the extent that the Parties decide to permit the level of production or consumption that is necessary to satisfy uses agreed by them to be essential.'' However, Article 2H of the Montreal Protocol, which states the control measures for methyl bromide, does not contain such language.

It is possible that the Parties will clarify the applicability of the laboratory and analytical use exemption to methyl bromide at a future Meeting of the Parties. In anticipation of such clarification, EPA is proposing that production and import of methyl bromide for essential laboratory and analytical uses, as defined in 40 CFR part 82, subpart A, appendix G, be allowed under the general laboratory use exemption (40 CFR 82.4(n)(1)(iii)) through December 31, 2007. EPA requests comment on the types of laboratory and analytical uses of methyl

bromide, and whether such uses may be considered essential under the terms identified in Decision IV/25(1)(a) by the Parties (see Docket OAR–2004–0064). We also request comment on the amount of newly produced or imported methyl bromide that would be needed by laboratories in the United States annually in order to satisfy essential uses. Last, we request comment on the level of purity that should be specified for laboratory and analytical use of methyl bromide (see Annex II to the report of the Sixth Meeting of the Parties, available in Air Docket OAR–2004–0064).

Because EPA cannot be certain when the Parties will clarify the matter described above, the Agency may decide to finalize, after consideration of comments received on this proposal, only the portion of this rule that extends the date of the essential laboratory and analytical use exemption for substances other than methyl bromide to December 31, 2007. EPA may finalize the proposal with a separate notice to apply this extension to methyl bromide or to remove methyl bromide from the exemption, if warranted based on action by the Parties.

III. Statutory and Executive Order Reviews

A. Executive Order 12866: Regulatory Planning and Review

Under Executive Order 12866 (58 FR 51735, October 4, 1993), the Agency must determine whether this regulatory action is ''significant'' and therefore subject to review by the Office of Management and Budget (OMB) and the requirements of the Executive Order. The Order defines ''significant regulatory action'' as one that is likely to result in a rule that may:

(1) Have an annual effect on the economy of $100 million or more, or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities;

(2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency;

(3) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or

(4) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order.

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

B. Paperwork Reduction Act

This action does not add any information collection requirements or increase burden under the provisions of the Paperwork Reduction Act, 44 U.S.C. 3501 *et. seq*. OMB previously approved the information collection requirements contained in the final rule promulgated on May 10, 1995, and assigned OMB control number 2060–0170 (EPA ICR No. 1432.21).

Burden means the total time, effort, or financial resources expended by persons to generate, maintain, retain, or disclose or provide information to or for a Federal agency. This includes the time needed to review instruction; develop, acquire, install, and utilize technology and systems for the purposes of collecting, validating, and verifying information, processing and maintaining information, and disclosing and providing information; adjust the existing ways to comply with any previously applicable instructions and requirements; train personnel to be able to respond to a collection of information; search data sources; complete and review the collection of information; and transmit or otherwise disclose the information. An Agency may not conduct or sponsor, and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number. The OMB control numbers for EPA's regulations are listed in 40 CFR part 9 and 48 CFR chapter 1.

C. Regulatory Flexibility Act

The RFA generally requires an agency to prepare a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements under the Administrative Procedure Act or any other statute unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. Small entities include small businesses, small organizations, and small governmental jurisdictions.

For purposes of assessing the impact of today's rule on small entities, the term small entities is defined as: (1) Pharmaceutical preparations manufacturing businesses (NAICS code 325412) that have less than 750 employees; (2) a small governmental jurisdiction that is a government of a city, county, town, school district or special district with a population of less than 50,000; and (3) a small organization that is any not-for-profit enterprise which is independently owned and operated and is not dominant in its field.

After considering the economic impacts of today's proposed rule on small entities, I certify that this action will not have a significant economic impact on a substantial number of small entities. In determining whether a rule has a significant economic impact on a substantial number of small entities, the impact of concern is any significant *adverse* economic impact on small entities, since the primary purpose of the regulatory flexibility analysis is to identify and address regulatory alternatives ''which minimize any significant economic impact of the rule on small entities.'' 4 U.S.C. 603 and 604. Thus, an agency may certify that a rule will not have a significant economic impact on a substantial number of small entities if the rule relieves regulatory burden, or otherwise has a positive economic effect on all of the small entities subject to the rule. This rule provides an otherwise unavailable benefit to those companies that obtain ozone-depleting substances under the essential laboratory and analytical use exemption. We have therefore concluded that today's proposed rule will relieve regulatory burden for all small entities.

Although this proposed rule will not have significant economic impact on a substantial number of small entities, we continue to be interested in the potential impact of the proposed rule on small entities and welcome comments related to these issues.

D. Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), Public Law 104–4, establishes requirements for Federal agencies to assess the effects of their regulatory actions on State, local, and tribal governments and the private sector. Under section 202 of the UMRA, EPA generally must prepare a written statement, including a cost-benefit analysis, for proposed and final rules with ''Federal mandates'' that may result in expenditures to State, local, and tribal governments, in the aggregate, or to the private sector, of $100 million or more in any one year.

Before promulgating an EPA rule for which a written statement is needed, section 205 of the UMRA generally requires EPA to identify and consider a reasonable number of regulatory alternatives and adopt the least costly, most cost-effective, or least burdensome alternative that achieves the objectives of the rule. The provisions of section 205 do not apply when they are inconsistent with applicable law. Moreover, section 205 allows EPA to

adopt an alternative other than the least costly, most cost-effective, or least burdensome alternative, if the Administrator publishes with the final rule an explanation why that alternative was not adopted.

Before EPA establishes any regulatory requirements that may significantly or uniquely affect small governments, including tribal governments, it must have developed a small government agency plan under section 203 of the UMRA. The plan must provide for notifying potentially affected small governments, enabling officials of affected small governments to have meaningful and timely input in the development of EPA regulatory proposals with significant Federal intergovernmental mandates, and informing, educating, and advising small governments on compliance with the regulatory requirements.

Today's rule contains no Federal mandates (under the regulatory provisions of Title II of the UMRA) for State, local, or tribal governments or the private sector, since it merely extends the availability of an already available exemption to the ban on production and import of class I ODSs. For the same reason, EPA has determined that this rule contains no regulatory requirements that might significantly or uniquely affect small governments.

E. Executive Order 13132: Federalism

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

This proposed rule does not have federalism implications. It will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132. Today's rule affects only the companies that produce or import class I ozone-depleting substances for laboratory or analytical uses. Thus, Executive Order 13132 does not apply to this rule.

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

Executive Order 13175, entitled ''Consultation and Coordination with Indian Tribal Governments'' (65 FR 67249, November 9, 2000), requires EPA to develop an accountable process to ensure ''meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications.'' This proposed rule does not have tribal implications, as specified in Executive Order 13175. Today's rule affects only the companies that produce or import class I ozone-depleting substances for laboratory or analytical uses. Thus, Executive Order 13175 does not apply to this rule.

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

Executive Order 13045, ''Protection of Children from Environmental Health risks and Safety Risks'' (62 FR 19885, April 23, 1997), applies to any rule that (1) is determined to be ''economically significant'' as defined under Executive Order 12866, and (2) concerns an environmental health and safety risk that EPA has reason to believe may have a disproportionate effect on children. If the regulatory action meets both criteria, the Agency must evaluate the environmental health or safety effects of the planned rule on children, and explain why the planned regulation is preferable to other potentially effective and reasonably feasible alternatives considered by the Agency.

While this proposed rule is not subject to the Executive Order because it is not economically significant as defined in Executive Order 12866, we nonetheless have reason to believe that the environmental health or safety risk addressed by this action may have a disproportionate effect on children. Depletion of stratospheric ozone results in greater transmission of the sun's ultraviolet (UV) radiation to the earth's surface. The following studies describe the effects on children of excessive exposure to UV radiation: (1) Westerdahl J, Olsson H, Ingvar C. ''At what age do sunburn episodes play a crucial role for the development of malignant melanoma,'' Eur J Cancer 1994; 30A: 1647–54; (2) Elwood JM, Jopson J. ''Melanoma and sun exposure: an overview of published studies,'' Int J Cancer 1997; 73:198–203; (3) Armstrong BK. ''Melanoma: childhood or lifelong sun exposure'' In: Grobb JJ, Stern RS, Mackie RM, Weinstock WA, eds. ''Epidemiology, causes and prevention of skin diseases,'' 1st ed. London, England: Blackwell Science, 1997: 63–6; (4) Whiteman D., Green A. ''Melanoma and Sunburn,'' Cancer Causes Control, 1994: 5:564–72; (5) Kricker A, Armstrong, BK, English, DR, Heenan, PJ. ''Does intermittent sun exposure cause basal cell carcinoma? A case control study in Western Australia,'' Int J Cancer 1995; 60: 489–94; (6) Gallagher, RP, Hill, GB, Bajdik, CD, et. al. ''Sunlight exposure, pigmentary factors, and risk of nonmelanocytic skin cancer I, Basal cell carcinoma,'' Arch Dermatol 1995; 131: 157–63; (7) Armstrong, BK. ''How sun exposure causes skin cancer: an epidemiological perspective,'' Prevention of Skin Cancer. 2004. 89–116. The public is invited to submit or identify peer-reviewed studies and data, of which EPA may not be aware, that assessed results of early life sun exposure.

However, as discussed in the March 13, 2001, **Federal Register** notice, the laboratory and analytical applications addressed in today's proposed rule involve extremely controlled use and disposal of all chemicals, including any ODS. As a result, emissions of ODS into the atmosphere are negligible. In light of the conditions already applied to the global exemption by appendix G to subpart A of 40 CFR part 82, EPA believes that any additional controls on laboratory uses would provide little, if any, benefit.

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

This rule is not subject to Executive Order 13211, Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use (66 FR 28355, May 22, 2001) because it is not a significant regulatory action under Executive Order 12866.

I. National Technology Transfer and Advancement Act

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) directs EPA to use voluntary consensus standards in its regulatory activities unless to do so would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (*e.g.*, materials specifications, test methods, sampling procedures, and business practices) that are developed or adopted by voluntary consensus standards bodies. The NTTAA directs EPA to provide Congress, through OMB, explanations when the Agency decides not to use available and applicable

voluntary consensus standards. This proposed rule does not involve technical standards. Therefore, EPA is not considering the use of any voluntary consensus standards.

List of Subjects in 40 CFR Part 82

Environmental protection, Administrative practice and procedure, Air pollution control, Chemicals, Imports, Reporting and recordkeeping requirements.

Dated: May 6, 2005.

Stephen L. Johnson,

Administrator.

40 CFR Part 82 is proposed to be amended as follows:

PART 82—PROTECTION OF STRATOSPHERIC OZONE

1. The authority citation for part 82 continues to read as follows:

Authority: 42 U.S.C. 7414, 7601, 7671–7671q.

Subpart A—Production and Consumption Controls

2. Section 82.8 is amended by revising paragraph (b) to read as follows:

§ 82.8 Grant of essential use allowances and critical use allowances.

* * * * *

(b) A global exemption for class I controlled substances for essential laboratory and analytical uses shall be in effect through December 31, 2007, subject to the restrictions in appendix G of this subpart, and subject to the record keeping and reporting requirements at § 82.13(u) through (x). There is no amount specified for this exemption.

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[FR Doc. 05–9589 Filed 5–12–05; 8:45 am]

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Part VII

Office of Personnel Management

5 CFR Parts 530 and 575

Recruitment, Relocation, and Retention Incentives; Final Rules

OFFICE OF PERSONNEL MANAGEMENT

5 CFR PARTS 530 and 575

RIN 3206–AK81

Recruitment, Relocation, and Retention Incentives

AGENCY: Office of Personnel Management.

ACTION: Interim rule with request for comments.

SUMMARY: The Office of Personnel Management is issuing interim regulations to implement a provision of the Federal Workforce Flexibility Act of 2004 to provide agencies with the authority to pay recruitment, relocation, and retention incentives to employees. The new authorities will provide agencies with additional flexibility to help recruit and retain employees and better meet agency strategic human capital needs. The new authorities replace the former recruitment and relocation bonus and retention allowance authorities that applied to General Schedule and other categories of Federal employees.

DATES: Effective Date: The interim regulations will become effective on May 13, 2005.

Applicability Date: The interim regulations apply to recruitment and relocation incentives authorized under 5 U.S.C. 5753 and retention incentives authorized under 5 U.S.C. 5754 on the first day of the first pay period beginning on or after May 13, 2005.

Comment Date: Comments must be received on or before July 12, 2005.

ADDRESSES: Send or deliver written comments to Donald J. Winstead, Deputy Associate Director for Pay and Performance Policy, Division for Strategic Human Resources Policy, Office of Personnel Management, Room 7H31, 1900 E Street, NW., Washington, DC 20415–8200; by fax at (202) 606–0824, or by e-mail at *pay-performance-policy@opm.gov.*

FOR FURTHER INFORMATION CONTACT: Jeanne Jacobson by telephone at (202) 606–2858; by fax at (202) 606–0824; or by e-mail at *pay-performance-policy@opm.gov.*

SUPPLEMENTARY INFORMATION: The Office of Personnel Management (OPM) is issuing interim regulations to implement section 101 of the Federal Workforce Flexibility Act of 2004 (Pub. L. 108–411, October 30, 2004). Section 101 amends 5 U.S.C. 5753 and 5754 by providing a new authority to make recruitment, relocation, and retention payments. The amended law replaces the former authority provided by 5 U.S.C. 5753 and 5754. These interim regulations replace existing regulations at 5 CFR part 575, subparts A, B, and C, to pay recruitment and relocation bonuses and retention allowances. To differentiate these kinds of payments—which are designed to provide a monetary incentive for an individual or group to accept a new position or to remain employed in the current position(s), as opposed to rewarding an individual or group for quality of performance (the typical context in which the term ''bonus'' is used)—these interim regulations use the term ''incentive'' in place of ''bonus.'' These interim regulations also build on the flexibilities provided by the former authority to provide agencies with additional, enhanced authority to pay recruitment, relocation, and retention incentives to employees to address recruitment and retention problems and better meet agency strategic human capital needs.

Overall Authority

These interim regulations provide agencies with the authority to pay—

- Recruitment incentives under 5 CFR part 575, subpart A, to an employee newly appointed to a position that is likely to be difficult to fill in the absence of an incentive;
- Relocation incentives under 5 CFR part 575, subpart B, to a current employee who must relocate to a new geographic area to accept a position that is likely to be difficult to fill in the absence of an incentive; and
- Retention incentives under 5 CFR part 575, subpart C, to a current employee with unusually high or unique qualifications or when there is a special need of the agency for the employee's services that makes it essential to retain the employee and when the agency determines that the employee would be likely to leave the Federal service in the absence of an incentive.

Payments to Current Employees in Interagency Movements

Section 101 of the Act amended 5 U.S.C. 5753(b) to allow OPM to authorize the head of an agency to pay a recruitment incentive to a current employee (of the same or a different agency) who moves to a position in the same geographic area that is likely to be difficult to fill in the absence of an incentive under circumstances described in OPM's regulations. Similarly, 5 U.S.C. 5754 was amended to allow OPM to authorize the head of an agency to pay a retention incentive to a current employee who would be likely to leave his or her position for a different position in the Federal service in the absence of a retention incentive under conditions described in OPM's regulations. Congress requested OPM to monitor the use of recruitment and retention incentives under these circumstances to ensure that they are an effective use of the Federal Government's funds and do not adversely affect the ability of those Government agencies that lose employees to other Government agencies to carry out their mission. The law provides that agencies should notify OPM within 60 days after the date a recruitment or retention incentive is authorized under these circumstances.

OPM recognizes that costly and inefficient interagency competition could occur if agencies are permitted to authorize recruitment and retention incentives to encourage employees to move from other agencies or to discourage employees from moving to other agencies. We have discussed this issue with the Chief Human Capital Officers (CHCO) Council and have agreed that, before OPM issues any rules providing agencies with the authority to pay recruitment and retention incentives to current employees in interagency movements, we will invite comments from interested parties on whether an agency should be permitted to authorize a recruitment incentive to recruit an employee from another agency or to authorize a retention incentive to retain an employee likely to leave for another Federal position and, if so, the specific circumstances in which such incentives should be authorized. Therefore, these interim regulations do not provide agencies with the authority to pay recruitment or retention incentives to current employees in interagency movements.

OPM invites comments on whether, in view of the potential for costly and inefficient interagency competition, it would be appropriate to authorize a *recruitment incentive* for a current employee who moves to another Federal position in the same geographic area that is likely to be difficult to fill. Specifically—

- Would it be desirable to allow an agency to offer a recruitment incentive to a current employee (of the same or a different Federal agency) when the head of the agency initiating the recruitment action determines that the unique competencies (*i.e.*, knowledge, skills, abilities, behaviors, and other characteristics) possessed by the employee are critical to the successful accomplishment of an important agency mission?

• Would it be desirable to allow an agency to offer a recruitment incentive to a current employee (of the same or a different Federal agency) when the offered position is under a pay system that differs from the pay system of the employee's position before the move and the head of that agency determines that the employee's service in the new position is critical to the successful accomplishment of an important agency mission?

• Would it be desirable to allow the head of an agency to offer a recruitment incentive to a current employee (of the same or a different Federal agency) when the employee is changing career fields by moving to a position in an occupational series that is part of an occupational group other than the occupational group of the employee's position immediately before the move (*e.g.*, a program analyst (0343) moving to an information technology specialist (security (2210) position)?

Likewise, we invite comments on whether, in view of the potential for costly and inefficient interagency competition, it would be appropriate to offer a *retention incentive* to a current employee who would be likely to leave his or her position for a different position in the Federal service in the absence of such an incentive. Specifically—

• Would it be desirable to allow an agency to offer a retention incentive to a current employee when the head of that agency determines that the loss of the employee's unique competencies (*i.e.*, knowledge, skills, abilities, behaviors, and other characteristics) required for the position would adversely affect the successful accomplishment of an important agency mission or the completion of a critical project?

• Would it be desirable to allow an agency to offer a retention incentive to a current employee when the offered position is under a pay system that differs from the pay system of the employee's position before the move and the head of that agency determines that the loss of the employee in the current position would adversely affect the successful accomplishment of an important agency mission or the completion of a critical project?

• Would it be desirable to allow an agency to offer a retention allowance when the employee's position requires him or her to work under unusually severe or arduous working conditions (*e.g.*, an extreme climate; unreliable essential services, such as basic utility or telecommunication services; or other harsh conditions) that the agency cannot control and the head of that agency has determined that these conditions have a significant negative effect on the agency's ability to retain that employee at the worksite?

• Would it be desirable to allow an agency to offer a retention incentive to a current employee in order to retain an employee who is likely to leave his or her position for another Federal position before the closure or relocation of the employee's office or facility and the head of that agency has determined that the employee's services are critical to the successful closure or relocation?

OPM also invites comments on whether we should limit the payment of a recruitment or retention incentive in any of the circumstances listed in this section of the Supplementary Information to only those employees whose rating of record is at the highest level under the applicable performance appraisal or evaluation system.

Requirements Applicable to Recruitment, Relocation, and Retention Incentives

The regulations governing each of the recruitment, relocation, and retention incentive authorities are provided in separate subparts of 5 CFR part 575, as discussed later in this Supplementary Information. In addition to these interim regulations, OPM will issue guidance to implement the new recruitment, relocation, and retention incentive authorities. The following requirements are similar for all of the new recruitment, relocation, and retention authorities:

Covered Employees

Under 5 U.S.C. 5753(a)(1) and 5754(a)(1), the new recruitment, relocation, and retention incentive authorities may be applied to employees covered by the General Schedule (GS) pay system or to employees in a category approved by OPM for coverage at the request of the head of an Executive agency. OPM has decided to extend coverage under the new recruitment, relocation, and retention incentive authorities to those categories of employees that were previously approved for coverage under the former recruitment, relocation, and retention authorities, except when otherwise excluded. (See *Employees not covered* in this Supplementary Information.) As under the former recruitment, relocation, and retention regulations, §§ 575.103, 575.203, and 575.303 of these interim regulations provide that employees in the following categories of positions are eligible for recruitment, relocation, and retention incentives:

• A GS position paid under 5 U.S.C. 5332 or 5305 (or similar special rate authority);

• A senior-level (SL) or scientific or professional (ST) position paid under 5 U.S.C. 5376;

• A Senior Executive Service (SES) position paid under 5 U.S.C. 5383 or a Federal Bureau of Investigation and Drug Enforcement Administration (FBI/DEA) SES position paid under 5 U.S.C. 3151;

• A position as a law enforcement officer, as defined in 5 CFR 550.103;

• A position under the Executive Schedule paid under 5 U.S.C. 5311–5317 or a position the rate of pay for which is fixed by law at a rate equal to a rate for the Executive Schedule; and

• A prevailing rate position, as defined in 5 U.S.C. 5342(a)(3).

Sections 575.103, 575.203, and 575.303 of these interim regulations also provide the head of an Executive agency with the discretionary authority to request that OPM approve coverage of other categories of employees. Employees in a requested category must be in an Executive agency (as defined in 5 U.S.C. 105) and meet the definition of *employee* under 5 U.S.C. 2105 (including an employee paid from nonappropriated funds who is covered by 5 U.S.C. 2105(c)). However, agencies do not need to request coverage of a category of employees under the new recruitment, relocation, and retention incentive authorities if OPM previously approved that category for coverage under the former authorities. Coverage of such employee categories under the new authorities will continue unless otherwise requested by the head of an Executive agency or excluded by the regulations. OPM will separately notify agencies regarding the coverage of such employee categories.

Employees Not Covered

Sections 5753(a)(2) and 5754(a)(2) of title 5, United States Code, prohibit the payment of recruitment, relocation, and retention incentives to employees in—

• A position to which an individual is appointed by the President, by and with the advice and consent of the Senate;

• A position in the SES as a noncareer appointee (as defined in 5 U.S.C. 3132(a)(7)); or

• A position excepted from the competitive service by reason of its confidential, policy-determining, policy-making, or policy-advocating character.

In addition, these interim regulations prohibit recruitment, relocation, and retention incentives for employees in positions to which an individual is

appointed by the President without the advice and consent of the Senate. (See §§ 575.104, 575.204, and 575.304.) For example, certain Executive Schedule Presidential appointees who do not otherwise fall into the other excluded categories are prohibited from receiving new recruitment, relocation, and retention incentives under this additional exclusion. As with the former authorities, the interim regulations also prohibit an employee in a position designated as the head of an agency, including an agency headed by a collegial body composed of two or more individual members and an employee appointed to a position in the expectation of receiving an appointment as the head of an agency, from receiving recruitment, relocation, and retention incentives.

Authorization of Recruitment, Relocation, and Retention Incentives

An authorized agency official may (1) determine whether an employee meets the statutory requirements for receiving a recruitment, relocation, or retention incentive; (2) approve an incentive for an employee; (3) establish the criteria for determining the amount of an incentive payment, method of payment, and length of a required service period; and (4) establish the criteria for terminating a service agreement and any obligations of the agency and employee when a service agreement is terminated. (See §§ 575.106, 575.206, and 575.306.)

Recruitment, Relocation, and Retention Incentive Plans and Approval Levels

Under 5 U.S.C. 5753(f) and 5754(g) and §§ 575.107, 575.207, and 575.307, an agency must establish a separate plan for each of the new recruitment, relocation, and retention incentives authorities. However, the agency may establish an overall policy for using recruitment, relocation, and retention incentives that addresses the criteria, options, and requirements that apply to all three incentives, but also includes separate plans that provide detailed information on the unique features of each of the recruitment, relocation, and retention incentive authorities. The agency's policy must include the designation of officials with authority to approve the incentives, the categories of employees who are prohibited from receiving incentives, requirements for determining the amount of an incentive and the payment method, requirements governing service agreements, and documentation and recordkeeping requirements. In the interest of ensuring internal equity and consistency, the interim regulations require that such plans apply uniformly across the agency (unless the agency head in his or her sole and exclusive discretion determines otherwise, subject only to OPM review and oversight).

An authorized agency official who is at least one level higher than the employee's supervisor is authorized to approve a recruitment, relocation, and retention incentive for eligible employees, unless there is no official at a higher level in the agency. Sections 575.107(b), 575.207(b), and 575.307(b) provide certain additional exceptions to the higher-level review and approval requirement.

Requirements for Approving Incentives

Each of the recruitment, relocation, and retention incentive authorities has separate criteria for authorization of an incentive, but shares a new criterion—namely, that eligible employees must have or maintain a rating of record of at least ''Fully Successful'' or equivalent to receive a recruitment, relocation, or retention incentive, as applicable. (See §§ 575.111(b), 575.205(c), 575.211(b), 575.305(d), and 575.311(b) and (g)(4).)

In determining whether to authorize an incentive, agencies must consider a number of factors, as applicable to the case at hand. For example, agencies must consider employment trends and labor-market factors, non-Federal salaries paid for similar positions, special or unique competencies required for the position, agency efforts to use non-pay authorities, and the desirability of the duties, work or organizational environment, or location of the position.

For each determination to pay a recruitment, relocation, or retention incentive, an agency must document in writing the basis for the approval of the incentive, the amount and timing of the incentive payment, and the length of the required service period.

Recruitment, Relocation, and Retention Incentive Payments

The interim regulations require agencies to use an employee's special rate or locality rate of pay, as applicable, to compute recruitment, relocation, and retention incentive payments. (Agencies were prohibited from using locality rates for this purpose under the former recruitment, relocation, and retention authorities.) Sections 575.102, 575.202, and 575.302 of the regulations define *rate of basic pay* to include a special rate under 5 CFR part 530, subpart C, or similar payment under other legal authority and a locality-based comparability payment under 5 CFR part 531, subpart F, or similar payment under other legal authority. The definition of *rate of basic* pay excludes additional pay of any other kind, including night shift differentials under 5 U.S.C. 5343(f) or environmental differentials under 5 U.S.C. 5343(c)(4) for Federal Wage System employees.

Under 5 U.S.C. 5753(d)(3) and 5754(e)(3) and §§ 575.109(e), 575.209(d), and 575.309(h) of these interim regulations, recruitment, relocation, and retention incentive payments are not considered part of basic pay for any purpose. In addition, §§ 575.109(f), 575.209(e), and 575.309(i) provide that payment of recruitment, relocation, and retention incentives is subject to the aggregate limitation on pay under 5 U.S.C. 5307 and 5 CFR part 530, subpart B. (See also the discussion on the aggregate limitation on pay under the ''Retention Incentives'' section of this Supplementary Information.)

The law and these interim regulations prescribe the limitations on the maximum amount of recruitment, relocation, and retention incentives payments that may be paid to an employee. (See the maximum incentive payments that agencies may authorize under ''Recruitment Incentives'' and ''Retention Incentives'' later in this Supplementary Information.) Under 5 U.S.C. 5753(e) and 5754(f), and §§ 575.109(c), 575.209(c), and 575.309(e), an authorized agency official may request that OPM waive these limitations based on a critical agency need. In addition to determining whether the situation meets the regular approval criteria, the authorized agency official must determine that the competencies required for the position are critical to the successful accomplishment of an important agency mission, project, or initiative (*e.g.*, programs or projects related to a national emergency or implementing a new law or critical management initiative). (**Note:** The term *competencies* is defined in all three subparts of these interim regulations as ''the knowledge, skills, abilities, behaviors, and other characteristics an [individual or] employee needs to perform the duties of a position.'' See §§ 575.102, 575.202, and 575.302.)

Service Agreements

Under 5 U.S.C. 5753(c) and 5754(d) and §§ 575.110, 575.210, and 575.310, before paying a recruitment, relocation, or retention incentive, an agency must require the employee to sign a written service agreement to complete a specified period of employment with the agency. (A service agreement is not required when an agency pays an employee a retention incentive in biweekly installments of equal amounts. See 5 U.S.C. 5754(d)(3)(A) and § 575.310(f).)

A service agreement for a recruitment, relocation, or retention incentive must specify the length of the service period, the amount of the incentive, the method and timing of incentive payments (*e.g.*, lump-sum payment and/or installments), the conditions under which an agreement may be terminated by the agency, any agency or employee obligations if a service agreement is terminated, and any other terms and conditions for receiving and retaining incentive payments.

The required service period for a recruitment incentive may not be less than 6 months. There is no minimum service period for a relocation or retention incentive. The maximum service period for a recruitment or relocation incentive may not exceed 4 years. There is no maximum service period for a retention incentive.

The service agreement must specify the commencement date and termination date of the required service period. The regulations require that recruitment, relocation, and retention incentive service agreements begin on the first day of a pay period and end on the last day of a pay period. In addition, §§ 575.110(b)(3) and 575.210(b)(3) provide agencies with the discretionary authority to delay the commencement date of a recruitment or relocation incentive service agreement until after the employee completes an initial period of formal training or after a probationary period. (See 5 U.S.C. 5753(c)(2)(C).)

Termination of Service Agreement

An authorized agency official may unilaterally terminate a recruitment, relocation, or retention incentive service agreement based on the management needs of the agency. For example, an agency may terminate a service agreement when the employee's position is affected by a reduction in force, when there are insufficient funds to continue the planned incentive payments, or when the agency assigns the employee to a different position (if the different position is not within the terms of the service agreement). An agency must terminate a service agreement if an employee is demoted or separated for cause (*i.e.*, for unacceptable performance or conduct), if the employee receives a rating of record lower than ''Fully Successful'' or equivalent during the service period, or if the employee otherwise fails to fulfill the terms of the service agreement.

If an authorized agency official terminates a service agreement based on the management needs of the agency, the agency must pay any recruitment, relocation, or retention incentive payments attributable to completed service. If an authorized agency official terminates a service agreement because of the employee's unacceptable performance or conduct, the employee receives a rating of record of lower than ''Fully Successful'' or equivalent, or the employee fails to fulfill the terms of the service agreement, the employee will retain any recruitment, relocation, or retention incentives that are attributable to completed service; receive unpaid recruitment, relocation, or retention incentives that are attributable to completed service only if approved by the agency under the terms of the service agreement; and must reimburse the Federal Government for any recruitment or relocation incentive payments received that are attributable to uncompleted service. While the head of an agency may waive any debt owed to the Federal Government under 5 U.S.C. 5584, if warranted, waivers should be rare because the employee agreed to the repayment conditions when he or she signed the service agreement. See §§ 575.111, 575.211, and 575.311 for additional information on terminating service agreements.

Recruitment Incentives

Under 5 U.S.C. 5753(b)(2)(A) and (B) and § 575.105 of these interim regulations, an agency may pay a recruitment incentive to an individual who is newly appointed as an employee of the Federal Government to a position the agency has determined is likely to be difficult to fill in the absence of a recruitment incentive. This determination must be made on an individual, case-by-case basis before the employee enters on duty. An agency may target groups of positions and make this determination on a group basis.

Difficult To Fill

Under § 575.106, an agency may determine that a position is likely to be difficult to fill if—

- The agency is likely to have difficulty recruiting qualified candidates with the competencies required for a position (or group of positions) in the absence of a recruitment incentive, considering the factors in § 575.106(b); or
- OPM has approved the use of a direct-hire authority under 5 CFR part 337, subpart B, for the position (or group of positions).

Newly-Appointed Employees

An agency may pay a recruitment incentive to an individual who is newly appointed as an employee of the Federal Government. Under § 575.102 of the recruitment incentive regulations, *newly appointed* refers to—

- The first appointment, regardless of tenure, as an *employee of the Federal Government* (as that term is defined in § 575.102);
- An appointment as a former employee of the Federal Government following a break in service of at least 90 days; and
- An appointment as an employee of the Federal Government when the employee's Federal service during the 90-day period immediately preceding the appointment was limited to one or more of the categories listed in paragraph (3) of the definition of *newly appointed.* For example, if an individual was employed under a competitive or excepted service temporary or time-limited appointment during the 90 days immediately preceding an appointment to a GS position, the agency may pay the employee a recruitment incentive upon appointment to a GS position.

Payment Options and Caps

The new recruitment incentive authority provides a wide range of options for paying a recruitment incentive and significantly raises the limit on recruitment incentive payments. Under 5 U.S.C. 5753(d)(2) and § 575.109(a) of these interim regulations, an agency may pay a recruitment incentive as an initial lump-sum payment at the commencement of the service period required by the service agreement in equal or variable installment payments throughout the service period required by the service agreement, as a final lump-sum payment upon completion of the full service period required by the service agreement, or in a combination of these payment methods. For example, an agency may decide to pay a portion of a recruitment incentive to an employee upon appointment to the new position, another portion when the employee completes half of the service period required by the service agreement, and a final payment when the employee completes the full service period required by the service agreement. Under 5 U.S.C. 5753(d)(4) and § 575.109(d), agencies also may pay all or part of a recruitment incentive to an individual who has not yet entered on duty once he or she has signed a service agreement under § 575.110.

Under 5 U.S.C. 5753(d)(1) and § 575.109(b), the total amount of recruitment incentive payments received by an employee in a service period may not exceed 25 percent of an employee's annual rate of basic pay in effect at the beginning of the service

period (including any special rate or locality payment) multiplied by the number of years (or fractions of a year) in a service period. This will allow an agency to pay a recruitment incentive of as much as 100 percent of an employee's annual rate of basic pay in effect at the beginning of the service period if the employee signs a 4-year service agreement. Special rules apply for determining the annual rate of basic pay for employees who do not have a scheduled annual rate (*e.g.*, Federal Wage System employees) and for determining the number of years in a service period. (See § 575.109(b)(2) and (b)(3).)

For example, assume an agency decides to pay the maximum recruitment incentive to an employee. The recruitment incentive service agreement covers 39 pay periods (546 days). The employee's annual rate of basic pay (including locality pay) at the beginning of the service period is $74,782. To determine the maximum recruitment incentive the agency may authorize, the following calculation must be made: $74,782 (annual rate) × .25 (25%) × 1.5 years (546 days/365 days) = $28,043. Thus, the employee may receive recruitment incentive payments totaling up to $28,043 for a 39 pay period service agreement. Under § 575.109(a), the agency may pay the $28,043 recruitment incentive as an initial up-front payment at the beginning of the service period, divide the $28,043 recruitment incentive into installment payments to be paid throughout the service period, pay the full $28,043 at the end of the service period, or use a combination of these payment methods.

As previously discussed in this Supplementary Information, under 5 U.S.C. 5753(e) and § 575.109(c), an authorized agency official may request that OPM waive the 25 percent limitation under § 575.109(b) based on a critical agency need. Under such a waiver, the total amount of recruitment incentive payments received by an employee in a service period may not exceed 50 percent of the employee's annual rate of basic pay (including any special rate or locality payment) at the beginning of the service period multiplied by the number of years (including fractions of a year) in the service period. In no event may a waiver provide total recruitment incentives payments exceeding 100 percent of the employee's annual rate of basic pay at the beginning of the service period. Section 575.109(c)(2) provides the documentation that agencies must include when submitting waiver requests to OPM.

Repayment Upon Termination of Service Agreement

As previously discussed in this Supplementary Information, an agency must terminate a recruitment incentive service agreement when an employee is demoted or separated for cause, when the employee receives a rating of record of less then ''Fully Successful,'' or when an employee fails to fulfill the terms of a service agreement (§ 575.111(b)). If an agency terminates a service agreement under these circumstances, the employee is entitled to keep all recruitment incentive payments that the agency paid to the employee that are attributable to completed service. (See *Example A* in the next paragraph.) If the employee received recruitment incentive payments that are less than the amount that would be attributable to the completed portion of the service period, the agency is not obligated to pay the employee the amount attributable to completed service, unless the agency agrees to such payment under the terms of the recruitment incentive service agreement. If the employee received recruitment incentive payments in excess of the amount that would be attributable to the completed portion of the service period, he or she must repay the excess amount. (See *Example B* in the next paragraph.)

Example A: Assume that an employee who signed a 364-day (26-pay period) service agreement will receive a total recruitment incentive of $28,043 in two installment payments—*i.e.*, $14,021 at the end of 13 pay periods of completed service and $14,022 at the end of 26 pay periods of completed service. The employee receives the first payment of $14,021. However, after 20 pay periods (280 days), the employee is demoted for cause and the agency terminates the service agreement. The employee is entitled to keep the $14,021 recruitment incentive payment already received and to receive a prorated share of the second planned recruitment incentive payment based on the amount of service completed. The employee would receive an additional $7,544.07 (280 days/364 days = 76.9%; 76.9% × $28,043 = $21,565.07; $21,565.07 − $14,021 = $7,544.07) only if authorized by the agency under the terms of the service agreement.

Example B: Assume an employee signed a 364-day (26-pay period) service agreement and received the full amount of a $28,043 recruitment incentive payment as an initial lump-sum payment. If the agency separates the employee for conduct after 20 pay periods (280 days), the employee would incur an obligation equal to 23.1 percent (84 days/364 days) of the payment, or $6,477.93. The employee may keep 76.9 percent (280 days/364 days) of the payment, or $21,565.07.

Relocation Incentives

Under 5 U.S.C. 5753(b)(2)(B)(i) and (ii) and § 575.206 of these interim regulations, an agency may pay a relocation incentive to an employee of the Federal Government who must relocate to a different geographic area without a break in service to accept a position in an agency when the position is likely to be difficult to fill or to an employee of an agency who must relocate to a different geographic area to accept a position when the position is likely to be difficult to fill. The relocation may be permanent or temporary and voluntary or involuntary. The employee must sign a service agreement to fulfill a service period in the new geographic area in return for payment of the relocation incentive.

The new flexibilities and authorities in the relocation incentive regulations regarding approval criteria, documentation requirements, payment options and caps, service agreement options and requirements, and repayment requirements are parallel to the provisions in the recruitment incentive regulations at 5 CFR part 575, subpart A, as previously described in this Supplementary Information. The following provisions are unique to the relocation incentive regulations:

- Under § 575.208(b), an agency may waive the case-by-case approval requirement for relocation incentives under two specific conditions and authorize a relocation incentive for a group or category of employees. These conditions are identical to those found in the former relocation bonus regulations.
- Under § 575.205(b), an agency may pay a relocation incentive if the new position or assignment is in a different geographic area. A position is considered to be in a different geographic area if the worksite of the new position is 50 miles or more from the worksite of the position held immediately before the move. If the worksite of the new position is less than 50 miles from the worksite of the position held immediately before the move, but the employee must relocate (*i.e.*, establish a new residence) to accept the position, the head of the agency may waive the 50-mile requirement and pay the employee a relocation incentive subject to the requirements in subpart B of these interim regulations.
- Under § 575.205(b), an employee must establish a residence (temporary or permanent) in the new geographic area before the agency may pay a relocation incentive.
- An agency may not pay a relocation incentive to an employee before the employee enters on duty in the position to which relocated.

In addition, section 101(b) of Pub. L. 108–411 repealed the $15,000 relocation

bonus payment limit that applied to law enforcement officers under section 407 of the Federal Employees Pay Comparability Act of 1990 (Public Law 101–509). All employees are covered by the same relocation incentive limit under the new authority at 5 U.S.C. 5753(d) and § 575.209 of these interim regulations.

Retention Incentives

Under 5 U.S.C. 5754(b) and § 575.305 of these interim regulations, an agency may pay a retention incentive to a current employee when the agency determines that the unusually high or unique qualifications of the employee or a special need of the agency for the employee's services makes it essential to retain the employee and the employee would be likely to leave in the absence of a retention incentive. Like the former retention allowance authority, § 575.305 provides agencies with the flexibility to authorize a retention incentive for an individual employee or for a group or category of employees. (The group retention incentive authority may not be used for SL/ST employees, members of the SES or FBI/DEA SES, Executive Schedule officials, or employees in similar positions. See § 575.305(c).)

Payment Options and Caps

Under 5 U.S.C. 5754(e)(1) and § 575.309(a), an agency must establish a retention incentive rate for each individual employee or group of employees which must be expressed as a percentage of the employee's rate of basic pay (including any special rate or locality payment). Except as provided in § 575.309(e), the retention incentive rate may not exceed 25 percent of an employee's rate of basic pay, if authorized for an individual employee, or 10 percent of an employee's rate of basic pay, if authorized for a group or category of employees.

The new retention incentive authority provides agencies with a number of options for paying a retention incentive. Under 5 U.S.C. 5754(e)(2)(A) and § 575.309(b), an agency may pay a retention incentive in (1) installments after the completion of specified periods of service (biweekly, monthly, quarterly, etc.), or (2) a single lump-sum payment after the completion of the full service period required by a service agreement. Under 5 U.S.C. 5754(e)(2), an agency may not pay a retention incentive as an initial lump-sum payment at the start of a service period or in advance of fulfilling the service period for which the incentive is being paid. If an agency chooses to pay retention incentives in installments, the agency may compute each retention incentive installment payment using the full retention incentive percentage rate established for the employee (or group of employees) under § 575.309(a) or a reduced percentage rate. An agency may decide to use different payment options for different retention incentive authorizations.

Under 5 U.S.C. 5754(e)(2)(B) and § 575.309(c)(1), each installment payment is derived by multiplying the retention incentive percentage rate by the total rate of basic pay the employee earned during the installment period (including any special rate or locality payment). If an agency chooses to provide an installment payment that reflects a reduced retention incentive percentage rate under § 575.309(a), any portion of the retention incentive that is accrued by the employee during an installment period but not paid must be paid as part of a final installment payment to the employee after completion of the full service period under the terms of the service agreement. A retention incentive paid as a single lump-sum payment upon completion of the full service period is derived by multiplying the retention incentive percentage rate established for the employee (or group of employees) under § 575.309(a) by the total amount of basic pay earned by the employee during the full service period. (See 5 U.S.C. 5754(e)(2)(B) and (C) and § 575.309(c) and (d).)

The following chart compares how a 10 percent retention incentive payment is calculated and paid using a sample of payment options available under the regulations. An employee's biweekly rate (computed under 5 U.S.C. 5504) must be used to compute an installment payment or a lump-sum payment. The installment payment is derived by multiplying the percentage incentive retention rate by the employee's basic pay earned in each biweekly pay period during the installment period. In the examples below, a biweekly rate of $3,057.60 is used to compute retention incentive installment payments after 13 and 26 pay periods of service and to compute a retention incentive lump-sum payment after 26 pay periods of service.

Retention incentive payment option	Retention incentive rate	Basic pay earned in installment period	Retention incentive installment	Total retention incentive paid after 26 pay periods
Installment payment provided after 13 and 26 pay periods of service.	10% (Each installment computed at full percentage rate.).	$39,748.80 ($3,057.60 biweekly rate times 13 pay periods).	$3,974.88 (each) ($39,748.80 basic pay earned times 10%).	$7,949.76 ($3,974.88 incentive times 2 installments).
Installment payment provided after 13 and 26 pay periods of service.	10% First installment computed at a reduced percentage rate of 5%. Second installment computed at 10% percentage rate, plus remaining 5% unpaid accrued incentive from first installment period.	$39,748.80 ($3,057.60 biweekly rate times 13 pay periods).	First: $1,987.44 ($39,748.80 basic pay earned times 5%). Second: 5,962.32 ($39,748.80 basic pay earned times; 10%, plus $1,987.44 (remaining 5% unpaid accrued incentive from first installment period)).	$7,949.76 (Two installments of $1,987.44 and $5,962.32).
Final lump-sum payment provided after 26 pay periods of service.	10%	$79,497.60 ($3,057.60 biweekly rate times 26 pay periods).	$7,949.76 ($79,497.60 basic rate earned times 10%).	$7,949.76 (One lump-sum payment of $7,949.76).

As previously discussed in this Supplementary Information, under 5 U.S.C. 5754(f) and § 575.309(e), an authorized agency official may request that OPM waive the 25 percent payment limitation for individual employees or the 10 percent payment limitation for groups of employees under § 575.309(a) based on a critical agency need. Under such a waiver, a retention incentive may not exceed 50 percent of the employee's rate of basic pay (including any special rate or locality payment). OPM will consider waiver requests only for those employees or groups of employees who will be required to sign a service agreement. Section 575.309(e)(2) establishes the documentation that must

be submitted to OPM for waiver requests. OPM may require that waiver requests for groups or categories of employees be coordinated with other agencies that have similar categories of employees.

Under 5 U.S.C. 5754(d)(4) and § 575.309(g), an agency may not begin a retention incentive service agreement or begin paying a retention incentive during a service period covered by a service agreement for payment of a recruitment or relocation incentive. However, an agency may authorize a relocation incentive after a retention incentive service agreement or retention incentive payments have begun.

Aggregate Limitation on Pay

As previously discussed in this Supplementary Information, retention incentives are subject to the aggregate limitation on pay under 5 U.S.C. 5307 and 5 CFR part 530, subpart B. Unlike the former retention allowance authority, retention incentives under the new authority are treated like other covered payments authorized under title 5, United States Code, when administering the aggregate limitation rules. Excess retention incentive payments that would cause an employee's total compensation to exceed the applicable aggregate limitation may be deferred and paid in a lump-sum payment at the beginning of the following calendar year. This change will simplify payroll processing, be easier for employees to understand, and provide a full retention incentive to key employees.

Continuation, Reduction, and Termination of Retention Incentive Service Agreement

As previously discussed in this Supplementary Information, an agency must terminate a retention incentive service agreement when an employee is demoted or separated for cause, if the employee receives a rating of record of less than ''Fully Successful'' or equivalent, or when the employee fails to fulfill the terms of the service agreement (§ 575.311(b)). If an agency terminates a retention incentive service agreement under these circumstances, the employee is entitled to retain any retention incentive payments received that are attributable to completed service. If the employee received retention incentive payments that are less than the amount that would be attributable to the completed portion of the service period, the agency is not obligated to pay the employee the amount attributable to completed service, unless the agency agrees to such payment under the terms of the service agreement. (See *Example C* in the next paragraph.)

Example C: Assume an employee who signed a 364-day (26-pay period) service agreement will receive a total retention incentive of $7,949.76 in two installment payments—*i.e.*, $3,974.88 at the end of 13 pay periods of completed service and $3,974.88 at the end of 26 pay periods of completed service. The employee receives the first payment of $3,974.88. However, after 20 pay periods (280 days), the employee is demoted for cause and the agency terminates the service agreement. The employee is entitled to keep the $3,974.88 retention incentive payment already received. If authorized in the service agreement, the employee will receive a prorated share of the second planned retention incentive payment based on the amount of service completed or an additional $2,138.49 (280 days/364 days = 76.9%; 76.9% x $7,949.76 = $6,113.37; $6,113.37 − $3,974.88 = $2,138.49).

Termination of Retention Incentive When No Service Agreement Is Required

Under § 575.310(f) of these interim regulations, a written service agreement is not required if the agency pays a retention incentive in biweekly installments of equal amounts. Section 575.311(g) requires agencies to review at least annually each determination to pay retention incentives when no service agreement is required to determine whether payment is still warranted and to certify this determination in writing. An agency may continue such retention incentive payments as long as conditions giving rise to the original determination to pay the incentive still exist. An agency must reduce or terminate an incentive paid without a service agreement whenever payment at the level originally approved is no longer warranted. An agency must terminate a retention incentive when no service agreement is required if the employee is demoted or separated for cause or receives a rating of record lower than ''Fully Successful'' or equivalent. If an agency terminates a retention incentive when no service agreement is required, the agency must provide written notice to the employee, and the employee is entitled to receive any scheduled incentive payments through the end of the pay period in which the written notice is provided.

Recruitment, Relocation, and Retention Authority Monitoring Requirements and Revocation or Suspension of Authority

The interim regulations at §§ 575.112, 575.212, and 575.312 require agencies to monitor their use of the new recruitment, relocation, and retention incentive authorities to ensure that their recruitment, relocation, and retention plans and the use of the authorities are consistent with the requirements and criteria established under law and these interim regulations. These sections also authorize OPM to revoke or suspend an agency's authority to make recruitment, relocation, and retention incentive payments if OPM finds the agency's use of the incentive authorities is not consistent with law, regulations, and the agency's plans.

Records and Reports

These interim regulations at §§ 575.113(a), 575.213(a), and 575.313(a) require agencies to keep a record of each determination to pay a recruitment, relocation, or retention incentive and to make such records available for review upon OPM's request. Section 101(c) of Public Law 108–411 also requires OPM to submit an annual report to the Committee on Governmental Affairs of the Senate and the Committee on Government Reform in the House of Representatives on the operation of the new recruitment, relocation, and retention incentive authorities for each of the first 5 years in which the new authorities are in effect (*i.e.*, 2005 through 2009). Sections 575.113(b), 575.213(b), and 575.313(b) of these interim regulations require agencies to submit specific information and data to OPM for this annual report. OPM will issue additional guidance to agencies on these reporting requirements by memorandum.

Recruitment, Relocation, or Retention Payments Authorized Before May 1, 2005

These interim regulations do not apply to recruitment and relocation bonuses and retention allowances authorized under 5 U.S.C. 5753 and 5754 before May 1, 2005. Under section 101(d)(2) of Public Law 108–411 and §§ 575.114 and 575.214 of these interim regulations, a recruitment or relocation bonus service agreement that was authorized under 5 U.S.C. 5753 and 5 CFR part 575, subparts A and B, before May 1, 2005, remains in effect until its expiration, subject to the law and regulations applicable to recruitment and relocation bonuses before May 1, 2005. (**Note:** If an individual or employee received a formal offer of a recruitment or relocation bonus before May 1, 2005, the agency may pay the bonus after that date as long as the terms associated with the offer were consistent with the regulations in effect when the offer was made.)

Under section 101(d)(3) of Public Law 108–411 and § 575.314 of these interim regulations, retention allowances that were authorized under 5 U.S.C. 5754 and 5 CFR part 575, subpart C, before

May 1, 2005, must continue to be paid until the retention allowance is reauthorized or terminated, but not later than April 30, 2006, and are subject to the law and regulations applicable to retention allowances before May 1, 2005. For example, retention allowances authorized before May 1, 2005, must continue to be subject to the special rules regarding the aggregate pay limitation under 5 CFR part 530, subpart B, and 5 CFR part 575, subpart C, as in effect before May 1, 2005. (**Note:** If an individual or employee received a formal offer of a retention allowance before May 1, 2005, the agency may pay the allowance after that date as long as the terms associated with the offer were consistent with the regulations in effect when the offer was made.)

Other Conforming Changes

Aggregate Limitation on Pay

These interim regulations amend the definitions of *aggregate compensation and discretionary payment* in 5 CFR 530.202 and 5 CFR 530.203 of the aggregate limitation on pay regulations to reflect the new term *retention incentive* and the new rules regarding the application of retention incentives toward the aggregate pay limitation. (See discussion on the aggregate limitation on pay in the ''Retention Incentives'' section of this **SUPPLEMENTARY INFORMATION.**)

These interim regulations also make conforming changes to implement section 301 of Public Law 108–411. The amended definitions of *aggregate compensation* and *basic pay* in 5 CFR 530.202 delete obsolete references and treat locality payments under 5 CFR part 531, subpart F, as basic pay for the purpose of applying the aggregate limitation on pay.

Supervisory Differentials

These interim regulations amend the regulations regarding supervisory differentials at 5 CFR 575.405 to reflect the new term *retention incentive* and to exclude recruitment, relocation, and retention incentives from the continuing pay of a supervisor and the continuing pay of a subordinate for the purpose of comparing their pay and calculating a supervisory differential.

These interim regulations also make conforming changes to implement section 301 of Public Law 108–411 by removing obsolete references and treating locality payments under 5 CFR part 531, subpart F, as basic pay for the purpose of calculating supervisory differentials.

Extended Assignment Incentives

These interim regulations amend the extended assignment incentive regulations at 5 CFR 575.506 to provide that an agency may not begin paying an extended assignment incentive to an otherwise eligible employee who is receiving a recruitment, relocation, or retention incentive. These interim regulations also make conforming changes to implement section 301 of Public Law 108–411 by removing obsolete references and treating locality payments under 5 CFR part 531, subpart F, as basic pay for the purpose of calculating extended assignment incentives.

Waiver of Notice of Proposed Rulemaking and Delayed Effective Date

Pursuant to 5 U.S.C. 553(b)(3)(B), I find that good cause exists for waiving the general notice of proposed rulemaking. Also, pursuant to 5 U.S.C. 553(d)(3), I find that good cause exists for making this rule effective in less than 30 days. These interim regulations implement a provision of Public Law 108–411 that became effective on May 1, 2005. Waiver of the requirements for proposed rulemaking and making the effective date less than 30 days after publication are necessary to ensure timely implementation of the law as intended by Congress. To delay implementation of these regulations by imposing a general notice of proposed rulemaking or an additional 30 day implementation requirement would be contrary to the public interest in giving Federal agencies flexibility to assist in their recruiting, relocation, and retention efforts. The public will be benefited by the immediate implementation of these regulations with no detriment, financial or otherwise, in taking this action. Comments are being solicited which will assist OPM in issuing final regulations without negatively affecting agency flexibility.

E.O. 12866, Regulatory Review

This rule has been reviewed by the Office of Management and Budget in accordance with E.O. 12866.

Regulatory Flexibility Act

I certify that these regulations will not have a significant economic impact on a substantial number of small entities because they will apply only to Federal agencies and employees.

List of Subjects in 5 CFR 530 and 575

Government employees, Reporting and recordkeeping requirements, Wages.

Office of Personnel Management.

Dan G. Blair,

Acting Director.

■ Accordingly, OPM amends 5 CFR parts 530 and 575 as follows:

PART 530—PAY RATES AND SYSTEMS (GENERAL)

■ 1. Revise the authority citation for part 530 to read as follows:

Authority: 5 U.S.C. 5305 and 5307; subpart C also issued under 5 U.S.C. 5338 and sec. 4, Pub. L. 103–89, 107 Stat. 981.

Subpart B—Aggregate Limitation on Pay

■ 2. In § 530.202—

■ a. Remove paragraph (2) in the definition of *aggregate compensation;*

■ b. Redesignate paragraphs (3) through (15) in the definition of *aggregate compensation* as paragraphs (2) through (14), respectively, and revise newly redesignated paragraphs (5) and (6); and

■ c. Revise the definitions of *basic pay* and *discretionary payment*.

The revisions read as follows:

§ 530.202 Definitions.

* * * * *

Aggregate compensation means the total of—* * *

(5) Recruitment and relocation incentives under 5 U.S.C. 5753 and retention incentives under 5 U.S.C. 5754;

(6) Extended assignment incentives under 5 U.S.C. 5757;

* * * * *

Basic pay means the total amount of pay received at a rate fixed by law or administrative action for the position held by an employee, including any special rate under 5 CFR part 530, subpart B, or any locality-based comparability payment under 5 CFR part 531, subpart F, or other similar payment or supplement under other legal authority, before any deductions. *Basic pay* includes night and environmental differentials for prevailing rate employees under 5 U.S.C. 5343(f) and 5 CFR 532.511. *Basic pay* excludes additional pay of any other kind.

* * * * *

Discretionary payment means a payment an agency has discretion to make or not to make to an employee. An extended assignment incentive under 5 U.S.C. 5757 is a *discretionary payment.* However, other payments that are preauthorized to be made to an employee at a regular fixed rate each pay period are not *discretionary payments.*

* * * * *

■ 3. In § 530.203, remove paragraph (g)(3) and revise paragraph (d) to read as follows:

§ 530.203 Administration of aggregate limitation on pay.

* * * * *

(d) When an agency authorizes a discretionary payment for an employee, the agency must defer any portion of such payment that, when added to the estimated aggregate compensation the employee is projected to receive, would cause the employee's aggregate compensation during the calendar year to exceed the applicable aggregate limitation. Any portion of a discretionary payment deferred under this paragraph must be available for payment as provided in § 530.204. When a discretionary payment is authorized but not required to be paid in the current calendar year, an agency official's decision to set the payment date in the next calendar year is not considered a deferral under this paragraph.

* * * * *

■ 4. In part 575, revise the title to read as follows:

PART 575—RECRUITMENT, RELOCATION, AND RETENTION INCENTIVES; SUPERVISORY DIFFERENTIALS; AND EXTENDED ASSIGNMENT INCENTIVES

■ 5. Revise the authority citation for part 575 to read as follows:

Authority: 5 U.S.C. 1104(a)(2) and 5307; subparts A, B, and C also issued under sec. 101, Public Law 108–411, 118 Stat. 2305 (5 U.S.C. 5753 and 5754); subpart D also issued under 5 U.S.C. 5755; subpart E also issued under sec. 207 Public Law 107–273, 116 Stat. 1779 (5 U.S.C. 5757).

■ 6. Revise part 575, subpart A, to read as follows:

Subpart A—Recruitment Incentives

575.101 Purpose.
575.102 Definitions.
575.103 Eligible categories of employees.
575.104 Ineligible categories of employees.
575.105 Applicability to employees.
575.106 Authorizing a recruitment incentive.
575.107 Agency recruitment incentive plan and approval levels.
575.108 Approval criteria and written determination.
575.109 Payment of recruitment incentives.
575.110 Service agreement requirements.
575.111 Termination of a service agreement.
575.112 Internal monitoring requirements and revocation or suspension of authority.
575.113 Records and reports.
575.114 Recruitment bonus service agreements in effect before May 1, 2005.

Subpart A—Recruitment Incentives

§ 575.101 Purpose.

This subpart contains regulations implementing 5 U.S.C. 5753, which authorizes payment of recruitment incentives. An agency may pay a recruitment incentive to a newly appointed employee under the conditions specified in this subpart provided the agency has determined that the employee's position is likely to be difficult to fill in the absence of an incentive.

§ 575.102 Definitions.

In this subpart:

Agency means an executive agency or a legislative branch agency included in 5 U.S.C. 5102(a)(1).

Authorized agency official means the head of an agency or an official who is authorized to act for the head of the agency in the matter concerned.

Competencies means the knowledge, skills, abilities, behaviors, and other characteristics an individual needs to perform the duties of a position.

Employee has the meaning given that term in 5 U.S.C. 2105, except that the term also includes an employee described in 5 U.S.C. 2105(c). An *employee* also means an individual not yet employed who has received a written offer to be newly appointed or reappointed and has signed the written service agreement required by § 575.110 before payment of the recruitment incentive.

Employee of the Federal Government means an employee (as that term is defined in 5 U.S.C. 2105, except that the term also includes an employee described in 5 U.S.C. 2105(c) and (e)) of any part of the Government of the United States (which includes the United States Postal Service and the Postal Rate Commission).

Executive agency has the meaning given that term in 5 U.S.C. 105.

Newly appointed refers to—

(1) The first appointment, regardless of tenure, as an employee of the Federal Government;

(2) An appointment as a former employee of the Federal Government following a break in service of at least 90 days; or

(3) An appointment as an employee of the Federal Government when the employee's Federal service during the 90-day period immediately preceding the appointment was limited to one or more of the following:

(i) A time-limited or non-permanent appointment in the competitive or excepted service;

(ii) Employment with the government of the District of Columbia (DC) when the candidate was first appointed by the DC government on or after October 1, 1987;

(iii) An appointment as an expert or consultant under 5 U.S.C. 3109 and 5 CFR part 304;

(iv) Service as an employee of a nonappropriated fund instrumentality (NAFI) of the Department of Defense (when moving from a Department of Defense NAFI position to another Department of Defense position) or the Coast Guard (when moving from a Coast Guard NAFI position to another Coast Guard position) if the individual has a break in service of more than 3 days from the nonappropriated fund instrumentality;

(v) Service as an employee of a nonappropriated fund instrumentality of the Department of Defense when moving to a position outside of the Department of Defense or of the Coast Guard when moving to a position outside the Coast Guard; or

(vi) Employment under a provisional appointment designated under 5 CFR 316.403.

OPM means the Office of Personnel Management.

Rate of basic pay means the rate of pay fixed by law or administrative action for the position to which an employee is or will be appointed before deductions and including any special rate under 5 CFR part 530, subpart C, or similar payment under other legal authority, and any locality-based comparability payment under 5 CFR part 531, subpart F, or similar payment under other legal authority, but excluding additional pay of any other kind. For example, a *rate of basic pay* does not include additional pay such as night shift differentials under 5 U.S.C. 5343(f) or environmental differentials under 5 U.S.C. 5343(c)(4).

Service agreement means a written agreement between an agency and an employee under which the employee agrees to a specified period of employment of not less than 6 months or more than 4 years with the agency in return for payment of a recruitment incentive.

§ 575.103 Eligible categories of employees.

Except as provided in § 575.104, an agency may pay a recruitment incentive to an employee appointed or placed in the following categories of positions:

(a) A General Schedule position paid under 5 U.S.C. 5332 or 5305 (or similar special rate authority);

(b) A senior-level or scientific or professional position paid under 5 U.S.C. 5376;

(c) A Senior Executive Service position paid under 5 U.S.C. 5383 or a Federal Bureau of Investigation and Drug Enforcement Administration Senior Executive Service position paid under 5 U.S.C. 3151;

(d) A position as a law enforcement officer, as defined in 5 CFR 550.103;

(e) A position under the Executive Schedule paid under 5 U.S.C. 5311–5317 or a position the rate of pay for which is fixed by law at a rate equal to a rate for the Executive Schedule;

(f) A prevailing rate position, as defined in 5 U.S.C. 5342(a)(3); or

(g) Any other position in a category for which payment of recruitment incentives has been approved by OPM at the request of the head of an executive agency.

§ 575.104 Ineligible categories of employees.

An agency may not pay a recruitment incentive to an employee in—

(a) A position to which an individual is appointed by the President, by and with the advice and consent of the Senate;

(b) A position in the Senior Executive Service as a noncareer appointee (as defined in 5 U.S.C. 3132(a)(7));

(c) A position excepted from the competitive service by reason of its confidential, policy-determining, policy-making, or policy-advocating character; or

(d) A position not otherwise covered by the exclusions in paragraphs (a), (b), and (c) of this section—

(1) To which an individual is appointed by the President without the advice and consent of the Senate;

(2) Designated as the head of an agency, including an agency headed by a collegial body composed of two or more individual members; or

(3) In which the employee is expected to receive an appointment as the head of an agency.

§ 575.105 Applicability to employees.

(a) A recruitment incentive may be paid under the conditions prescribed in this subpart to an employee who is newly appointed to a position listed in § 575.103 that is likely to be difficult to fill, as determined under § 575.106.

(b) An agency may target groups of similar positions (excluding positions covered by § 575.103(b), (c), or (e) or those in similar categories approved by OPM under § 575.103(g)) that have been difficult to fill in the past or that may be difficult to fill in the future and make the required determination to offer a recruitment incentive to newly-appointed employees on a group basis.

§ 575.106 Authorizing a recruitment incentive.

(a) *Authority of authorized agency official.* An authorized agency official retains sole and exclusive discretion, subject only to OPM review and oversight, to—

(1) Determine when a position is likely to be difficult to fill under paragraph (b) of this section;

(2) Approve a recruitment incentive for an employee under § 575.105;

(3) Establish the criteria for determining the amount of a recruitment incentive and the length of a service period under §§ 575.109(a) and 575.110(a), respectively;

(4) Request a waiver from OPM of the limitation on the maximum amount of a recruitment incentive under § 575.109(c); and

(5) Establish the criteria for terminating a service agreement under § 575.111.

(b) *Factors for determining when a position is likely to be difficult to fill.* An agency in its sole and exclusive discretion, subject only to OPM review and oversight, may determine that a position is likely to be difficult to fill if the agency is likely to have difficulty recruiting candidates with the competencies required for the position (or group of positions) in the absence of a recruitment incentive. An agency must consider the following factors, as applicable to the case at hand, in determining whether a position (or group of positions) is likely to be difficult to fill in the absence of a recruitment incentive and in documenting this determination as required by § 575.108:

(1) The availability and quality of candidates possessing the competencies required for the position, including the success of recent efforts to recruit candidates for similar positions using indicators such as offer acceptance rates, the proportion of positions filled, and the length of time required to fill similar positions;

(2) The salaries typically paid outside the Federal Government for similar positions;

(3) Recent turnover in similar positions;

(4) Employment trends and labor-market factors that may affect the agency's ability to recruit candidates for similar positions;

(5) Special or unique competencies required for the position;

(6) Agency efforts to use non-pay authorities, such as special training and work scheduling flexibilities, to resolve difficulties alone or in combination with a recruitment incentive;

(7) The desirability of the duties, work or organizational environment, or geographic location of the position; and

(8) Other supporting factors.

(c) An agency may determine that a position (or group of positions) is likely to be difficult to fill if OPM has approved the use of a direct-hire authority applicable to the position (or group of positions) under 5 CFR part 337, subpart B.

§ 575.107 Agency recruitment incentive plan and approval levels.

(a) Before paying recruitment incentives under this subpart, an agency must establish a recruitment incentive plan. The plan must include the following elements:

(1) The designation of officials with authority to review and approve payment of recruitment incentives (subject to paragraph (b) of this section), including the circumstances under which an official has the authority to approve payment without higher level approval under paragraph (b)(2) of this section;

(2) The categories of employees who are prohibited from receiving recruitment incentives;

(3) Required documentation for determining that a position is likely to be difficult to fill;

(4) Any requirements for determining the amount of a recruitment incentive;

(5) The payment methods that may be authorized;

(6) Requirements governing service agreements, which, at a minimum, must include—

(i) The criteria for determining the length of a service period;

(ii) The conditions for terminating a service agreement; and

(iii) The obligations of the agency and the employee, as applicable, if an agency terminates a service agreement; and

(7) Documentation and recordkeeping requirements sufficient to allow reconstruction of the action and to fulfill the requirements of §§ 575.112 and 575.113.

(b)(1) Except as provided in paragraph (b)(2) of this section, an authorized agency official who is at least one level higher than the employee's supervisor must review and approve each determination to pay a recruitment incentive to a newly-appointed employee, unless there is no official at a higher level in the agency.

(2) When necessary to make a timely offer of employment, an authorized agency official may establish criteria in advance for offering recruitment incentives to newly-appointed employees and may authorize an official

who is not lower than a candidate's supervisor to use these criteria to offer a recruitment incentive (in any amount within a pre-established range) to a candidate without further review or approval.

(c) Unless the head of the agency determines otherwise, an agency recruitment incentive plan must apply uniformly across the agency.

§ 575.108 Approval criteria and written determination.

(a) For each determination to pay a recruitment incentive under this subpart, an agency must document in writing—

(1) The basis for determining that a position is likely to be difficult to fill, as determined under § 575.106;

(2) The basis for authorizing a recruitment incentive; and

(3) The basis for the amount and timing of the approved recruitment incentive payment and the length of the required service period.

(b) An agency must make the determination to pay a recruitment incentive before the prospective employee enters on duty in the position for which recruited.

§ 575.109 Payment of recruitment incentives.

(a) An authorized agency official must establish the criteria for determining the amount of a recruitment incentive. An agency may pay a recruitment incentive-

(1) As an initial lump-sum payment at the commencement of the service period required by the service agreement or before the start of the service period, as authorized by paragraph (d) of this section;

(2) In installments throughout the service period required by the service agreement;

(3) As a final lump-sum payment upon the completion of the full service period required by the service agreement; or

(4) In a combination of these payment methods.

(b)(1) Except as provided in paragraph (c) of this section, the total amount of recruitment incentive payments paid to an employee in a service period may not exceed 25 percent of the annual rate of basic pay of the employee at the beginning of the service period multiplied by the number of years (including fractions of a year) in the service period (not to exceed 4 years).

(2) For hourly rate employees who do not have a scheduled annual rate of basic pay, compute the annual rate required for paragraph (b)(1) of this section by multiplying the applicable hourly rate in effect at the beginning of the service period by 2,087 hours.

(3) For the purpose of determining the number of years in a service period under paragraph (b)(1) of this section, divide the total number of calendar days in the service period by 365 and round the result to two decimal places. For example, a service period covering 39 biweekly pay periods equals 546 days, and 546 days divided by 365 days equals 1.50 years.

(c)(1) An authorized agency official may request that OPM waive the limitation in paragraph (b)(1) of this section for an employee based on a critical agency need. The authorized agency official must determine that the competencies required for the position are critical to the successful accomplishment of an important agency mission, project, or initiative (*e.g.*, programs or projects related to a national emergency or implementing a new law or critical management initiative). Under such a waiver, the total amount of recruitment incentive payments paid to an employee in a service period may not exceed 50 percent of the annual rate of basic pay of the employee at the beginning of the service period multiplied by the number of years (including fractions of a year) in the service period. However, in no event may a waiver provide total recruitment incentive payments exceeding 100 percent of the employee's annual rate of basic pay at the beginning of the service period.

(2) Waiver requests must include—

(i) A description of the critical agency need the proposed recruitment incentive would address;

(ii) The documentation required by § 575.108;

(iii) The proposed recruitment incentive payment amount and a justification for that amount;

(iv) The timing and method of making the recruitment incentive payments;

(v) The service period required; and

(vi) Any other information pertinent to the case at hand.

(d) An agency may pay a recruitment incentive to an employee who has not yet entered on duty once the employee has signed a service agreement established under § 575.110.

(e) A recruitment incentive is not part of an employee's rate of basic pay for any purpose.

(f) Payment of a recruitment incentive is subject to the aggregate limitation on pay under 5 CFR part 530, subpart B.

§ 575.110 Service agreement requirements.

(a) Before paying a recruitment incentive, an agency must require the employee to sign a written service agreement to complete a specified period of employment with the agency (or successor agency in the event of a transfer of function). An authorized agency official must establish the criteria for determining the length of a service period. The service period may not be less than 6 months and may not exceed 4 years.

(b)(1) The service agreement must include the commencement and termination dates of the required service period. Except as provided in paragraphs (b)(2) and (b)(3) of this section, the required service period must begin upon the commencement of service with the agency. The service period must terminate on the last day of a pay period.

(2) If service with the agency does not begin on the first day of a pay period, the agency must delay the service period commencement date so that a required service period begins on the first day of the first pay period beginning on or after the commencement of service in the agency.

(3) An agency may delay a service agreement commencement date until after the employee completes an initial period of formal training or required probationary period when continued employment in the position is contingent on successful completion of the formal training or probationary period. The agency must make the determination to pay a recruitment incentive before the employee enters on duty in the position. However, the service agreement must specify that if an employee does not successfully complete the training or probationary period before the service period commences, the agency is not obligated to pay any portion of the recruitment incentive to the employee.

(c) The service agreement must specify the total amount of the incentive, the method of paying the incentive, and the timing and amounts of each incentive payment, as established under § 575.109.

(d) The service agreement must include the conditions under which the agency must terminate the service agreement (*i.e.*, if an employee is demoted or separated for cause, receives a rating of record of less than ''Fully Successful'' or equivalent, or otherwise fails to fulfill the terms of the service agreement) and the conditions under which the employee must repay a recruitment incentive under § 575.111.

(e) The service agreement must include the conditions under which the agency may terminate the service agreement before the employee completes the agreed-upon service period. The service agreement must specify the effect of a termination under

§ 575.111, including the conditions under which the agency will pay an additional recruitment incentive payment for partially completed service under § 575.111(e) and (f).

(f) The service agreement may include any other terms or conditions that, if violated, will result in termination of the service agreement under § 575.111(b). For example, the service agreement may specify the employee's work schedule, type of position, and the duties he or she is expected to perform. In addition, the service agreement may address the extent to which periods of time on detail, in a nonpay status, or in a paid leave status are creditable towards the completion of the service period.

§ 575.111 Termination of a service agreement.

(a) An authorized agency official may unilaterally terminate a recruitment incentive service agreement based solely on the management needs of the agency. For example, an agency may terminate a service agreement when the employee's position is affected by a reduction in force, when there are insufficient funds to continue the planned incentive payments, or when the agency assigns the employee to a different position (if the different position is not within the terms of the service agreement).

(b) An authorized agency official must terminate a recruitment incentive service agreement if an employee is demoted or separated for cause (*i.e.*, for unacceptable performance or conduct), if the employee receives a rating of record (or an official performance appraisal or evaluation under a system not covered by 5 U.S.C. chapter 43 or 5 CFR part 430) of less than ''Fully Successful'' or equivalent, or if the employee otherwise fails to fulfill the terms of the service agreement.

(c) The termination of a service agreement is not grievable or appealable.

(d) The agency must notify an employee in writing when it terminates a recruitment incentive service agreement.

(e) If an authorized agency official terminates a service agreement under paragraph (a) of this section, the employee is entitled to all recruitment incentive payments that are attributable to completed service and to retain any portion of a recruitment incentive payment he or she received that is attributable to uncompleted service.

(f) If an authorized agency official terminates a service agreement under paragraph (b) of this section, the employee is entitled to retain recruitment incentive payments previously paid by the agency that are attributable to the completed portion of the service period. If the employee received recruitment incentive payments that are less than the amount that would be attributable to the completed portion of the service period, the agency is not obligated to pay the employee the amount attributable to completed service, unless the agency agreed to such payment under the terms of the recruitment incentive service agreement. If the employee received recruitment incentive payments in excess of the amount that would be attributable to the completed portion of the service period, he or she must repay the excess amount.

(g) If an employee fails to reimburse the paying agency for the full amount owed under paragraph (f) of this section, the amount outstanding must be recovered from the employee under the agency's regulations for collection by offset from an indebted Government employee under 5 U.S.C. 5514 and 5 CFR part 550, subpart K, or through the appropriate provisions governing Federal debt collection if the individual is no longer a Federal employee. However, the head of the agency may waive the debt under 5 U.S.C. 5584.

§ 575.112 Internal monitoring requirements and revocation or suspension of authority.

(a) Each agency must monitor the use of recruitment incentives to ensure that its recruitment incentive plan and the payment of recruitment incentives are consistent with the requirements and criteria established under 5 U.S.C. 5753 and this subpart.

(b) When OPM finds that an agency is not paying recruitment incentives consistent with the agency's recruitment incentive plan and the criteria established under 5 U.S.C. 5753 and this subpart or otherwise determines that the agency is not using this authority selectively and judiciously, OPM may—

(1) Direct the agency to revoke or suspend the authority granted to any organizational component in the agency and, with respect to any category or categories of employees, require that the component obtain approval from the agency's headquarters level before paying a recruitment incentive to such employees; or

(2) Revoke or suspend the authority granted to the agency under this subpart for all or any part of the agency and, with respect to any category or categories of employees, require that the agency obtain OPM's approval before paying a recruitment incentive to such employees.

§ 575.113 Records and reports.

(a) Each agency must keep a record of each determination to pay a recruitment incentive and make such records available for review upon OPM's request.

(b) By March 31 in each of the years 2006 through 2010, each agency must submit a written report to OPM on the use of the recruitment incentive authority within the agency during the previous calendar year for use in compiling an OPM report to Congress, as required by section 101(c) of Public Law 108–411. Each agency report must include—

(1) A description of how the authority to pay recruitment incentives was used by the agency during the previous calendar year;

(2) The number and dollar amount of recruitment incentives paid during the previous calendar year by occupational series and grade, pay level, or other pay classification; and

(3) Other information, records, reports, and data as OPM may require.

§ 575.114 Recruitment bonus service agreements in effect before May 1, 2005.

This subpart does not apply to a recruitment bonus service agreement that was authorized under 5 U.S.C. 5753 and 5 CFR part 575, subpart A, before May 1, 2005. Such service agreements remain in effect until their expiration, subject to regulations applicable to recruitment bonuses before May 1, 2005. (See 5 CFR part 575 and part 530, subpart B, contained in the 5 CFR, parts 1 to 699, edition revised as of January 1, 2005.)

■ 7. Revise part 575, subpart B, to read as follows:

Subpart B—Relocation Incentives

575.201 Purpose.
575.202 Definitions.
575.203 Eligible categories of employees.
575.204 Ineligible categories of employees.
575.205 Applicability to employees.
575.206 Authorizing a relocation incentive.
575.207 Agency relocation incentive plan and approval levels.
575.208 Approval criteria and written determination.
575.209 Payment of relocation incentives.
575.210 Service agreement requirements.
575.211 Termination of a service agreement.
575.212 Internal monitoring requirements and revocation or suspension of authority.
575.213 Records and reports.
575.214 Relocation bonus service agreements in effect before May 1, 2005.

Subpart B—Relocation Incentives

§ 575.201 Purpose.

This subpart contains regulations implementing 5 U.S.C. 5753, which

authorizes payment of relocation incentives. An agency may pay a relocation incentive to a current employee who must relocate to accept a position in a different geographic area under the conditions specified in this subpart provided the agency determines that the position is likely to be difficult to fill in the absence of an incentive.

§ 575.202 Definitions.

In this subpart:

Agency means an executive agency or a legislative branch agency included in 5 U.S.C. 5102(a)(1).

Authorized agency official means the head of an agency or an official who is authorized to act for the head of the agency in the matter concerned.

Competencies means the knowledge, skills, abilities, behaviors, and other characteristics an employee needs to perform the duties of a position.

Employee has the meaning given that term in 5 U.S.C. 2105, except that the term also includes an employee described in 5 U.S.C. 2105(c).

Employee of the Federal Government means an employee (as that term is defined in 5 U.S.C. 2105, except that the term also includes an employee described 5 U.S.C. 2105(c) and (e)) of any part of the Government of the United States (which includes the United States Postal Service and the Postal Rate Commission).

Executive agency has the meaning given that term in 5 U.S.C. 105.

OPM means the Office of Personnel Management.

Rate of basic pay means the rate of pay fixed by law or administrative action for the position to which the employee is relocated before deductions and including any special rate under 5 CFR part 530, subpart C, or similar payment under other legal authority, and any locality-based comparability payment under 5 CFR part 531, subpart F, or similar payment under other legal authority, but excluding additional pay of any other kind. For example, a *rate of basic pay* does not include additional pay such as night shift differentials under 5 U.S.C. 5343(f) or environmental differentials under 5 U.S.C. 5343(c)(4).

Service agreement means a written agreement between an agency and an employee under which the employee agrees to a specified period of employment of not more than 4 years with the agency at the new duty station to which relocated in return for payment of a relocation incentive.

§ 575.203 Eligible categories of employees.

Except as provided in § 575.204 of this part, an agency may pay a relocation incentive to an employee in the following categories of positions:

(a) A General Schedule position paid under 5 U.S.C. 5332 or 5305 (or similar special rate authority);

(b) A senior-level or scientific or professional position paid under 5 U.S.C. 5376;

(c) A Senior Executive Service position paid under 5 U.S.C. 5383 or a Federal Bureau of Investigation and Drug Enforcement Administration Senior Executive Service position paid under 5 U.S.C. 3151;

(d) A position as a law enforcement officer, as defined in 5 CFR 550.103;

(e) A position under the Executive Schedule paid under 5 U.S.C. 5311–5317 or a position the rate of pay for which is fixed by law at a rate equal to a rate for the Executive Schedule;

(f) A prevailing rate position, as defined in 5 U.S.C. 5342(a)(3); or

(g) Any other position in a category for which payment of relocation incentives has been approved by OPM at the request of the head of an executive agency.

§ 575.204 Ineligible categories of employees.

An agency may not pay a relocation incentive to an employee in—

(a) A position to which an individual is appointed by the President, by and with the advice and consent of the Senate;

(b) A position in the Senior Executive Service as a noncareer appointee (as defined in 5 U.S.C. 3132(a)(7));

(c) A position excepted from the competitive service by reason of its confidential, policy-determining, policy-making, or policy-advocating character; or

(d) A position not otherwise covered by the exclusions in paragraphs (a), (b), and (c) of this section—

(1) To which an individual is appointed by the President without the advice and consent of the Senate;

(2) Designated as the head of an agency, including an agency headed by a collegial body composed of two or more individual members; or

(3) In which the employee is expected to receive an appointment as the head of an agency.

§ 575.205 Applicability to employees.

(a) An agency may pay a relocation incentive under the conditions prescribed in this subpart to—

(1) An employee of the Federal Government who must relocate to a different geographic area without a break in service to accept a position listed in § 575.203 in an agency when the position is likely to be difficult to fill as determined under § 575.206; or

(2) An employee of an agency who must relocate to a different geographic area (permanently or temporarily) to accept a position listed in § 575.203 when the position is likely to be difficult to fill as determined under § 575.206.

(b) An agency may pay a relocation incentive under paragraph (a) of this section when an employee must relocate to accept a position or assignment in a different geographic area. A position is considered to be in a different geographic area if the worksite of the new position is 50 or more miles from the worksite of the position held immediately before the move. If the worksite of the new position is less than 50 miles from the worksite of the position held immediately before the move, but the employee must relocate (*i.e.*, establish a new residence) to accept the position, an authorized agency official may waive the 50-mile requirement and pay the employee a relocation incentive subject to the requirements of this subpart. In all cases, the employee must establish a residence in the new geographic area before the agency may pay a relocation incentive to the employee.

(c) A relocation incentive may be paid only when the employee's rating of record (or an official performance appraisal or evaluation under a system not covered by 5 U.S.C. chapter 43 or 5 CFR part 430) for the position held immediately before the move is at least ''Fully Successful'' or equivalent.

§ 575.206 Authorizing a relocation incentive.

(a) *Authority of authorized agency official.* An authorized agency official retains sole and exclusive discretion, subject only to OPM review and oversight, to—

(1) Determine when a position is likely to be difficult to fill under paragraph (b) of this section;

(2) Approve a relocation incentive for an employee under § 575.205;

(3) Establish the criteria for determining the amount of a relocation incentive and the length of a service period under §§ 575.209 and 575.210, respectively;

(4) Request a waiver from OPM of the limitation on the maximum amount of a recruitment incentive under § 575.209(c); and

(5) Establish the criteria for terminating a service agreement under § 575.211.

(b) *Factors for determining when a position is likely to be difficult to fill.* An agency in its sole and exclusive discretion, subject only to OPM review and oversight, may determine that a

position is likely to be difficult to fill if the agency is likely to have difficulty recruiting candidates with the competencies required for the position (or group of positions) in the absence of a relocation incentive. An agency must consider the following factors, as applicable to the case at hand, in determining whether a position (or group of positions) is likely to be difficult to fill in the absence of a relocation incentive and in documenting this determination as required by § 575.208:

(1) The availability and quality of candidates possessing the competencies required for the position, including the success of recent efforts to recruit candidates for similar positions using indicators such as offer acceptance rates, the proportion of positions filled, and the length of time required to fill similar positions;

(2) The salaries typically paid outside the Federal Government for similar positions;

(3) Recent turnover in similar positions;

(4) Employment trends and labor-market factors that may affect the agency's ability to recruit candidates for similar positions;

(5) Special or unique competencies required for the position;

(6) Agency efforts to use non-pay authorities, such as special training and work scheduling flexibilities, to resolve difficulties alone or in combination with a relocation incentive;

(7) The desirability of the duties, work or organizational environment, or geographic location of the position; and

(8) Other supporting factors.

(c) An agency may determine that a position (or group of positions) is likely to be difficult to fill if OPM has approved the use of a direct-hire authority applicable to the position (or group of positions) under 5 CFR part 337, subpart B.

§ 575.207 Agency relocation incentive plan and approval levels.

(a) Before paying relocation incentives under this subpart, an agency must establish a relocation incentive plan. This plan must include the following elements:

(1) The designation of officials with authority to review and approve payment of relocation incentives, subject to paragraph (b) of this section, including;

(2) The categories of employees who are prohibited from receiving relocation incentives;

(3) Required documentation for determining that a position (or group of positions) is likely to be difficult to fill;

(4) Any requirements for determining the amount of a relocation incentive;

(5) The payment methods that may be authorized;

(6) Requirements governing service agreements which, at a minimum, must include—

(i) The criteria for determining the length of a service period under a service agreement;

(ii) The conditions for terminating a service agreement; and

(iii) The obligations of the agency and the employee, as applicable, if an agency terminates a service agreement; and

(7) Documentation and recordkeeping requirements sufficient to allow reconstruction of the action and fulfill the requirements of §§ 575.212 and 575.213.

(b)(1) Except as provided in paragraph (b)(2) of this section, an agency official who is at least one level higher than the employee's supervisor must review and approve each determination to pay a relocation incentive, unless there is no official at a higher level in the agency.

(2) The higher level approval required by paragraph (b)(1) of this section is not needed when approving coverage of individual employees under a previously approved relocation incentive authorization if the case-by-case approval requirement is waived under § 575.208(b).

(c) Unless the head of the agency determines otherwise, an agency relocation incentive plan must apply uniformly across the agency.

§ 575.208 Approval criteria and written determination.

(a)(1) For each determination to pay a relocation incentive under this subpart, an agency must document in writing—

(i) The basis for determining that a position is likely to be difficult to fill as determined under § 575.206;

(ii) The basis for authorizing a relocation incentive for an employee;

(iii) The basis for the amount and timing of the approved relocation incentive payments and the length of the required service period; and

(iv) That the worksite of the employee's new position is not in the same geographic area as the worksite of the position held immediately before the move (or that a waiver was approved under § 575.205(b)) and that the employee established a residence in the new geographic area, as required by § 575.205(b).

(2) Except as provided in paragraph (b) of this section, the agency must make each determination to pay a relocation incentive on a case-by-case basis for each employee.

(3) The agency must make the determination to pay a relocation incentive before the employee enters on duty in the position to which relocated.

(b)(1) An agency may waive the case-by-case approval requirement under paragraph (a) of this section when—

(i) The employee is a member of a group of employees subject to a mobility agreement and the agency determines that relocation incentives are necessary to retain employees subject to such an agreement to ensure continuation of operations; or

(ii) A major organizational unit of the agency is relocated to a new duty station and the agency determines that relocation incentives are necessary for a group of employees to ensure the continued operation of that unit without undue disruption of an activity or function that is deemed essential to the agency's mission or without undue disruption of service to the public.

(2) The written determination under paragraph (a) of this section must specify the group of employees covered by the case-by-case waiver, the conditions under which the waiver is approved, and the period of time for which the waiver may be applied.

§ 575.209 Payment of relocation incentives.

(a) An authorized agency official must establish the criteria for determining the amount of a relocation incentive. An agency may pay a relocation incentive—

(1) As an initial lump-sum payment at the commencement of the service period required by the service agreement;

(2) In installments throughout the service period required by the service agreement;

(3) As a final lump-sum payment upon the completion of the full service period required by the service agreement; or

(4) In a combination of these payment methods.

(b)(1) Except as provided in paragraph (c) of this section, the total amount of relocation incentive payments paid to an employee in a service period may not exceed 25 percent of the annual rate of basic pay of the employee at the beginning of the service period multiplied by the number of years (including fractions of a year) in the service period (not to exceed 4 years).

(2) For hourly rate employees who do not have a scheduled annual rate of basic pay, compute the annual rate required for paragraph (b)(1) of this section by multiplying the applicable hourly rate in effect at the beginning of the service period by 2,087 hours.

(3) For the purpose of determining the number of years in a service period

under paragraph (b)(1) of this section, divide the total number of calendar days in the service period (as established under § 575.208) by 365 and round the result to two decimal places. For example, a service period covering 39 biweekly pay periods equals 546 days, and 546 days divided by 365 days equals 1.50 years.

(c)(1) An authorized agency official may request that OPM waive the limitation in paragraph (b)(1) of this section for an employee based on a critical agency need. The authorized agency official must determine that the competencies required for the position are critical to the successful accomplishment of an important agency mission, project, or initiative (*e.g.*, programs or projects related to a national emergency or implementing a new law or critical management initiative). Under such a waiver, the total amount of relocation incentive payments paid to an employee in a service period may not exceed 50 percent of the annual rate of basic pay of the employee at the beginning of the service period multiplied by the number of years (including fractions of a year) in the service period. However, in no event may a waiver provide total relocation incentive payments exceeding 100 percent of the employee's annual rate of basic pay at the beginning of the service period.

(2) Waiver requests must include—

(i) A description of the critical agency need the proposed relocation incentive would address;

(ii) The documentation required by § 575.208;

(iii) The proposed relocation incentive payment amount and a justification for that amount;

(iv) The timing and method for making the relocation incentive payments;

(v) The period of service required; and

(vi) Any other information pertinent to the case at hand.

(d) A relocation incentive is not part of an employee's rate of basic pay for any purpose.

(e) Payment of a relocation incentive is subject to the aggregate limitation on pay under 5 CFR part 530, subpart B.

§ 575.210 Service agreement requirements.

(a) Before paying a relocation incentive, an agency must require the employee to sign a written service agreement to complete a specified period of employment with the agency (or successor agency in the event of a transfer of function) at the new duty station. An authorized agency official must establish the criteria for determining the length of a service period. The service period may not exceed 4 years.

(b)(1) The service agreement must include the commencement and termination dates of the required service period. Except as provided under paragraphs (b)(2) and (b)(3) of this section, the required service period must begin upon the commencement of service at the new duty station. The service period must terminate on the last day of a pay period.

(2) If service at the new duty station does not begin on the first day of a pay period, the agency must delay the service period commencement date so that a required service period begins on the first day of the first pay period beginning on or after the commencement of service at the new duty station.

(3) An agency may delay a service agreement commencement date until after the employee completes an initial period of formal training when continued employment in the position is contingent on successful completion of the formal training. The agency must make the determination to pay a relocation incentive before the employee enters on duty in the position, as required by § 575.208(a)(3). However, the service agreement must specify that if an employee does not successfully complete the training before the service period commences, the agency is not obligated to pay any portion of the relocation incentive to the employee.

(c) The service agreement must specify the total amount of the incentive, the method of paying the incentive, and the timing and amount of each incentive payment, as established under § 575.209.

(d) The service agreement must include the conditions under which the agency must terminate the service agreement (*i.e.*, if an employee is demoted or separated for cause, receives a rating of record of less than ''Fully Successful'' or equivalent, or otherwise fails to fulfill the terms of the service agreement) and the conditions under which the employee must repay a relocation incentive under § 575.211.

(e) The service agreement must include the conditions under which the agency may terminate the service agreement before the employee completes the agreed-upon service period. The service agreement must specify the effect of the termination under § 575.211, including the conditions under which the agency will agree to pay an additional relocation incentive payment for partially completed service under § 575.211(e) and (f).

(f) The service agreement may include any other terms or conditions that, if violated, will result in termination of the service agreement. For example, the service agreement may specify the employee's work schedule, type of position, and the duties he or she is expected to perform. In addition, the service agreement may address the extent to which periods of time on detail, in a nonpay status, or in a paid leave status are creditable towards the completion of the service period.

§ 575.211 Termination of a service agreement.

(a) An authorized agency official may unilaterally terminate a relocation incentive service agreement based solely on the management needs of the agency. For example, an agency may terminate a service agreement when the employee's position is affected by a reduction in force, when there are insufficient funds to continue the planned incentive payments, or when the agency assigns the employee to a different position (if the different position is not within the terms of the service agreement).

(b) An authorized agency official must terminate a relocation incentive service agreement if an employee is demoted or separated for cause (*i.e.*, for unacceptable performance or conduct), if the employee receives a rating of record (or an official performance appraisal or evaluation under a system not covered by 5 U.S.C. chapter 43 or 5 CFR part 430) of less than ''Fully Successful'' or equivalent, or if the employee otherwise fails to fulfill the terms of the service agreement.

(c) The termination of a service agreement is not grievable or appealable.

(d) The agency must notify an employee in writing when it terminates a relocation incentive service agreement.

(e) If an authorized agency official terminates a service agreement under paragraph (a) of this section, the employee is entitled to all relocation incentive payments attributable to completed service and to retain any portion of a relocation incentive payment he or she received that is attributable to uncompleted service.

(f) If an authorized agency official terminates a service agreement under paragraph (b) of this section, the employee is entitled to retain relocation incentive payments previously paid by the agency that are attributable to the completed portion of the service period. If the employee received relocation incentive payments that are less than the amount that would be attributable to

the completed portion of the service period, the agency is not obligated to pay the employee the amount attributable to completed service, unless the agency agreed to such payment under the terms of the relocation incentive service agreement. If the employee received relocation incentive payments in excess of the amount that would be attributable to the completed portion of the service period, he or she must repay the excess amount.

(g) If an employee fails to reimburse the paying agency for the full amount owed under paragraph (f) of this section, the amount outstanding must be recovered from the employee under the agency's regulations for collection by offset from an indebted Government employee under 5 U.S.C. 5514 and 5 CFR part 550, subpart K, or through the appropriate provisions governing Federal debt collection if the individual is no longer a Federal employee. However, the head of the agency may waive the debt under 5 U.S.C. 5584.

§ 575.212 Internal monitoring requirements and revocation or suspension of authority.

(a) Each agency must monitor the use of relocation incentives to ensure that the agency's relocation incentive plan and the payment of relocation incentives are consistent with the requirements and criteria established under 5 U.S.C. 5753 and this subpart.

(b) When OPM finds that an agency is not paying relocation incentives consistent with the agency's relocation incentive plan and the criteria established under this subpart or otherwise determines that the agency is not using this authority selectively and judiciously, OPM may—

(1) Direct the agency to revoke or suspend the authority granted to any organizational component in the agency and, with respect to any category or categories of employees, require that the component obtain approval from the agency's headquarters level before paying a relocation incentive to such employees; or

(2) Revoke or suspend the authority granted to the agency under this subpart for all or any part of the agency and, with respect to any category or categories of employees, require that the agency obtain OPM's approval before paying a relocation incentive to such employees.

§ 575.213 Records and reports.

(a) Each agency must keep a record of each determination to pay a relocation incentive and make such records available for review upon OPM's request.

(b) By March 31 in each of the years 2006 through 2010, each agency must submit a written report to OPM on the use of the relocation incentive authority within the agency during the previous calendar year for use in compiling an OPM report to Congress, as required by section 101(c) of Pubic Law 108–411. Each agency report must include—

(1) A description of how the authority to pay relocation incentives was used by the agency during the previous calendar year;

(2) The number and dollar amount of relocation incentives paid during the previous calendar year to individuals by occupational series and grade, pay level, or other pay classification; and

(3) Other information, records, reports, and data as OPM may require.

§ 575.214 Relocation bonus service agreements in effect before May 1, 2005.

This subpart does not apply to a relocation bonus service agreement that was authorized under 5 U.S.C. 5753 and 5 CFR part 575, subpart B, before May 1, 2005. Such service agreements remain in effect until their expiration, subject to regulations applicable to relocation bonuses before May 1, 2005. (See 5 CFR part 575 and part 530, subpart B, contained in the 5 CFR, parts 1 to 699, edition revised as of January 1, 2005.)

■ 8. Revise part 575, subpart C, to read as follows:

Subpart C—Retention Incentives

575.301 Purpose.
575.302 Definitions.
575.303 Eligible categories of employees.
575.304 Ineligible categories of employees.
575.305 Applicability to employees.
575.306 Authorizing a retention incentive.
575.307 Agency retention incentive plan and approval levels.
575.308 Approval criteria and written determination.
575.309 Payment of retention incentives.
575.310 Service agreement requirements.
575.311 Continuation, reduction, and termination of retention incentives.
575.312 Internal monitoring requirements and revocation or suspension of authority.
575.313 Records and reports.
575.314 Retention allowances in effect before May 1, 2005.

Subpart C—Retention Incentives

§ 575.301 Purpose.

This subpart contains regulations implementing 5 U.S.C. 5754, which authorizes payment of retention incentives. An agency may pay a retention incentive to a current employee under the conditions specified in this subpart when an agency determines that the unusually high or unique qualifications of the employee or a special need of the agency for the employee's services makes it essential to retain the employee and that the employee would be likely to leave the Federal service in the absence of an incentive.

§ 575.302 Definitions.

In this subpart:

Agency means an executive agency or a legislative branch agency included in 5 U.S.C. 5102(a)(1).

Authorized agency official means the head of an agency or an official who is authorized to act for the head of the agency in the matter concerned.

Competencies means the knowledge, skills, abilities, behaviors, and other characteristics an employee needs to perform the duties of a position.

Employee has the meaning given that term in 5 U.S.C. 2105, except that the term also includes an employee described in 5 U.S.C. 2105(c).

Executive agency has the meaning given that term in 5 U.S.C. 105.

OPM means the Office of Personnel Management.

Rate of basic pay means the rate of pay fixed by law or administrative action for the position to which an employee is appointed before deductions and including any special rate under 5 CFR part 530, subpart C, or similar payment under other legal authority, and any locality-based comparability payment under 5 CFR part 531, subpart F, or similar payment under other legal authority, but excluding additional pay of any other kind. For example, a *rate of basic pay* does not include additional pay such as night shift differentials under 5 U.S.C. 5343(f) or environmental differentials under 5 U.S.C. 5343(c)(4).

Service agreement means a written agreement between an agency and an employee under which the employee agrees to a specified period of employment with the agency in return for payment of a retention incentive.

§ 575.303 Eligible categories of employees.

Except as provided in § 575.304, an agency may pay a retention incentive to a current employee who holds—

(a) A General Schedule position paid under 5 U.S.C. 5332 or 5305 (or similar special rate authority);

(b) A senior-level or scientific or professional position paid under 5 U.S.C. 5376;

(c) A Senior Executive Service position paid under 5 U.S.C. 5383 or a Federal Bureau of Investigation and Drug Enforcement Administration Senior Executive Service position paid under 5 U.S.C. 3151;

(d) A position as a law enforcement officer, as defined in 5 CFR 550.103;

(e) A position under the Executive Schedule paid under 5 U.S.C. 5311–5317 or a position the rate of pay for which is fixed by law at a rate equal to a rate for the Executive Schedule;

(f) A prevailing rate position, as defined in 5 U.S.C. 5342(a)(3); or

(g) Any other position in a category for which payment of retention incentives has been approved by OPM at the request of the head of an executive agency.

§ 575.304 Ineligible categories of employees.

An agency may not pay a retention incentive to an employee in—

(a) A position to which an individual is appointed by the President, by and with the advice and consent of the Senate;

(b) A position in the Senior Executive Service as a noncareer appointee (as defined in 5 U.S.C. 3132(a)(7));

(c) A position excepted from the competitive service by reason of its confidential, policy-determining, policy-making, or policy-advocating character; or

(d) A position not otherwise covered by the exclusions in paragraphs (a), (b), and (c) of this section—

(1) To which an individual is appointed by the President without the advice and consent of the Senate;

(2) Designated as the head of an agency, including an agency headed by a collegial body composed of two or more individual members; or

(3) In which the employee is expected to receive an appointment as the head of an agency.

§ 575.305 Applicability to employees.

(a) An agency may pay a retention incentive to an individual employee under the conditions prescribed in this subpart when the agency determines that—

(1) The unusually high or unique qualifications (*i.e.*, competencies) of the employee or a special need of the agency for the employee's services makes it essential to retain the employee; and

(2) The employee would be likely to leave the Federal service in the absence of a retention incentive.

(b) Except as provided in paragraph (c) of this section, an agency may pay a retention incentive to a group or category of employees under the conditions prescribed in this subpart when the agency determines that—

(1) The unusually high or unique qualifications (*i.e.*, competencies) of the group or category of employees or a special need of the agency for the employees' services makes it essential to retain the employees in that group or category; and

(2) There is a high risk that a significant number of the employees in the group would be likely to leave the Federal service in the absence of a retention incentive.

(c) An agency may not include in a group retention incentive authorization an employee covered by § 575.303(b), (c), (e) or those in similar categories of positions approved by OPM to receive retention incentives under § 575.303(g).

(d) A retention incentive may be paid only when the employee's rating of record (or an official performance appraisal or evaluation under a system not covered by 5 U.S.C. chapter 43 or 5 CFR part 430) is at least ''Fully Successful'' or equivalent.

§ 575.306 Authorizing a retention incentive.

(a) *Authority of authorized agency official.* An authorized agency official retains sole and exclusive discretion, subject only to OPM review and oversight, to—

(1) Determine when the unusually high or unique qualifications (*i.e.*, competencies) of an employee or a special need of the agency for the employee's services makes it essential to retain the employee and when the employee would be likely to leave the Federal service in the absence of a retention incentive;

(2) Determine when a group or category of employees has unusually high or unique qualifications (*i.e.*, competencies) or when an agency has a special need for the employees' services that makes it essential to retain the employees in that group or category and when there is a high risk that a significant number of employees in the group would be likely to leave the Federal service in the absence of a retention incentive;

(3) Approve a retention incentive for an employee (or group or category of employees, except as prohibited by § 575.305(c)) in a position (or positions) listed in § 575.303;

(4) Establish the criteria for determining the amount of a retention incentive and the length of a service period under §§ 575.309 and 575.310, respectively;

(5) Request a waiver from OPM of the limitation on the maximum amount of a retention incentive for an employee (or group or category of employees) under § 575.309(e); and

(6) Establish the criteria for terminating a service agreement or retention incentive payments under § 575.311.

(b) *Factors for authorizing a retention incentive for an individual employee.* An agency must consider the following factors, as applicable to the case at hand, in determining whether the unusually high or unique qualifications of an employee or a special need of the agency for an employee's services makes it essential to retain the employee and that the employee would be likely to leave the Federal service in the absence of a retention incentive:

(1) Employment trends and labor market factors such as the availability and quality of candidates in the labor market possessing the competencies required for the position and who, with minimal training, cost, or disruption of service to the public, could perform the full range of duties and responsibilities of the employee's position at the level performed by the employee;

(2) The success of recent efforts to recruit candidates and retain employees with competencies similar to those possessed by the employee for positions similar to the position held by the employee;

(3) Special or unique competencies required for the position;

(4) Agency efforts to use non-pay authorities to help retain the employee instead of or in addition to a retention incentive, such as special training and work scheduling flexibilities or improving working conditions;

(5) The desirability of the duties, work or organizational environment, or geographic location of the position;

(6) The extent to which the employee's departure would affect the agency's ability to carry out an activity, perform a function, or complete a project that the agency deems essential to its mission;

(7) The salaries typically paid outside the Federal Government; and

(8) Other supporting factors.

(c) *Factors for authorizing a retention incentive for a group or category of employees.* (1) An agency must consider the factors in paragraph (b) of this section as they relate to determining whether a group or category of employees—

(i) Has unusually high or unique qualifications (*i.e.*, competencies) or that the agency has a special need for the employees' services that makes it essential to retain the employees in that category; and

(ii) That it is reasonable to presume that there is a high risk that a significant number of employees in the targeted category would be likely to leave the Federal service in the absence of a retention incentive.

(2) An agency must narrowly define a targeted category of employees using

factors that relate to the conditions described in paragraph (c)(1) of this section. Factors that may be appropriate include the following: occupational series, grade level, distinctive job duties, unique competencies required for the position, assignment to a special project, minimum agency service requirements, organization or team designation, geographic location, and required rating of record. (While a rating of record of higher than the ''Fully Successful'' rating of record required by § 575.305(d) may be a factor used in defining the targeted category, a rating of record by itself is not sufficient to justify a retention incentive. A rating of record may function as a supporting factor in authorizing an incentive or setting the incentive rate only to the extent it directly relates to the conditions in paragraph (d) of this section.)

(d) An agency must document the determinations required under paragraphs (b) and (c) of this section as required by § 575.308.

§ 575.307 Agency retention incentive plan and approval levels.

(a) Before paying retention incentives under this subpart, an agency must establish a retention incentive plan. This plan must include the following elements:

(1) The designation of officials with authority to review and approve payment of retention incentives, subject to paragraph (b) of this section;

(2) The categories of employees who are prohibited from receiving retention incentives;

(3) Required documentation for determining that an employee would be likely to leave the Federal service;

(4) Any requirements for determining the amount of a retention incentive;

(5) The payment methods that may be authorized;

(6) Requirements governing service agreements which, at a minimum, must include—

(i) The criteria for determining the length of a service period under a service agreement;

(ii) The conditions for terminating a service agreement;

(iii) The obligations of the agency and the employee, as applicable, if an agency terminates a service agreement; and

(iv) The conditions for terminating retention incentive payments when no service agreement is required (see § 575.310(f)); and

(7) Documentation and recordkeeping requirements sufficient to allow reconstruction of the action and fulfill the requirements of §§ 575.312 and 575.313.

(b)(1) Except as provided in paragraph (b)(2) of this section, an authorized agency official who is at least one level higher than the employee's (or group of employees') supervisor must review and approve each determination to pay a retention incentive to an individual or group of employees, unless there is no official at a higher level in the agency.

(2) The higher level approval required by paragraph (b)(1) of this section is not needed when approving coverage of individual employees under a previously approved group retention incentive authorization.

(c) Unless the head of the agency determines otherwise, an agency retention incentive plan must apply uniformly across the agency.

§ 575.308 Approval criteria and written determination.

(a) An agency in its sole and exclusive discretion, subject only to OPM review and oversight, may approve a retention incentive for an individual employee or group or category of employees using the approval criteria in § 575.306.

(b) For each determination to pay a retention incentive under this subpart, an agency must document in writing—

(1) The basis for determining that the unusually high or unique qualifications of the employee (or group of employees) or a special need of the agency for the employee's (or group of employees') services makes it essential to retain the employee(s);

(2) The basis for determining that the employee (or a significant number of employees in a group) would be likely to leave the Federal service in the absence of a retention incentive; and

(3) The basis for establishing the amount and timing of the approved retention incentive payment and the length of the required service period.

§ 575.309 Payment of retention incentives.

(a) An authorized agency official must determine the criteria for determining the amount of a retention incentive. An agency must establish a single retention incentive rate for each individual or group of employees that is expressed as a percentage of the employee's rate of basic pay. Except as provided in paragraph (e) of this section, a retention incentive rate may not exceed—

(1) 25 percent, if authorized for an individual employee; or

(2) 10 percent, if authorized for a group or category of employees.

(b) An agency may pay a retention incentive in—

(1) Installments after the completion of specified periods of service; or

(2) A single lump-sum payment after completion of the full service period.

(c)(1) An installment payment is derived by multiplying the rate of basic pay the employee earned in the installment period by a percentage not to exceed the incentive percentage rate established for the employee under paragraph (a) of this section. For example, an agency establishes a retention incentive percentage rate of 10 percent for an employee. The employee has a service agreement that provides for a retention incentive installment payment after completion of 6 pay periods of service at the full percentage rate established for the employee. The employee earns $15,000 during the 6 pay periods of service. Upon completion of that service period, the employee will receive the accrued retention incentive installment payment of $1,500 ($15,000 × .10).

(2) If the retention incentive installment payment percentage is less than the full percentage rate established for the employee under paragraph (a) of this section, any accrued portion of the retention incentive that is not paid as an installment payment during the service period must be paid as part of a final installment payment to the employee after completion of the full service period under the terms of the service agreement established under § 575.310. For example, an agency establishes a retention incentive percentage rate of 10 percent for an employee. The employee's service agreement provides for a 7 percent retention incentive installment payment after completion of 6 pay periods of service. The employee earns $15,000 during the 6 pay periods of service. Upon completion of that installment period, the employee accrues a retention incentive installment payment of $1,500 ($15,000 × .10). However, under the terms of the service agreement, the employee will receive a $1,050 retention incentive installment payment ($15,000 × .07). The agency must pay the accrued but unpaid portion of the retention incentive payment of $450 ($1,500 − $1,050) as a final lump-sum payment upon completion of the full service period required by the service agreement.

(3) An agency may not pay a retention incentive as an initial lump-sum payment at the start of a service period or in advance of fulfilling the service period for which the retention incentive is being paid.

(d) A retention incentive payment paid as a single lump-sum payment upon completion of the full service period required by the service agreement is derived by multiplying the retention incentive percentage rate established under paragraph (a) of this

section by the total basic pay the employee earned during the full service period.

(e)(1) An authorized agency official may request that OPM waive the limitation in paragraph (a) of this section and permit the agency to pay an individual employee or group of employees a retention incentive of up to 50 percent of the employee's basic pay based on a critical agency need. In addition to the determination required by § 575.308, the authorized agency official must determine that the employee's (or group of employees') unusually high or unique qualifications (*i.e.*, competencies) are critical to the successful accomplishment of an important agency mission, project, or initiative (*e.g.*, programs or projects related to a national emergency or implementing a new law or critical management initiative).

(2) Waiver requests must include—

(i) A description of the employee's work requirements and responsibilities or, if requesting a group retention incentive, a description of the group or category of employees and the number of employees to be covered by the proposed retention incentive;

(ii) A description of the critical agency need the proposed retention incentive would address;

(iii) The written documentation required by § 575.308;

(iv) The proposed retention incentive percentage rate and a justification for that percentage;

(v) The timing and method of making the retention incentive payments;

(vi) The service period required; and

(vii) Any other information pertinent to the case at hand.

(3) OPM may require that waiver requests for groups or categories of employees be coordinated with other agencies having similarly situated employees in the same category.

(4) Notwithstanding § 575.310(f), an authorized agency official must require a signed written service agreement for any employee who may receive a higher retention incentive as a result of approval of a waiver of the maximum limit on the amount of a retention incentive under paragraph (e)(1) of this section.

(f) An agency may not offer or authorize a retention incentive for an individual prior to employment with the agency.

(g) An agency may not commence a retention incentive service agreement (or begin paying a retention incentive) during a period of employment established under any service agreement required for payment of a recruitment incentive under 5 CFR part 575, subpart A, or a relocation incentive under 5 CFR part 575, subpart B. After a retention incentive service agreement has commenced (or retention incentive payments have commenced), an agency may pay a relocation incentive without affecting the payment of a retention incentive.

(h) A retention incentive is not part of an employee's rate of basic pay for any purpose.

(i) Payment of a retention incentive is subject to the aggregate limitation on pay under 5 CFR part 530, subpart B.

§ 575.310 Service agreement requirements.

(a) Before paying a retention incentive, an agency must require an employee, including each employee covered by a group retention incentive authorization and any employee who may receive a higher retention incentive as a result of an approved waiver of the maximum limit on the amount of a retention incentive under § 575.309(e), to sign a written service agreement to complete a specified period of employment with the agency (or successor agency in the event of a transfer of function). An authorized agency official must determine the length of a service period. A written service agreement is not required under the condition described in paragraph (g) of this section.

(b) The service agreement must include the commencement and termination dates of the required service period. The service period must begin on the first day of a pay period and end on the last day of a pay period.

(c) The service agreement must specify the retention incentive percentage rate established under § 575.309(a); whether the incentive will be paid in installments or in a lump-sum payment upon completion of the service period provided in the service agreement; whether any installment payments will be paid at less than the full retention incentive percentage rate established under § 575.309(a), with the accrued but unpaid incentive payment being paid in a lump sum upon completion of the full service period required by the service agreement under § 575.309(c)(2); and the timing of incentive payments.

(d) The service agreement must include the conditions under which the agency must terminate the service agreement before the employee completes the agreed-upon service period (*i.e.*, if an employee is demoted or separated for cause, receives a rating of record of less than ''Fully Successful'' or equivalent, or otherwise fails to fulfill the terms of the service agreement) under § 575.311. The service agreement must specify the effect of a termination, including the conditions under which the agency will pay an additional retention incentive payment for partially completed service under § 575.311(e) and (f).

(e) The service agreement may include any other terms or conditions that, if violated, will result in a termination of the service agreement under § 575.311(b). For example, the service agreement may specify the employee's work schedule, type of position, and the duties he or she is expected to perform. In addition, the service agreement may address the extent to which periods of time on detail, in a nonpay status, or in paid leave status are creditable towards the completion of the service period.

(f) A written service agreement is not required if the agency—

(1) Pays the retention incentive in biweekly installments; and

(2) Sets each biweekly installment payment at the full retention incentive percentage rate established for the employee under § 575.309(a).

§ 575.311 Continuation, reduction, and termination of retention incentives.

(a) An authorized agency official may unilaterally terminate a retention incentive service agreement based solely on the management needs of the agency. For example, an agency may terminate a service agreement when the employee's position is affected by a reduction in force, when there are insufficient funds to continue the planned retention incentive payments, when conditions no longer warrant payment at the level originally approved or at all, or when the agency assigns the employee to a different position (if the different position is not within the terms of the service agreement).

(b) An authorized agency official must terminate a retention incentive service agreement if the employee is demoted or separated for cause (*i.e.*, for unacceptable performance or conduct), if the employee receives a rating of record (or an official performance appraisal or evaluation under a system not covered by 5 U.S.C. chapter 43 or 5 CFR part 430) of less than ''Fully Successful'' or equivalent, or if the employee otherwise fails to fulfill the terms of the service agreement.

(c) The termination of a service agreement is not grievable or appealable.

(d) The agency must notify an employee in writing when it terminates a retention incentive service agreement.

(e) If an authorized agency official terminates a service agreement under

paragraph (a) of this section, the employee is entitled to retain any retention incentive payments that are attributable to completed service and to receive any portion of a retention incentive payment owed by the agency for completed service.

(f) If an authorized agency official terminates a service agreement under paragraph (b) of this section, the employee is entitled to retain retention incentive payments previously paid by the agency that are attributable to the completed portion of the service period. If the employee received retention incentive payments that are less than the amount that would be attributable to the completed portion of the service period, the agency is not obligated to pay the employee the amount attributable to completed service, unless the agency agreed to such payment under the terms of the retention incentive service agreement.

(g)(1) For retention incentives that are paid when no service agreement is required under § 575.310(f), an agency must review each determination to pay the incentive at least annually to determine whether payment is still warranted. An authorized agency official must certify this determination in writing.

(2) An agency may continue paying a retention incentive to an employee when no service agreement is required as long as the conditions giving rise to the original determination to pay the incentive still exist.

(3) An agency must reduce or terminate a retention incentive authorization when no service agreement is required whenever payment at the level originally approved is no longer warranted. An agency may consider the following factors in determining whether to reduce or terminate a retention incentive—

(i) Whether a lesser amount (or none at all) would be sufficient to retain the employee (or group or category of employees);

(ii) Whether labor-market factors make it more likely (or reasonably likely) to recruit a candidate with competencies similar to those possessed by the employee (or group or category of employees);

(iii) Whether the agency's need for the services of the employee (or group or category of employees) has been reduced to a level that makes it unnecessary to continue payment at the level originally approved (or at all);

(iv) Whether budgetary considerations make it difficult to continue payment at the level originally approved (or at all); or

(v) Other supporting factors.

(4) An agency must terminate a retention incentive authorization when no service agreement is required if the employee is demoted or separated for cause (*i.e.*, for unacceptable performance or conduct), the employee receives a rating of record (or an official performance appraisal or evaluation under a system not covered by 5 U.S.C. chapter 43 or 5 CFR part 430) of less than ''Fully Successful'' or equivalent, or the agency assigns the employee to a different position.

(5) Termination or reduction of a retention incentive is not grievable or appealable under any law or regulation.

(6) If an agency reduces or terminates a retention incentive under paragraph (g) of this section, the agency must notify the employee in writing. The employee is entitled to receive any scheduled incentive payments through the end of the pay period in which the written notice is provided or until the date of separation, if sooner.

§ 575.312 Internal monitoring requirements and revocation or suspension of authority.

(a) Each agency must monitor the use of retention incentives to ensure that its retention incentive plan and the payment of retention incentives are consistent with the requirements and criteria established under 5 U.S.C. 5754 and this subpart.

(b) When OPM finds that an agency is not paying retention incentives consistent with the agency's retention incentive plan and the criteria established under 5 U.S.C. 5754 or this subpart or otherwise determines that the agency is not using this authority selectively and judiciously, OPM may—

(1) Direct the agency to revoke or suspend the authority granted to any organizational component of the agency and, with respect to any category or categories of employees, require that the component obtain approval from the agency's headquarters level before paying a retention incentive to such employees; or

(2) Revoke or suspend the authority granted to the agency under this subpart for all or any part of the agency and, with respect to any category or categories of employees, require that the agency obtain OPM's approval before paying a retention incentive to such employees.

§ 575.313 Records and reports.

(a) Each agency must keep a record of each determination to pay a retention incentive and make such records available for review upon OPM's request.

(b) By March 31 in each of the years 2006 through 2010, each agency must submit a written report to OPM on the use of the retention incentive authority within the agency during the previous calendar year for use in compiling an OPM report to Congress, as required by section 101(c) of Public Law 108–411. Each agency report must include—

(1) A description of how the authority to pay retention incentives was used in the agency during the previous calendar year;

(2) The number and dollar amount of retention incentives paid during the previous calendar year to individuals by occupational series and grade, pay level, or other pay classification; and

(3) Other information, records, reports, and data as OPM may require.

§ 575.314 Retention allowances in effect before May 1, 2005.

This subpart does not apply to a retention allowance authorized under 5 U.S.C. 5754 and 5 CFR part 575, subpart C, before May 1, 2005. Such allowances must continue to be paid until the retention allowance is reauthorized or terminated or until April 30, 2006, whichever comes first, subject to the regulations applicable to retention allowances before May 1, 2005. (See 5 CFR part 575 and part 530, subpart B, contained in the 5 CFR, parts 1 to 699, edition revised as of January 1, 2005.)

Subpart D—Supervisory Differentials

■ 9. In § 575.402, revise paragraph (b) to read as follows:

§ 575.402 Delegation of authority.

* * * * *

(b) A supervisory differential may not be paid on the basis of supervising a civilian employee whose rate of basic pay exceeds the maximum rate of basic pay established for grade GS–15 on the pay schedule applicable to the GS supervisor, including a schedule for any applicable special rate under 5 CFR part 530, subpart B; locality-based comparability payment under 5 CFR part 531, subpart F; or similar payment or supplement under other legal authority.

■ 10. In § 575.403, revise the definition of *rate of basic pay* to read as follows:

§ 575.403 Definitions.

* * * * *

Rate of basic pay means the rate of pay fixed by law or administrative action for the position to which the employee is or will be appointed before deductions and including any special rate under 5 CFR part 530, subpart B, or any locality-based comparability payment under 5 CFR part 531, subpart F, or other similar payment or supplement under other legal authority,

but excluding any additional pay of any kind.

* * * * *

■ 11. In § 575.405—

■ a. Remove paragraphs (c)(2) through (c)(4) and redesignate paragraphs (c)(5) through (c)(7) as paragraphs (c)(2) through (c)(4), respectively;

■ b. Remove paragraph (d)(2) and redesignate paragraphs (d)(3) and (d)(4) as (d)(2) and (d)(3), respectively; and

■ c. Revise newly redesignated paragraph (c)(4); paragraph (d)(1); and newly redesignated paragraph (d)(2) to read as follows:

§ 575.405 Calculation and payment of supervisory differential.

* * * * *

(c) * * *

(4) Any other continuing payment, except night, Sunday, or holiday premium pay or hazardous duty pay under 5 U.S.C. chapter 55, subchapter V; recruitment or relocation incentives under 5 U.S.C. 5753; retention incentives under 5 U.S.C. 5754; or similar payments under other legal authority.

* * * * *

(d) * * *

(1) Basic pay, excluding a night or environmental differential under 5 U.S.C. 5354(f) or part 5343(c)(4), respectively, or similar payment under other legal authority;

(2) Any other continuing payment, except Sunday or holiday pay under 5 U.S.C. chapter 55, subchapter V; recruitment or relocation incentives under 5 U.S.C. 5753; retention incentives under 5 U.S.C. 5754; or similar payments under other legal authority; and

* * * * *

Subpart E—Extended Assignment Incentives

■ 12. In § 575.502, revise the definition of *rate of basic pay* to read as follows:

§ 575.502 Definitions.

* * * * *

Rate of basic pay means the rate of pay fixed by law or administrative action for the position held by an employee, including any special rate under 5 CFR part 530, subpart B, or locality-based comparability payment under 5 CFR part 531, subpart F, or similar payment or supplement under other legal authority, but before deductions and exclusive of additional pay of any kind. For example, a *rate of basic pay* may not include nonforeign area cost-of-living allowances under 5 U.S.C. 5941, night shift differentials under 5 U.S.C. 5343(f), or environmental differentials under 5 U.S.C. 5343(c)(4).

* * * * *

■ 13. In § 575.506, revise paragraph (b) to read as follows:

§ 575.506 When is an agency prohibited from paying an extended assignment incentive?

* * * * *

(b) An agency may not begin paying an extended assignment incentive to an otherwise eligible employee who is receiving or fulfilling the requirements of a service agreement for the payment of a recruitment, relocation, or retention incentive. (See 5 CFR part 575, subparts A, B, and C.)

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This is a continuing list of public bills from the current session of Congress which have become Federal laws. It may be used in conjunction with ''PLUS'' (Public Laws Update Service) on 202–741–6043. This list is also available online at *http://www.archives.gov/federal_register/public_laws/public_laws.html*.

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H.J. Res. 19/P.L. 109–11

Providing for the appointment of Shirley Ann Jackson as a citizen regent of the Board of Regents of the Smithsonian Institution. (May 5, 2005; 119 Stat. 229)

H.J. Res. 20/P.L. 109–12

Providing for the appointment of Robert P. Kogod as a citizen regent of the Board of Regents of the Smithsonian Institution. (May 5, 2005; 119 Stat. 230)

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